

## THE FIGHT FOR ACCESS TO AIDS MEDICATIONS: HOW THE CENTRAL AMERICAN FREE TRADE AGREEMENT CONFLICTS WITH COSTA RICA'S CONSTITUTIONAL COURTS

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The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution, is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.<sup>1</sup>

### I. INTRODUCTION

During the past twenty-five years, the world's most destructive epidemic, Acquired Immune Deficiency Syndrome ("AIDS"), has taken the life of more than twenty million people.<sup>2</sup> AIDS continues to have a devastating impact on the world's population, particularly in developing countries.<sup>3</sup> One of the biggest advancements against the world's HIV/AIDS pandemic came in 1996 with the innovation of new antiretroviral drugs, which could be used to fight infection by HIV in the body.<sup>4</sup> However, access to these new drugs was almost impossible for most people living with AIDS due to the drugs' high costs, especially for

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<sup>1</sup> *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 368, 388-89 (1803).

<sup>2</sup> KAREN A. STANECKI, U.S. CENSUS BUREAU, THE AIDS PANDEMIC IN THE 21ST CENTURY 7 (2004), available at <http://www.census.gov/ipc/prod/wp02/wp02-2.pdf>.

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

<sup>4</sup> Enrique González Mac Dowell, *Juridical Action for the Protection of Collective Rights and Its Legal Impact: A Case Study*, 30 J.L. MED. & ETHICS 644, 644 (2002).

people in developing countries, where the spread of the disease was quickest.<sup>5</sup> For years, human rights organizations and activist groups working for people with AIDS have struggled to bring affordable medications to those dying of AIDS.<sup>6</sup> These organizations often used health-related treaties and conventions to fight for universal access to treatment.<sup>7</sup> Additionally, the creation of national constitutional courts has launched a different vehicle for individuals to pursue their rights.<sup>8</sup> Political scientist Bruce Wilson theorizes that often “[w]here supreme courts have been created, reformed, or taken on a more activist role, citizens are often able to pursue governmental violations of their rights.”<sup>9</sup>

Several states in Latin America, through judicial decisions, now officially recognize the right of access to antiretroviral AIDS medicines.<sup>10</sup> Costa Rica provides an illustrative example. In the late 1990s, Costa Rica’s newly created chamber of the Supreme Court, the Sala Cuarta, handed down a critical ruling for people living with AIDS. In the landmark 1997 case, *William García v. La Caja Costarricense Del Seguro Social (“CCSS”)*, the Sala Cuarta ruled in favor of the provision for free antiretroviral drugs to all AIDS patients in Costa Rica.<sup>11</sup> The court, establishing the right of access to treatment as part of the state’s duty to offer medical care under the national health care system,<sup>12</sup> based its decision, in part, on Article 21 of the Costa Rican Constitution, which states that “life is inviolable.”<sup>13</sup>

Unfortunately, the constitutional right of access to treatment for people living with AIDS in Costa Rica is now in jeopardy. Costa Rica’s Central American Free Trade Agreement (“CAFTA”) with the United States will give “monopoly-like status to high-priced, brand-name drugs in poor markets,”<sup>14</sup> drive up the cost of antiretroviral medicine, and delay

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<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., INT’L COUNCIL OF AIDS SERV. ORGS., HIV/AIDS AND HUMAN RIGHTS STORIES FROM THE FRONTLINES 17 (1999), available at [http://www.icaso.org/publications/stories\\_frontlines\\_en.pdf](http://www.icaso.org/publications/stories_frontlines_en.pdf).

<sup>7</sup> Mac Dowell, *supra* note 4, at 644.

<sup>8</sup> Bruce M. Wilson & Juan Carlos Rodríguez Cordero, *Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics*, 39 COMP. POL. STUD. 325, 326-27 (2006).

<sup>9</sup> *Id.* at 327.

<sup>10</sup> Mac Dowell, *supra* note 4, at 644.

<sup>11</sup> Wilson & Rodríguez Cordero, *supra* note 8, at 339.

<sup>12</sup> Mac Dowell, *supra* note 4, at 645-46.

<sup>13</sup> Wilson & Rodríguez Cordero, *supra* note 8, at 339.

<sup>14</sup> Kelly Hearn, *Drug Deal*, YALEGLOBAL ONLINE, May 26, 2005, <http://yaleglobal.yale.edu/display.article?id=5764>.

or obstruct the generic forms of similar drugs which are used by many Latin American states.<sup>15</sup> In May 2004, Costa Rica was one of the five Central American countries to sign CAFTA but, as of October 2007, it was the only state that has yet to ratify the agreement.<sup>16</sup>

Within the context of Sala Cuarta's progressive rulings regarding access to medication, this Article will argue that certain constitutional rights—including the right to healthcare—are in jeopardy because certain CAFTA provisions directly conflict with constitutional rights. Part III discusses the background of Costa Rica's Sala Cuarta and the access to justice the Court has provided for people living with AIDS to ensure their constitutional rights. Part IV explores CAFTA and how it threatens Costa Ricans' access to life-saving medicines. Part V analyzes Costa Rica's constitutional principles and discusses the inherent conflict between the rulings of the Constitutional Court and the implications CAFTA, could have on Costa Rica.

## II. BACKGROUND

The struggle for access to justice, although not easily defined, involves the system by which people may resolve their disputes or assert their rights.<sup>17</sup> This system must not only be equally accessible to all, but it must also produce just results.<sup>18</sup> Such fundamental tenets as the right to work, to health, and to education are usually included in modern constitutions; however, frequently the state must take affirmative action to ensure that its people are actually benefiting from these constitutionally protected rights.

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<sup>15</sup> Press Release, Common Dreams Progressive Newswire, Central American Free Trade Agreement: Talks Breakdown but U.S. Still Obstructing Access to AIDS Drugs in Central America (Dec. 17, 2003), available at <http://www.commondreams.org/news2003/1217-13.htm>.

<sup>16</sup> *Bright Outlook for Costa Rica*, LATIN BUS. CHRON. (Miami), Aug. 9, 2006, <http://www.latinbusinesschronicle.com> (on file with author). In theory, parties would want to sign on to this agreement because CAFTA was established to create a free trade zone between the parties, intending to facilitate trade and to extend the volume of the trade relations by stabilizing access for Central American markets to the US market; it will also allow duty-free exchange of products between the participating states. Nina Rohe, *Update: The Central American Free Trade Agreement — A Survey and Comparison to the Treaty of the European Community*, 12 LAW & BUS. REV. AM. 73, 73 (2006). The motivation was also "to deepen the friendly contacts between the parties by establishing a mostly common market." *Id.* at 74.

<sup>17</sup> See INT'L COUNCIL OF AIDS SERV. ORGS., *supra* note 6, at 16.

<sup>18</sup> *See id.*

Costa Rica has a long history as a functioning democracy with a tradition of judicial independence and respect for the law.<sup>19</sup> Since gaining independence from Spain in 1821, Costa Rica has had thirteen constitutions.<sup>20</sup> According to a 1998 article in the *New York Times*, “[t]here is an argument to be made that the favorite pastime of Latin American politicians is neither soccer nor baseball, but tinkering with their countries’ constitutions.”<sup>21</sup> The fifty-year period prior to 1871 is often referred to as the “era of experimentation” because ten of those thirteen constitutions were promulgated during that time.<sup>22</sup> The constitutional experiments were varied, including numerous changes regarding the procedures for enforcing constitutional guarantees.<sup>23</sup> Since 1859, every constitution in Costa Rica has expressly provided that constitutional norms are superior and any statute, decree, or order of the executive or legislature which infringe upon the constitution are considered null and void.<sup>24</sup> While this may sound ideal, the early constitutions of Costa Rica did not create systems for the “enforcement of constitutional supremacy.”<sup>25</sup>

#### A. CONSTITUTION OF 1949

The Costa Rican Constitution of 1949, in theory, established a separation of powers which gave the Supreme Court, the Sala Cuarta’s predecessor, a co-equal role with the elected branches of government.<sup>26</sup> However, the Court continued playing a small role as the judges’ actions were limited.<sup>27</sup> The judges were often inexperienced in constitutional issues before they were elected to the Supreme Court and standing was severely restricted so as to limit the number of cases that were heard by the Court.<sup>28</sup> The Court was often unwilling to take action against elected leaders and deferred to them in the belief that it was those leaders who

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<sup>19</sup> See Robert S. Barker, *Constitutional Adjudication in Costa Rica: A Latin American Model*, 17 U. MIAMI INTER-AM. L. REV. 249, 253 (1985-86).

<sup>20</sup> Robert S. Barker, *Taking Constitutionalism Seriously: Costa Rica’s Sala Cuarta*, 6 FLA. J. INT’L L. 349, 352 (1991).

<sup>21</sup> Larry Rohter, *In Latin America, ‘The Constitution Is What I Say It Is’*, N.Y. TIMES, Aug. 30, 1998, § 4, at WK5.

<sup>22</sup> Barker, *supra* note 20, at 352.

<sup>23</sup> *Id.* at 353.

<sup>24</sup> Barker, *supra* note 19, at 254.

<sup>25</sup> *Id.*

<sup>26</sup> Wilson & Rodríguez Cordero, *supra* note 8, at 330.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

had the absolute power to legislate.<sup>29</sup> Knowing that the Supreme Court would not declare their legislation unconstitutional, the elected branches governed without fear of judicial review.<sup>30</sup> In fact, the Supreme Court usually only took action when laws were clearly “against the letter of the law.”<sup>31</sup> Moreover, in keeping with the civil law tradition, the Costa Rican judiciary did not practice *stare decisis*, which meant the Court lacked binding precedent and uniformity in constitutional decisions.<sup>32</sup> Before the creation of the Sala Cuarta, the Supreme Court played a very minor role, making it difficult for individuals to have their constitutional rights enforced. The restrictive standing requirements and lack of constitutional precedent, coupled with the court’s timidity to rule against elected officials, discouraged people from using the Court to uphold their rights.<sup>33</sup>

#### **B. THE SALA CUARTA, COSTA RICA’S CONSTITUTIONAL CHAMBER OF THE SUPREME COURT**

One of the most significant mechanisms created for the “enforcement of constitutional supremacy” was the 1989 establishment of the Sala Cuarta, the Constitutional Chamber of the Costa Rican Supreme Court. The Sala Cuarta has exclusive, non-reviewable jurisdiction in all constitutional matters in Costa Rica.<sup>34</sup> Additionally, it is vested with the power to declare, by an absolute majority, the unconstitutionality of all legal norms.<sup>35</sup> At its establishment, the constitutional jurisdiction of the court was expanded to include the protection of constitutional norms and principles.<sup>36</sup>

Included within the jurisdiction of the Sala Cuarta are not only constitutional norms and principles, but also the “norms and principles of international law in effect in Costa Rica.”<sup>37</sup> Furthermore, the Sala Cuarta has provided that in terms of human rights, international instruments have “not only a value similar to that of the Political Constitution, but, to

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Robert S. Barker, *Judicial Review In Costa Rica: Evolution and Recent Developments*, 7 SW. J.L. & TRADE AM. 267, 273-74 (2000).

<sup>33</sup> Wilson & Rodríguez Cordero, *supra* note 8, at 331.

<sup>34</sup> Barker, *supra* note 32, at 279.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 279-80.

<sup>37</sup> *Id.*

the measure [that] they grant better rights or guarantees to individuals, they may prevail over the Constitution."<sup>38</sup> This inclusion of international law is important because: (1) the enforcement of human rights ensuing from international law is now within the jurisdiction of the Sala Cuarta even though those rights are not explicitly guaranteed by the constitution; and (2) the resolution of conflicts between Costa Rican laws and international treaties is part of constitutional jurisdiction.<sup>39</sup>

This expansion is due to the inclusion of the writ of *amparo* at the formation of the Sala Cuarta in 1989.<sup>40</sup> A writ of *amparo*, common in Latin America, is a petition presented before the Constitutional Chamber that allows for the quick resolution of a violated constitutional right—to maintain or reestablish the enjoyment of other rights conferred by the constitution as well as those of fundamental nature established in international instruments on human rights.<sup>41</sup> Under Article 48 of the Political Constitution of Costa Rica,

[e]very person has the right to present . . . writs of *amparo* to maintain or reestablish the enjoyment of other rights conferred by this Constitution as well as those of fundamental nature established in international instruments on human rights, enforceable in the Republic. Both writs shall be within the jurisdiction of the [Sala Cuarta].<sup>42</sup>

The writ of *amparo* was thus expanded to protect not only constitutional rights, but also rights acquired under international law.<sup>43</sup> Additionally, although Costa Rica did not adhere to the rules of *stare decisis*, with the

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<sup>38</sup> See Sentencia No. 02313-95, 9 May 1995, Sala Constitucional de la Corte Suprema de Justicia [Constitutional Chamber of the Supreme Court] (Costa Rica), translated in Bernardo van der Laat E., Central American Free Trade Agreement (CAFTA) Labor Obligations and Costa Rica, 11, (unpublished manuscript, available at [idrinfo.idrc.ca/archive/corpdocs/124135/61638.pdf](http://idrinfo.idrc.ca/archive/corpdocs/124135/61638.pdf) (last visited Jan. 30, 2008)).

<sup>39</sup> Barker, *supra* note 20, at 372

The Sala has utilized its international-law jurisdiction to declare that a statute terminating the pension rights of certain public officials convicted of crimes was unconstitutional because it violated, among other norms, the Convention of the International Labor Organization. Similarly, the Sala declared unconstitutional a provision of the Family Support Law because it did not provide the right of appeal which the Sala found to be guaranteed by the American Convention on Human Rights.

<sup>40</sup> Barker, *supra* note 32, at 280.

<sup>41</sup> Constitución Política de la República de Costa Rica [Constitution] art. 48 (amended 1989); see also Mac Dowell, *supra* note 4, at 644.

<sup>42</sup> Constitución Política de la República de Costa Rica art. 48 (amended 1989), translated in Political Constitution of Costa Rica, <http://usembassy.or.cr/engconst.htm>.

<sup>43</sup> Barker, *supra* note 32, at 280.

formation of the Sala Cuarta, all cases that are decided by it have binding precedent over all other similar cases in other courts.<sup>44</sup> The importance of constitutional justice in Costa Rica is illustrated by the fact that the caseload of the Sala Cuarta almost triples that of the Constitutional Courts of El Salvador, Guatemala, Honduras, and Nicaragua combined.<sup>45</sup>

In discussing the expansion of constitutional rights, it is important to note Article 7 of the Political Constitution of the Republic of Costa Rica.<sup>46</sup> Under Article 7, international agreements, duly ratified by the Legislative Assembly, prevail over national law. Thus, ratified international covenants and agreements have such force over the law as to determine the enforcement of domestic provisions or the repeal of domestic provisions that conflict with the agreement.<sup>47</sup> The importance of this is that the rights guaranteed by international agreements have a protection that prevails over the Constitution.<sup>48</sup>

### C. THE SALA CUARTA AND PEOPLE LIVING WITH AIDS

The Sala Cuarta has become “an aggressive defender of individual rights and an assertive interpreter of the powers of, and boundaries between, the branches of government.”<sup>49</sup> Perhaps one of the most illustrative examples of the Sala Cuarta as the “aggressive defender of individual rights” can be seen with its treatment of people living with AIDS. Stemming from principles of social justice and solidarity, the Supreme Court created the right of access to treatment as part of the state’s duty to offer medical care to all people.<sup>50</sup> At first, however, this wasn’t an automatic success.

In 1992, several persons living with AIDS filed writs of *amparo* in an unsuccessful attempt to make sure that antiretroviral medicines

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<sup>44</sup> Wilson & Rodríguez Cordero, *supra* note 8, at 339-40.

<sup>45</sup> Bernardo van der Laet E., Central American Free Trade Agreement (CAFTA) Labor Obligations and Costa Rica, 11-12, (unpublished manuscript, available at [idrinformo.idrc.ca/archive/corpdocs/124135/61638.pdf](http://idrinformo.idrc.ca/archive/corpdocs/124135/61638.pdf) (last visited Jan. 30, 2008)).

<sup>46</sup> Constitución Política de la República de Costa Rica art. 7 (amended 1968), translated in Political Constitution of Costa Rica, <http://usembassy.or.cr/engconst.htm> (“Public treaties, international agreements and concordants duly approved by the Legislative Assembly shall have a higher authority than the laws upon their enactment or from the day that they designate.”).

<sup>47</sup> van der Laet, *supra* note 45, at 12.

<sup>48</sup> *Id.*

<sup>49</sup> Fabrice Lehoucq, Policymaking, Parties, and Institutions in Democratic Costa Rica 2-3 (Mar. 1, 2006) (unpublished manuscript, available at <http://www.iadb.org/res/publications/pubfiles/pubS-306.pdf>).

<sup>50</sup> Mac Dowell, *supra* note 4, at 645-46.

were covered by the CCSS, Costa Rica's national healthcare system.<sup>51</sup> The Sala Cuarta ruled against people living with AIDS by accepting the CCSS' argument that the medication would not "cure" patients of AIDS, but would only prolong their deterioration.<sup>52</sup> After this defeat, in 1996, a group of people living with AIDS formed a coalition to strategize what would be their next best plan of attack.<sup>53</sup> Hesitant to approach the Sala Cuarta again, the group negotiated with pharmaceutical companies for subsidized drugs and with government officials to obtain federal money to pay for them.<sup>54</sup> Directly in the face of those dying from AIDS, the pharmaceutical companies responded, "We are an industry: we cannot fund this type of treatment."<sup>55</sup> This philosophy would continue to resonate years later. It was apparent that Costa Rica's healthcare system was not going to provide AIDS medications to anyone.<sup>56</sup> This all changed in 1997, however, as a landmark case dramatically changed the situation for people living with AIDS in Costa Rica.

In 1997, William García, a graduate student dying from AIDS, along with three other plaintiffs, filed a writ with the Sala Cuarta in another attempt to gain access to life-saving medication.<sup>57</sup> Doctors provided the court with documentation about García's imminent death and argued that the drugs were his only chance for possible survival, making this a life or death situation.<sup>58</sup> In a fast resolution, within three weeks of filing, the Sala Cuarta ruled that the CCSS must pay for antiretroviral medications.<sup>59</sup> The Court reasoned, "[o]f what use are all the other rights and guarantees, the institutions and its programs, the advantages and benefits of our social welfare system, if even one person is not able to count on, and be assured to, the right of life and health?"<sup>60</sup> The Court based its decision on not only Article 21 of the Political Constitution of the Republic of Costa Rica, which states that "life is inviolable,"<sup>61</sup> but also on guarantees contained in various international

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<sup>51</sup> INT'L COUNCIL OF AIDS SERV. ORGS., *supra* note 6, at 17.

<sup>52</sup> Wilson & Rodríguez Cordero, *supra* note 8, at 338.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 339.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> INT'L COUNCIL OF AIDS SERV. ORGS., *supra* note 6, at 17.

<sup>61</sup> Constitución Política de la República de Costa Rica art. 21, *translated in* Political Constitution of Costa Rica, <http://usembassy.or.cr/engconst.htm>.

human rights conventions.<sup>62</sup> The Court focused more of its discussion on international human rights than its own constitutional provisions, leading to the inference that international agreements have become just as an important source of human rights guarantees as the Constitution of 1949.<sup>63</sup>

With the *García* ruling, Costa Rica became the country with the most liberal AIDS policy in the western hemisphere.<sup>64</sup> The Sala Cuarta normally hears only between twenty and twenty-five cases per year, a small fraction of the appeals that are filed;<sup>65</sup> however, the Sala has heard more than eighty cases concerning HIV/AIDS cases and human rights issues since *García* was decided in 1997.<sup>66</sup> Due to this high volume of cases, the government of Costa Rica worked with national and international non-governmental organizations to create national legislation regarding rights for people living with AIDS and the penalties for those who violate those rights.<sup>67</sup> Costa Rica was the first country in Central America to pass legislation about the rights of people with AIDS and the first country to guarantee access to healthcare for people with AIDS.<sup>68</sup> In 1998, the president of Costa Rica issued an executive order that states, “In order to clarify discrepancies within the general law . . . [t]hose persons infected with the HIV/AIDS virus regardless of sexuality or nationality will be treated fairly under the law.”<sup>69</sup> This legislation, combined with the executive order and precedential decisions of the Supreme Court, forces judges to treat people living with AIDS fairly under the law. This could all change, however, as Costa Rica ratified CAFTA.

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<sup>62</sup> Barker, *supra* note 32, at 285.

<sup>63</sup> *Id.* at 285-86.

<sup>64</sup> Daniel Rosenblum, *A Ray of Hope: Costa Rica's Progressive Approach to HIV/AIDS*, MICH J. HIST., Fall 2005, at 3, [http://www.umich.edu/~historyj/pages\\_folder/articles/A\\_Ray\\_of\\_Hope.pdf](http://www.umich.edu/~historyj/pages_folder/articles/A_Ray_of_Hope.pdf). As Costa Rica was the first country in Central America to offer AIDS drugs free of charge, the Costa Rican government opened itself up to a flood of foreigners coming to Costa Rica for treatment. Rudolfo Piza, the president of CCSS, said, “We have tried to communicate with immigration services, we do not want to violate the human rights of non-residents seeking care, but people cannot overlook the cost.” *Id.* By 1999, 11% of those treated were resident aliens or illegal immigrants. *Id.*

<sup>65</sup> *Id.* at 3-4.

<sup>66</sup> *Id.* at 4.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 4-5 (translating Exec. Order No. 27894-7, Miguel A. Rodríguez, Decretos; El Presidente de la República y el Ministro de Salud (May 1998) (Costa Rica)).

### III. AN OVERVIEW OF CAFTA AND ITS INTELLECTUAL PROPERTY PROVISIONS

The Central American Free Trade Agreement (“CAFTA”) is a multilateral treaty between the United States and the Central American states of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic.<sup>70</sup> CAFTA creates a free trade zone between the states, which is intended to facilitate and increase the volume of trade, to deepen the contacts between the signatories by establishing more of a common market, to set forth common competition conditions, and to safeguard intellectual property rights.<sup>71</sup> Critics argue that CAFTA is about much more than free trade, however, as it contains a “number of provisions that directly export U.S. federal law into the international context.”<sup>72</sup> Furthermore, critics contend that “[w]here there is no balance of power, negotiation means imposition.”<sup>73</sup> The Central American parties to this agreement are required to make changes to their national laws to bring them up to par with U.S. norms outlined in CAFTA.<sup>74</sup>

In some cases, the legal changes required by CAFTA can even reach the constitutional level.<sup>75</sup> The undemocratic nature of this free trade agreement is made abundantly clear as legislatures throughout Central America are struggling to modify their national laws governing, among other things, intellectual property in order to receive United States certification for joining CAFTA.<sup>76</sup> Critics argue that CAFTA will “define supra-national rules in key areas for development and poverty reduction such as intellectual property . . . with far reaching political,

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<sup>70</sup> Rohe, *supra* note 16, at 73.

<sup>71</sup> *Id.* at 74.

<sup>72</sup> Mark B. Baker, *No Country Left Behind: The Exporting of U.S. Legal Norms Under the Guise of Economic Integration*, 19 EMORY INT’L L. REV. 1321, 1365 (2005).

<sup>73</sup> Tom Ricker & Burke Stansbury, *The CAFTA Chronicles: Strong-Arming Central America, Mocking Democracy*, MULTINATIONAL MONITOR, Jan.-Feb. 2006, at 21, 21 (quoting Carlos Pacheco of the Centro de Estudios Internacionales in Managua, Nicaragua), available at <http://multinationalmonitor.org/mm2006/012006/ricker.html>.

<sup>74</sup> Baker, *supra* note 72, at 1367. In Costa Rica, intellectual property as a sector of law is governed within the legal framework by a series of international agreements, laws, and decrees. JUDGE CARMEN MARÍA ESCOTO, INTELLECTUAL PROPERTY RIGHTS’ AND TRADE ENFORCEMENT PROCEDURES IN COSTA RICA 6, [http://www.wipo.int/edocs/mdocs/enforcement/en/wipo\\_ace\\_2/wipo\\_ace\\_2\\_www\\_33725.pdf](http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_2/wipo_ace_2_www_33725.pdf) (last visited January 30, 2008).

<sup>75</sup> See Ricker & Stansbury, *supra* note 73, at 1367.

<sup>76</sup> Brendan Coyne, *Opposition Delays Free Trade Implementation*, NEWSTANDARD, Dec. 30, 2005 (on file with author).

economic and social implications for the Central American people.”<sup>77</sup> Some maintain that CAFTA’s intellectual property protections will give “monopoly-like status to high-priced, brand name drugs in poor markets; potentially killing off generics” and preventing many of those dying from AIDS from receiving the treatment they need to survive.<sup>78</sup> Whatever Costa Rica may gain from CAFTA, the striking increase in protection of intellectual property rights will likely have a considerable impact on Costa Rica’s ability to not only implement development policies in the area of public health, but also to uphold the decisions of the Sala Cuarta regarding access to antiretroviral medicines for people living with AIDS.<sup>79</sup>

### A. CAFTA’S INTELLECTUAL PROPERTY PROVISIONS

In the multilateral context of CAFTA, provisions for the protection of intellectual property (“IP”) rights have been negotiated with each country agreeing to implement new rules based on its level of development.<sup>80</sup> For example, Central American countries are already required to establish high levels of IP protection under the World Trade Organization’s Trade Related Aspects of Intellectual Property (“TRIPS”) Agreement.<sup>81</sup> “However, the TRIPS Agreement left certain flexibilities for developing countries to implement the guidelines in a manner appropriate with their state of economic and technological development.”<sup>82</sup> Under the TRIPS Agreement, countries are required to provide twenty-year patent protections for all products, including pharmaceuticals. This has forced many countries which previously offered limited or no protection for pharmaceuticals to adopt patent rules covering medicines similar to those of the United States.<sup>83</sup> However, the

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<sup>77</sup> OXFAM AMERICA, MAKE TRADE FAIR FOR CENTRAL AMERICA 6 (2003), available at [http://www.oxfamamerica.org/newsandpublications/publications/briefing\\_papers/art6302.html/OA-Fair\\_Trade\\_Central\\_America\\_English.pdf](http://www.oxfamamerica.org/newsandpublications/publications/briefing_papers/art6302.html/OA-Fair_Trade_Central_America_English.pdf).

<sup>78</sup> Hearn, *supra* note 14.

<sup>79</sup> Carlos M. Correa, *Bilateralism in Intellectual Property: Defeating the WTO System for Access to Medicines*, 36 CASE W. RES. J. INT’L L. 79, 81-82 (2004).

<sup>80</sup> Briefing Paper, Román Macaya, Nat’l Chamber of Generic Prods., Costa Rica, The Economic and Social Consequences of an Overprotection of Intellectual Property Rights in CAFTA 1 (April, 2005), available at <http://www.cptech.org/ip/health/trade/cafta/macaya042005.doc>.

<sup>81</sup> Costa Rica acceded to the TRIPS agreement on January 10, 1995. ESCOTO, *supra* note 74, at 5.

<sup>82</sup> Macaya, *supra* note 80, at 1.

<sup>83</sup> Robert Weissman, *Dying for Drugs: How CAFTA Will Undermine Access to Essential Medicines*, HEALTH NOW, Mar. 6, 2004, <http://www.health-now.org/site/article.php?articleId=75&menuId=13>.

TRIPS Agreement and the subsequent Doha Declaration on the TRIPS Agreement and Public Health provided certain safeguards by giving developing countries the right to break drug patents in health emergencies, reaffirming these countries' rights to life-saving medicines.<sup>84</sup> Nevertheless, with CAFTA this may all change—as with most trade agreements, CAFTA contains a chapter on intellectual property rights that further regulates and supplements current intellectual property legislation.<sup>85</sup> For instance, the IP provisions in CAFTA significantly increase the burden on developing countries by eliminating the flexibilities allowed under TRIPS to protect public health.<sup>86</sup> The consequences of the provisions of CAFTA are the exact opposite of those of the Doha Declaration, which recognized that developing nations should have access to inexpensive generic medicines due to their pressing health concerns.<sup>87</sup>

### 1. DATA EXCLUSIVITY

One of the most controversial provisions of CAFTA is Article 15.10, the “data exclusivity” provision, which further regulates and limits some conditions found in the TRIPS agreement.<sup>88</sup> Critics argue that this provision weakens the right to essential medicines by placing barriers around pharmaceutical test data and delaying the registration of generic drugs in developing countries.<sup>89</sup> Article 15.10.1 of CAFTA provides:

If a party requires, as a condition of approving the marketing of a new pharmaceutical or agricultural chemical product, the submission of undisclosed data concerning safety or efficacy, the Party shall not permit third persons, without the consent of the person who provided such 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

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<sup>84</sup> Hearn, *supra* note 14.

<sup>85</sup> Pacheco Coto, *CAFTA and Intellectual Property Rights*, AMCHAM'S BUSINESS COSTA RICA, Jan. 2005, reprinted at [http://www.hg.org/articles/article\\_910.html](http://www.hg.org/articles/article_910.html).

<sup>86</sup> Correa, *supra* note 79, at 94.

<sup>87</sup> MINORITY STAFF OF H.R. COMM. ON GOVT. REFORM, 109TH CONG., TRADE AGREEMENTS AND ACCESS TO MEDICATIONS UNDER THE BUSH ADMINISTRATION 7 (2005), available at <http://www.democrats.reform.house.gov/Documents/20050609094902-11945.pdf>.

<sup>88</sup> Coto, *supra* note 85.

<sup>89</sup> Hearn, *supra* note 14.

products . . . .<sup>90</sup>

Countries require that pharmaceutical companies release data showing that their products have been tested and are safe and effective.<sup>91</sup> In particular, U.S. law mandates that generic drug makers do not have to conduct their own safety trials, but can rely on the data gathered by the brand-name companies on file with the Food and Drug Administration.<sup>92</sup> To make up for the large amounts of money the brand-name manufacturers spend on expensive testing, Congress has limited generic manufacturers' access to this data until five years after approval.<sup>93</sup> However, CAFTA takes this restriction one step further, as the provisions for test data protection in CAFTA were created to exclude the registration of generic pharmaceuticals, guaranteeing "at least five years" of exclusivity for brand-name manufacturers.<sup>94</sup> Thus, if the original medicine is approved in a Central American country, the generic medicine will not get approval until *at least* five years after the approval of the original medicine.<sup>95</sup> Moreover, if the generic drug manufacturers are not able to rely on the testing done by the brand-name manufacturers, most likely the generic drugs will not even enter the market.<sup>96</sup> This essentially guarantees drug monopolies for the brand-name pharmaceutical companies.<sup>97</sup> Public health officials worry that this data exclusivity provision would cease all drug access in developing countries until the prohibited time limit expires, even though many of the name-brand medicines are not even sold in the developing countries that use the generic medicines.<sup>98</sup>

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<sup>90</sup> The Dominican Republic-Central America-United States Free Trade Agreement art. 15.10.1, Aug. 5, 2004, [http://www.ustr.gov/Trade\\_Agreements/Regional/CAFTA/CAFTA-DR\\_Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html) [hereinafter CAFTA].

<sup>91</sup> Weissman, *supra* note 83.

<sup>92</sup> Hearn, *supra* note 14.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Correa, *supra* note 79, at 86.

<sup>96</sup> Weissman, *supra* note 83.

<sup>97</sup> Macaya, *supra* note 80, at 1-3.

<sup>98</sup> Hearn, *supra* note 14.

## 2. COMPULSORY LICENSING

Another data protection of CAFTA would make compulsory licensing impossible in Central American countries.<sup>99</sup> Compulsory licensing enables a government to authorize a third party to use a patent held by another company.<sup>100</sup> For example, Costa Rica could provide a license to a generic pharmaceutical company for a particular AIDS medication manufactured by a brand-name drug manufacturer.<sup>101</sup> The generic drug company would then manufacture the drug for sale in Costa Rica under the generic name, and pay a royalty to the brand-name manufacturer.<sup>102</sup> Compulsory licensing lowers prices for medicines by creating competition while the drug is still covered under patent.<sup>103</sup> However, CAFTA appears to prohibit any generic drug manufacturer from relying on the data submitted by the brand-name drug manufacturer at any point during the patent unless the generic manufacturer has permission from the patent holder.<sup>104</sup> Article 15.10.2 provides:

Where a party permits, as a condition of approving the marketing of a pharmaceutical product, persons, other than the person originally submitting safety or efficacy information, to rely on evidence or information concerning the safety and efficacy of a product that was previously approved, such as evidence of prior marketing approval in the territory of a Party or in another country, that Party:

(a) shall implement measures in its marketing approval process to prevent such other persons from marketing a product covered by a patent claiming the previously approved product or its approved use during the term of that patent, unless by consent or acquiescence of the patent owner; and

(b) shall provide that the patent owner shall be informed of the request and the identity of any such other person who requests approval to enter the market during the term of a patent identified as claiming the approved product or its approved use.<sup>105</sup>

This language suggests that even if a compulsory license is granted, generic manufacturers cannot rely on marketing approval data for a drug

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<sup>99</sup> Weissman, *supra* note 83.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

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

<sup>104</sup> *See id.*

<sup>105</sup> CAFTA, *supra* note 90, at art 15.10.2.

for the entire length of its patent.<sup>106</sup> Because the costs of testing for marketing approval are so high, and the markets in Central America are so small, generic manufacturers will not be able to perform safety tests to obtain approval for their medicines.<sup>107</sup> As a result, generic drug manufacturers could not employ their products even with a compulsory license, severely limiting Latin American access to essential medicines.

### 3. LINKAGE

Another objective that has been pursued by pharmaceutical companies, linkage between drug registration and patent status, has been achieved with CAFTA. Although there is no provision of this kind in the TRIPS Agreement, CAFTA now creates this linkage.<sup>108</sup> The patent-registration linkage is above and beyond the standards of developed countries, ignoring the fact that patents are private rights and whether a product infringes on a patent is a legal matter completely separate from the issues regarding the safety of medicines.<sup>109</sup> Health authorities have no basis or experience in the assessment of patent claims.<sup>110</sup> Pharmaceutical patents cover a wide range of products and can be used to deter generic competition.<sup>111</sup> Conversely, in Europe, there is complete independence between intellectual property protection and drug registration and health officials have no legal basis to look into patent infringement issues or deny approval to an application based on that infringement.<sup>112</sup> Additionally, in the United States, the Food and Drug Administration informs patent owners about a third party's application for the same drug, but it is the responsibility of the owner to bring suit before the courts to hinder the application of a third party.<sup>113</sup> Thus, "courts in the United States . . . take a very cautious approach towards the granting of injunctions in patent cases."<sup>114</sup>

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<sup>106</sup> See Weissman, *supra* note 83.

<sup>107</sup> See *id.*

<sup>108</sup> Correa, *supra* note 79, at 88.

<sup>109</sup> See Correa, *supra* note 79, at 89.

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

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 90.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 91.

## B. IMPACT ON HEALTHCARE

Costa Rica has the longest running democracy in Latin America having established a democratic regime in 1949.<sup>115</sup> After a short revolution in 1948, revolutionary leader José Maria Figueres instituted a temporary government and abolished the army, transferring the military funds to education and health.<sup>116</sup> As a result of this unique history, Costa Rica's social security system provides universal healthcare.<sup>117</sup> Under this system, everyone within the territory is covered. In addition, every medical procedure is covered, including all clinical drugs, and all treatment is completely prepaid, meaning there is no co-payment or deductible required.<sup>118</sup> Costa Rica spends only about \$250 per capita on public health care, but its health indices are comparable to those of developed countries.<sup>119</sup> The United States, in comparison, spends three times that amount just on the cost of prescription drugs.<sup>120</sup> In order to maintain its universal healthcare system, Costa Rica needs access to new, life-saving medicines. Without access to generic medicines due to the strict provisions of CAFTA, Costa Rica's universal healthcare system is in jeopardy.<sup>121</sup> The importance of generic drugs is illustrated by the fact that in Costa Rica, the cost for antiretroviral medicines has been reduced from \$625 per month per person to less than \$200 with the use of generic medicines.<sup>122</sup>

The higher drug prices that could result due to CAFTA can be best illustrated by the example of AIDS medicines and Costa Rica's Social Security system.<sup>123</sup> In 1997, the AIDS drug Nelfinavir was included on the drug list of the Social Security system, granting coverage for Costa Ricans living with AIDS.<sup>124</sup> In 1997, the branded product was registered in Costa Rica.<sup>125</sup> However, if CAFTA's data exclusivity provisions had been in effect at that time, the five-year exclusionary test

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<sup>115</sup> David Kane, *Costa Rica and CAFTA*, in MONITORING REPORT: DR-CAFTA IN YEAR ONE 26, 26 (2006), [www.cispes.org/cafta/CAFTA\\_Monitoring\\_sept12.pdf](http://www.cispes.org/cafta/CAFTA_Monitoring_sept12.pdf).

<sup>116</sup> *Id.*

<sup>117</sup> *See id.*

<sup>118</sup> Macaya, *supra* note 80, at 3.

<sup>119</sup> *Id.* at 3-4.

<sup>120</sup> *Id.* at 4.

<sup>121</sup> *See id.*

<sup>122</sup> Diana Cariboni, *Health: Access to Anti-AIDS Drugs Varies Widely in Latin America*, INTERPRESS SERVICE, Dec. 1, 2003, <http://aegis.com/news/ips/2003/IPO31206.html>.

<sup>123</sup> Macaya, *supra* note 80, at 4.

<sup>124</sup> *Id.* at 5.

<sup>125</sup> *Id.*

data protection would not have expired until 2002.<sup>126</sup> This means that generic drugs would not have been able to begin the registration process and they would not have been ready to participate until 2003, as the registration process takes approximately six months in Costa Rica.<sup>127</sup> With the exclusion of generic medicines for five years, coupled with the time needed for the drug registration and bidding processes, an additional \$3.66 million in costs would be added to the purchase of this drug.<sup>128</sup> Considering that the entire budget for the Costa Rican Social Security system's total drug purchases for over five hundred different drugs is \$70 million per year, \$3.66 million is a significant amount lost.<sup>129</sup> With the purchase of generic medicines, the Costa Rican Social Security system has saved more than 97 percent of the cost of brand-name drugs, which would not have been possible under CAFTA.<sup>130</sup>

CAFTA's approval will entail a series of changes in Costa Rican legislation.<sup>131</sup> Three CAFTA bills on intellectual property, covering provisions on patent reform and observance of intellectual property rights, need to be ratified by Costa Rica in order for it to be fully compliant with the provisions of CAFTA.<sup>132</sup> Supreme Court Justice Carmen María Escoto reports that:

The subject of intellectual property rights is, *inter alia*, of great importance owing to the process of globalization in which the Republic of Costa Rica is immersed and, as a result of the country's international trade relations, its laws have required adjustment, in an attempt to guarantee the protection of the relevant rights.<sup>133</sup>

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Kane, *supra* note 115, at 27.

<sup>132</sup> *Id.*

<sup>133</sup> ESCOTO, *supra* note 74, at 1.

#### IV. CONSTITUTIONAL ANALYSIS OF CAFTA

##### A. CONSTITUTIONAL RIGHT TO HEALTH AND CAFTA

The most important factor in ensuring access to medicine as part of a fulfillment of the right to health, is that certain rights are constitutionally-protected. Human rights treaties have played a major role in supporting the creation of such constitutional provisions.<sup>134</sup> Costa Rica has ratified the main international covenants and conventions on human rights, including the Universal Declaration of Human Rights of 1948<sup>135</sup> and the International Covenant on Economic, Social, and Cultural Rights.<sup>136</sup> Moreover, the Political Constitution of the Republic of Costa Rica explicitly recognizes the role of the state in ensuring the right to health. Article 21 states that the right to life is inviolable.<sup>137</sup> Article 33 states that all persons are equal before the law and there shall be no discrimination against human dignity.<sup>138</sup> Article 46 grants that “[c]onsumers and users are entitled to the protection of their health . . . and to equal treatment.”<sup>139</sup> Additionally, Article 48 of the constitution grants every person the right to present writs of *amparo*.<sup>140</sup>

The Political Constitution of the Republic of Costa Rica recognizes the supremacy of its laws above all other laws.<sup>141</sup> It also recognizes the right of citizens to address the constitutionality of provisions and acts subject to public law before the Sala Cuarta of the

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<sup>134</sup> Hans V. Hogerzeil et al, *Is Access to Essential Medicines as Part of the Fulfilment of the Right to Health Enforceable Through the Courts?*, 368 LANCET 305, 308 (2006), available at [http://www.who.int/medicines/news/Lancet\\_EssMedHumanRight.pdf](http://www.who.int/medicines/news/Lancet_EssMedHumanRight.pdf).

<sup>135</sup> Universal Declaration of Human Rights, G.A. RES. 217A, U.N. GAOR, 3d Sess., 1st plen. mtng., U.N. DOC. A/810 (Dec. 10, 1948). Article 25.1 states that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . .” *Id.* art 25.1.

<sup>136</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. The covenant provides that States parties “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” *Id.* art. 12.1. Article 12.2 provides for the “creation of conditions which would assure to all medical service and medical attention in the event of sickness” creating an important standard by which the parties may assess their laws and practices. *Id.* art. 12.2(d). *See also* Hogerzeil, *supra* note 134, at 305.

<sup>137</sup> Constitución Política de la República de Costa Rica art. 21.

<sup>138</sup> *Id.* art. 33 (amended 1968).

<sup>139</sup> *Id.* art. 46 (amended 1996), translated in Political Constitution of Costa Rica, <http://usembassy.or.cr/engconst.htm>.

<sup>140</sup> *Id.* art. 48 (amended 1989).

<sup>141</sup> Barker, *supra* note 19, at 254.

Supreme Court,<sup>142</sup> granting the Sala Cuarta the authority to “hear any consultations on constitutional amendment bills, ratification of international agreements or treaties and other bills, as provided by law.”<sup>143</sup> It would appear that international agreements can only be valid within Costa Rica if they are subject to and comply with the provisions of the Political Constitution of the Republic of Costa Rica.

International agreements, like national laws, must be ratified by Costa Rica’s Legislative Assembly in order to be valid.<sup>144</sup> CAFTA need only be ratified by a majority of members of Congress; however, before the Legislative Assembly can pass any treaty into law, the Supreme Court must be consulted regarding its constitutionality.<sup>145</sup> Logically it would then follow that the ratification of an international agreement is based on the recognition that it does not violate any existing constitutional precepts. However, in accordance with Article 7 of the constitution, international agreements duly ratified by the Legislative Assembly prevail over the constitution.<sup>146</sup> Under Article 7 of the Political Constitution of the Republic of Costa Rica, there will be an inherent conflict between the rulings of the Sala Cuarta and CAFTA as access to essential medicines will not be as readily available. Essentially, the constitutional provisions and rulings of the Sala Cuarta may be ideal for access to lifesaving medicines, but if the constitutional provisions are not effective or the courts cannot enforce them due to a superceding international agreement like CAFTA, they are of little value.

## B. COSTA RICA’S JUDICIAL INDEPENDENCE AND CAFTA

The legitimacy of the judiciary stems from the constitution; however, constitutional guarantees of judicial independence do not automatically produce an independent judiciary.<sup>147</sup> According to Professor Owen Fiss, three different ideas of judicial independence, in combination, allow for a strong, independent judiciary: (1) party

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<sup>142</sup> Constitución Política de la República de Costa Rica art. 10 (amended 1989).

<sup>143</sup> *Id.*, translated in Political Constitution of Costa Rica, <http://usembassy.or.cr/engconst.htm>.

<sup>144</sup> *See id.* art. 7 (amended 1968).

<sup>145</sup> R. Victoria Lindo, Note, *Hydroelectric Power Production in Costa Rica and the Threat of Environmental Disaster Through CAFTA*, 29 B.C. INT’L & COMP. L. REV. 297, 318 (2006).

<sup>146</sup> Constitución Política de la República de Costa Rica art. 7 (amended 1968), translated in Political Constitution of Costa Rica, <http://usembassy.or.cr/engconst.htm>.

<sup>147</sup> Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1, 33-34 (1987).

detachment; (2) individual autonomy; and (3) political insularity.<sup>148</sup> Party detachment, as its name implies, is rooted in impartiality and requires judges to be independent from the parties in the litigation not to be controlled or influenced by them in any way.<sup>149</sup> Individual autonomy, or “internal judicial independence,” concerns the power of one judge over another with the idea that judges should neither influence their colleagues on cases or decisions nor be threatened by the hierarchy of the courts.<sup>150</sup> Finally, the third concept of judicial independence, political insularity, or “external judicial independence,” means that the judiciary should be free and independent from other political institutions and the general public.<sup>151</sup> According to Fiss, “[t]he greater the insularity from political control, the more likely judges are to do what is just rather than what is politic.”<sup>152</sup> In short, judicial independence requires judges who are detached and neutral from the parties litigating the case before them, who have individual autonomy to reach a decision based on the law and the facts of the case, and who are shielded from external partisan influence and control.<sup>153</sup>

#### 1. AN OVERVIEW OF CAFTA’S ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

The judicial branch plays an important role in the investment conditions under free trade agreements. The sovereignty of Costa Rica’s judicial system, however, is threatened as CAFTA includes alternate mechanisms for dispute resolution. Chapter 20 of CAFTA states that each party “shall make every attempt through cooperation and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation.”<sup>154</sup> The dispute resolution system is gradual, beginning with consultations, and if no agreement is reached by consultation, then a party may request an arbitral tribunal be created to

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<sup>148</sup> Owen M. Fiss, *The Limits of Judicial Independence*, 25 U. MIAMI INTER-AM. L. REV. 57, 58-59 (1993).

<sup>149</sup> *Id.* at 58.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 59.

<sup>152</sup> *Id.* at 60.

<sup>153</sup> J. Michael Dodson & Donald W. Jackson, *Judicial Independence and Instability in Central America*, in JUDICIAL INDEPENDENCE IN THE AGO OF DEMOCRACY, 251, 256 (Peter H. Russell & David O’Brien, eds. 2001).

<sup>154</sup> CAFTA, *supra* note 90, art. 20.1.

solve the dispute.<sup>155</sup> Furthermore, the complaining party may select the forum in which to settle the dispute and this forum shall be used at the exclusion of all others.<sup>156</sup> The creation of an arbitration tribunal under CAFTA favors transnational corporations at the expense of national sovereignty because: (1) arbitration requires a significant amount of money; (2) transnational corporations have more extensive knowledge of the tribunal process; and (3) transnational corporations are better able to control the outcome of an arbitral tribunal, given their monetary influence.<sup>157</sup>

The alternate dispute resolution mechanisms provided by CAFTA threaten national sovereignty because these mechanisms allow a nation's internal matters to be decided in an unknown forum outside the country rather than in the country's national courts. This directly conflicts with Article 35 of the Political Constitution of the Republic of Costa Rica, which establishes the jurisdiction of its courts by stating that "[n]o one may be tried by a commission, a court or a judge specially appointed for the case, but exclusively by the courts established in accordance with this Constitution."<sup>158</sup> Additionally, Article 153 of the Political Constitution of the Republic of Costa Rica provides that,

In addition to the functions vested in it by this Constitution, the Judicial Branch shall hear civil, criminal, commercial, labor, and administrative-litigation cases, as well as any others established by law, regardless of their nature or the status of the persons involved; enter final resolutions thereon and execute the judgments entered, with the assistance of law enforcement forces, if necessary.<sup>159</sup>

Thus, disputes arising out of the domestic application of an international agreement should be adjudicated in a national court, because once an international agreement is ratified that agreement is incorporated as part of the national law.<sup>160</sup>

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<sup>155</sup> van der Laet, *supra* note 45, at 9.

<sup>156</sup> CAFTA, *supra* note 90, art. 20.3.

<sup>157</sup> See generally JEANNETTE CHÁVEZ GÓMEZ, CENTRO DE ESTUDIOS INTERNACIONALES, EL TRATADO DE LIBRE COMERCIO ENTRE CENTROAMÉRICA Y LOS ESTADOS UNIDOS: ANÁLISIS JURÍDICO CONSTITUCIONAL (2004), available at <http://www.ceinicaragua.org.ni/justicia?iddocumento=15>.

<sup>158</sup> Constitución Política de la República de Costa Rica art. 35, translated in Political Constitution of Costa Rica, <http://usembassy.or.cr/engconst.htm>.

<sup>159</sup> *Id.* art. 153, translated in Political Constitution of Costa Rica, <http://usembassy.or.cr/engconst.htm>.

<sup>160</sup> GÓMEZ, *supra* note 157.

Finally, Article 10 of the constitution grants power to the Sala Cuarta to “declare, by the absolute majority vote of its members, the unconstitutionality of provisions of any nature and acts subject to Public Law.”<sup>161</sup> In fact, a concern to U.S. investors is the frequent use of writs of *amparo* before the Sala Cuarta, reviewing the constitutionality of legislation and regulations and challenging the legality of acts.<sup>162</sup> Investors are concerned that challenges have been “used at times to slow procedures and hinder the quick resolution of disputes.”<sup>163</sup>

CAFTA, on the other hand, provides for the creation of a separate commission to resolve issues relating to CAFTA. Article 19.1 creates a Free Trade Commission which is intended to: (1) supervise the implementation of the agreement; (2) oversee the further elaboration of the agreement; (3) seek to resolve disputes that may arise regarding the interpretation or application of the agreement; (4) supervise the work of all committees and working groups established under the agreement; and (5) consider any other matter that may affect the operation of the agreement.<sup>164</sup> Additionally, Article 19.1 provides that the commission may “issue interpretations of the provisions of this Agreement.”<sup>165</sup>

CAFTA’s creation of a Free Trade Commission to resolve disputes, if there were no Article 7 of the Political Constitution of the Republic of Costa Rica and other clauses granting supreme power to international law, would infringe upon the rights of the judiciary and the National Assembly to interpret the law. Article 105 of the Political Constitution of the Republic of Costa Rica provides that the power to legislate resides in the people, and it delegates this power by means of suffrage to the Legislative Assembly.<sup>166</sup> Additionally, Article 121 grants the Legislative Assembly the exclusive power to “[e]nact, amend, repeal and give authentic interpretation to the laws” and “[a]pprove or disapprove of international conventions, public treaties and

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<sup>161</sup> Constitución Política de la República de Costa Rica art. 10 (amended 1989), *translated in* Political Constitution of Costa Rica, <http://usembassy.or.cr/engconst.htm>.

<sup>162</sup> OFFICE OF THE U.S. TRADE REPRESENTATIVE, *Costa Rica*, in FOREIGN TRADE BARRIERS 102, 106 (2004), *available at* [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2004/2004\\_National\\_Trade\\_Estimate/2004\\_NTE\\_Report/asset\\_upload\\_file231\\_4191.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/2004_National_Trade_Estimate/2004_NTE_Report/asset_upload_file231_4191.pdf).

<sup>163</sup> *Id.*

<sup>164</sup> CAFTA, *supra* note 90, art. 19.1(2).

<sup>165</sup> *Id.* art. 19.1(3)(c).

<sup>166</sup> Constitución Política de la República de Costa Rica art. 105 (amended 1989), *translated in* Political Constitution of Costa Rica, <http://usembassy.or.cr/engconst.htm> (“Such a power may not be waived or subject to limitations by any agreement or contract, either directly or indirectly, except in the case of treaties, in accordance with the principles of International Law.”).

concordants.”<sup>167</sup> Public treaties which transfer certain powers for the purpose of achieving regional goals must be approved by the Legislative Assembly by a vote of not less than two-thirds its entire membership before they can become Costa Rican law.<sup>168</sup> With these constitutional provisions, if CAFTA is ratified by the Legislative Assembly, it would essentially reduce the power of Costa Rica’s democratic government to enact laws and policy that its people want, including access to essential medicines under Costa Rica’s universal health care system. CAFTA would subject Costa Rica’s national powers of legislation to international free trade commissions controlled by multinational companies, effectively giving away the sovereignty of the Costa Rican people to supranationally-created bodies.

## 2. THREAT TO COSTA RICA’S JUDICIAL INDEPENDENCE

International review of Costa Rican court decisions threatens the independence and authority of the Costa Rican judiciary. International free trade agreements with alternative dispute resolution mechanisms such as CAFTA are threatening to Costa Rica’s political insularity and judicial independence from external controls. International investment tribunals such as the Free Trade Commission make politically and constitutionally sensitive decisions about the fairness of Costa Rica’s Supreme Court decisions using a model of international arbitration and commercial contracts. This model of arbitration conflicts with Title XIV of the Political Constitution of the Republic of Costa Rica, protecting the judiciary from outside sources of political and economic pressures.<sup>169</sup> As previously mentioned, however, Article 7 provides that international agreements approved by the Legislative Assembly shall have higher authority than national laws.<sup>170</sup> Thus, although it does infringe upon the independence of Costa Rica’s judiciary, international arbitration under CAFTA is technically constitutional.

Alternative dispute mechanisms under trade agreements such as CAFTA lack key elements of judicial impartiality and independence, as the appointment of arbitrators is essentially political. Each country

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<sup>167</sup> *Id.* art. 121, ¶ 1, *translated in* Political Constitution of Costa Rica, <http://usembassy.or.cr/engconst.htm>; *id.* art 121, ¶ 4 (amended 1968), *translated in* Political Constitution of Costa Rica, <http://usembassy.or.cr/engconst.htm>.

<sup>168</sup> *Id.* art 121, ¶ 4 (amended 1968).

<sup>169</sup> *See id.* tit. XIV, art 188 (amended 1968).

<sup>170</sup> *See supra* notes 46-48 and accompanying text.

involved in the dispute picks one arbitrator, and the third arbitrator is either appointed by a World Bank official or mutually agreed upon by both parties and “arbitrators are appointed for only one case at a time.”<sup>171</sup> In comparison with the constitutional provisions for the appointment of judges found in Articles 157 and 158 of the Political Constitution of the Republic of Costa Rica, which provide that judges shall be elected by the Legislative Assembly for a period of eight years,<sup>172</sup> arbitrators are appointed by executive branch officials without the approval of the legislature and do not have limited tenure.<sup>173</sup> Arbitrators are prohibited from applying any country’s constitutional principles in making a decision, and they base the majority of their reasoning on the text of the international agreements and international law.<sup>174</sup> Thus, Costa Rica’s constitutional provisions are not considered, nor are the rulings of the Sala Cuarta, and the decisions reached by the arbitrators may be in direct conflict with the prior holdings of Costa Rica’s Supreme Court. U.S. Representative, Butch Otter (R-ID), summed up the threat to judicial independence that CAFTA will have by stating that:

The foreign investor protection provisions in CAFTA’s Chapter 10 and the establishment of a separate “court” system available only to foreign investors . . . shifts decisions away from Congress and out of the Federal court system . . . and into the authority of international tribunals . . . .<sup>175</sup>

Because arbitrators are appointed to solve disputes concerning an international trade agreement, it only follows that their interpretation of the text serves the main purpose of the agreement—promoting international trade and investment. With CAFTA, as with other free trade agreements, the goal of “free trade” supercedes the basic ideals of judicial independence and the constitutionally-protected rights of a nation’s people.

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<sup>171</sup> William Waren, *Courts*, F. ON DEMOCRACY & TRADE, Feb. 6, 2006, [http://www.forumdemocracy.net/trade\\_topics/courts/courts1.html](http://www.forumdemocracy.net/trade_topics/courts/courts1.html); CAFTA, *supra* note 90, art. 20.9.

<sup>172</sup> Constitución Política de la República de Costa Rica art. 157, (amended 1954); *id.* art 158.

<sup>173</sup> Waren, *supra* note 171.

<sup>174</sup> *Id.*

<sup>175</sup> 151 CONG. REC. H6186 (2005).

### C. OUTLOOK FOR CAFTA

Recently, the international affairs committee in the Costa Rican Congress approved CAFTA by a majority vote, more than thirteen months after introducing it into Congress.<sup>176</sup> After debating CAFTA for a long and arduous 272 hours, the committee voted 6-3 in favor of CAFTA, opening the debate up to the lower house.<sup>177</sup> President Oscar Arias believed that this would have paved the way for CAFTA to be ratified by April 30, 2007, the day the Congressional Session ended,<sup>178</sup> however, ratification took much longer than Arias expected. Mayi Antillon, party leader from the National Liberation Party, said, “the party will stay firm in rejecting [CAFTA], that three draft bills aimed at expediting its approval did not reach consensus and the Legislature has more pressing, national, matters to attend to than dealing with this legislation for the United States.”<sup>179</sup> Additionally, a series of thirteen other laws need to be passed in Costa Rica in order for CAFTA to take force, including a tightening of its laws governing intellectual property rights.<sup>180</sup>

“Although Arias will get the necessary majority in congress, he will still have to face strong protest from CAFTA opponents.”<sup>181</sup> It is estimated that the country is split equally on CAFTA, and protests are likely to continue during this critical time before a possible ratification.<sup>182</sup> A national front of individuals from politics, academia, and various social sectors has been meeting to expand the struggle for patriotism and sovereignty.<sup>183</sup> Activists in the group believe that CAFTA is a “threat to the progress achieved in the second half of the twentieth century and the solidarity that has been part of the Costa Rican model for economic and social development.”<sup>184</sup> Additionally, it is important to note that a study conducted by the University of Costa Rica showed that 69 percent of

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<sup>176</sup> *CAFTA 2007: Good Outlook*, LATIN BUS. CHRON. (Miami), Dec. 18, 2006, <http://www.latinbusinesschronicle.com> (on file with author).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Costa Rica to Nix CAFTA-DR*, ALCA ABAJO.CU, Jan. 16, 2007, [http://www.alcaabajo.cu/design/read.tpl.html?news\\_id\\_obj\\_id=1002062](http://www.alcaabajo.cu/design/read.tpl.html?news_id_obj_id=1002062).

<sup>180</sup> *U.S. Trade Deal Passes Costa Rica Congress Hurdle*, REUTERS, Dec. 14, 2006, available at <http://www.truthabouttrade.org/article.asp?id=6725>.

<sup>181</sup> *CAFTA 2007: Good Outlook*, *supra* note 176.

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

<sup>183</sup> *Costa Rica CAFTA Fight Goes National*, PRENSA LATINA, Dec. 15, 2006 (on file with author).

<sup>184</sup> *Id.*

those polled, regardless of whether they favor or oppose CAFTA, say the final decision to ratify the trade agreement should be made democratically—directly by the people by means of a national referendum, rather than through a vote by the Legislative Assembly.<sup>185</sup>

It is apparent from recent mobilization that Costa Ricans are concerned about the future of their country and their sovereignty with CAFTA. At the request of a group of legislators, the Sala Cuarta postponed the referendum to review the constitutionality of the controversial trade agreement.<sup>186</sup> After deliberations, the Sala Cuarta declared that CAFTA will be subject to a nationwide referendum, as such a vote does not violate the constitution.<sup>187</sup> Although the seven justices' opinion on whether CAFTA itself violates the constitution is not binding,<sup>188</sup> the Supreme Elections Tribunal scheduled a nationwide referendum to vote on CAFTA for October 7, 2007,<sup>189</sup> making Costa Rica the first country to hold a referendum to decide the fate of this trade agreement rather than allowing Congress alone to vote.<sup>190</sup> Even with CAFTA being left to the popular vote, many concerned groups of citizens are not discouraged. National Association of Educators President, José Antonio Barquero, believes, "[e]ven if the treaty is approved by popular vote, that won't stop the movement."<sup>191</sup> Opposition leaders argue that the referendum is not an end, but rather just "'one more means' to defeating privatization."<sup>192</sup> In a close vote, Costa Rica narrowly voted in favor of CAFTA with about 51.5 percent of the public who voted "yes" in the October 7, 2007 referendum, making Costa Rica the last of the signatories to put the trade agreement into practice.<sup>193</sup>

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<sup>185</sup> See generally Larry Luxner, *Free Trade Agreement Divides Costa Rica*, WASH. DIPLOMAT, Nov. 2005, available at [http://www.washdiplomat.com/November%202005/a7\\_11\\_05.html](http://www.washdiplomat.com/November%202005/a7_11_05.html).

<sup>186</sup> Katherine Stanley, *CAFTA Referendum in Costa Rica Postponed*, TICO TIMES.NET, June 6, 2007, [http://www.ticotimes.net/dailyarchive/2007\\_06/0606071.htm](http://www.ticotimes.net/dailyarchive/2007_06/0606071.htm).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Costa Rica Will Hold Referendum on CAFTA*, CALTRADE REP., May 24, 2007, <http://www.caltradereport.com/eWebPages/front-page-1180015938.html>.

<sup>191</sup> Peter Krupa, *Anti-CAFTA Leaders Launch Offensive*, TICO TIMES.NET, June 12, 2007, [http://www.ticotimes.net/dailyarchive/2007\\_06/0612071.htm](http://www.ticotimes.net/dailyarchive/2007_06/0612071.htm).

<sup>192</sup> *Id.*

<sup>193</sup> Editorial, *Victory for Costa Rica: The Central American Democracy Approves Free Trade with the United States*, WASH. POST, Oct. 9, 2007, at A16.

## V. CONCLUSION

In the absence of Article 7 of the Constitution, which provides that international agreements ratified by the Legislative Assembly supercede national law, CAFTA is seemingly in conflict with Costa Rica's constitution and the rulings of the Sala Cuarta. Article 7 of the Political Constitution of the Republic of Costa Rica appears to reduce the constitution from a superior, paramount law to the level of ordinary, legislative acts. Certainly the framers of the Political Constitution of the Republic of Costa Rica contemplated it as forming the fundamental and paramount law of Costa Rica, not to be weakened by an international "free trade" agreement. Certainly, it was never imagined that CAFTA would weaken the efficient and effective Sala Cuarta, "one of the bastions of the Costa Rican legal system and a basic component of its democratic system."<sup>194</sup>

As the United States is moving for a more controlled and unified hemisphere, Costa Rica needs to analyze the sovereignty it would lose. The consequences of ratifying CAFTA could be devastating for Costa Rica's national health care system, especially those living with AIDS who fought so hard in Costa Rica's Sala Cuarta to gain universal access to treatment. While signing CAFTA, U.S. President George W. Bush emphasized that, "CAFTA is more than a trade bill . . . it is a commitment among freedom loving nations to advance freedom."<sup>195</sup> But the real question is: what rights are being taken away and whose freedom is being lost to advance this idea of "freedom"? In the words of the Costa Rican Supreme Court:

In a state of law, the right to life, and in consequence the right to health, receives particular protection. Any economic criterion that pretends to annul the exercise of such rights must cede in importance . . . because without the right to life all of the other rights are useless . . . . Of what use are all the other rights or guarantees, the institutions and programs, the advantages and benefits of our system of liberties, if even one person cannot count on having the rights to health and life guaranteed?<sup>196</sup>

Without the right to life, what good is freedom?

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<sup>194</sup> See van der Laet, *supra* note 45, at 57.

<sup>195</sup> Ricker & Stansbury, *supra* note 73, at 24.

<sup>196</sup> Alicia Ely Yamin, *Not Just a Tragedy: Access to Medications as a Right Under International Law*, 21 B.U. INT'L L. J. 325, 341 (2003) (translating the opinion from *Alvarez v. Caja Costarricense de Seguro Social*, Sentencia No. 5934-97, Sala Constitucional de la Corte Suprema de Justicia [Constitutional Chamber of the Supreme Court] (Costa Rica)).