

## **EXECUTIVE SUMMARY**

Free trade agreements (FTA) have the potential for being beneficial, but only when all participating nations honor their commitments. As evidenced by the experience summarized herein, the Dominican Republic – Central American – United States Free Trade Agreement (CAFTA) has actually damaged American business interests because CAFTA lacks any practical enforcement mechanisms or incentive for a foreign country to comply, while U.S. markets remain open to foreign businesses doing business in the U.S. Specifically, Costa Rica has shown the world that a country can reap great benefits from free trade with the U.S., while intentionally violating an FTA and excluding U.S. businesses from their markets.

This Executive Summary, along with the accompanying Chronological Transcript (“Transcript”), illustrates the roadblocks Datzap, LLC has encountered attempting to expand business into Costa Rica. Despite the requirement to open its telecommunications market to private businesses by January 1, 2009, Costa Rica has refused to comply, taunting the U.S. and exploiting the lack of enforcement mechanisms, while further solidifying its state telecommunications monopoly. Meanwhile, Costa Rica businesses take advantage of U.S. markets, resulting in the creation of a substantial trade deficit where a trade surplus previously existed.

Datzap, based in Akron, Ohio, is part of an affiliated group providing satellite Internet service throughout North America. Datzap’s President closely followed the negotiation and enactment of CAFTA, with particular interest in entering the Costa Rica market. Significant investments were made in anticipation of the market’s mandated opening set to occur no later than January 1, 2009. Yet, nearly three years later, Costa Rica’s telecommunication markets are still closed to private and foreign investment. Further, Datzap anticipates adding 25 new employees when, and more appropriately if, it is authorized to begin providing service in Costa Rica.

Now, Congress is considering similar FTAs with South Korea, Panama and Columbia, with supporters boasting the same “protections” and “guarantees” for American investments promised under CAFTA. Datzap asks that you consider its situation, summarized below and in the accompanying Transcript, when considering these FTAs. These additional FTAs cannot be approved until they contain effective enforcement mechanisms, which may include automatic consequences for noncompliance. Otherwise, more American businesses will be damaged by the same illusory protections and guarantees as contained in CAFTA, and our trade deficit will grow exponentially as it has with Costa Rica.

### **1. CAFTA BACKGROUND**

In August, 2004, the United States agreed to CAFTA, a free trade agreement with five Central American countries and the Dominican Republic. It was to benefit all parties by eliminating tariffs, opening markets to businesses from other party nations, reducing barriers to service providers and promoting transparency. Specifically, CAFTA supporters promoted the free trade agreement as revolutionary, offering protections and guarantees to ensure access for U.S. businesses in these developing economies while ensuring access to U.S. markets for businesses based in party nations. The following is part of now-Senator, and then-USTR, Rob Portman’s statement on the House’s passage of CAFTA:

Tonight is an historic night for American leadership on free and fair trade. House passage of CAFTA-DR will create jobs and economic growth here at home... This win sends a powerful signal to the region and the world that the United States will continue to lead in opening markets and leveling the playing field.

The Bush Administration has worked with Congress to pass free trade agreements with ten countries since the passage of Trade Promotion Authority. Each opens markets to U.S. exports and creates U.S. jobs.

\* \* \*

The drive to open markets for U.S. exports continues...

While the paper upon which CAFTA is written states markets are open to American businesses, no one is interested in ensuring foreign markets are actually open so that American business can realize the negotiated benefits.

A significant issue for Costa Rica was liberalization of its telecommunications market which is, and continues to be, dominated by two government-owned service providers. Nonetheless, Costa Rica agreed to CAFTA and committed to, among other things, open its telecommunication markets to competition, establish new rules to govern the sector, create an impartial regulatory body with enforcement powers, institute transparency within such markets, and not discriminate against providers based upon the technology used to provide such services. Costa Rica originally agreed to open its markets for Internet service and provide data networks on January 1, 2006 and wireless services on January 1, 2007. At Costa Rica's request, these deadlines were later extended three years to January 1, 2009, being conditioned as follows: "If Costa Rica requires a license for the provision of a listed service, Costa Rica shall make licenses available within the timeframes specified." *See CAFTA, Annex 13 at p. 13-12.*

Even with this additional time, Costa Rica has still refused to comply with its commitments under CAFTA, resulting in two government-owned Internet service providers continuing to enjoy, and further solidifying, a monopoly in Costa Rica's telecommunication markets.

## **2. DATZAP'S EXPERIENCE**

Over the past three years, Datzap's affirmative action to enter Costa Rica's telecommunications market has only been met with endless obstacles and delays. Following the negotiation of CAFTA, Datzap's President prepared the company to immediately enter the market on January 1, 2009. Even prior to this deadline, Datzap developed advertising and promotional materials to create interest in its new services to be offered to Costa Rican consumers and businesses. Additionally, Datzap secured a lease of substantial satellite spectrum for service in Central America (and not for service in the United States and Canada, where the vast majority of its existing customers are located), which has resulted in a recurring monthly cost of approximately \$30,000 for satellite spectrum that continues to be unutilized. However, Datzap's efforts to enter the Costa Rica market have proven to be a horrendous waste of time and money, which may

ultimately prove to be fatal for a small business like Datzap. The following is a timeline of events highlighting the fierce and continued resistance Datzap has encountered in seeking to provide satellite Internet service in Costa Rica. References are to the accompanying Transcript containing more details regarding the identified events.

- Costa Rica enacts the General Telecommunications Law (GTL) in mid-2008, which created the Superintendent of Telecommunications (SUTEL) to act as the technical regulatory body and establish an application process requiring Datzap to obtain: (1) a frequency concession authorizing operation in the KU band, followed by (2) authorization to offer Internet service to the public (i.e., to act as a common carrier). The GTL also directed the Ministerio de Ambiente, Energia y Telecomunicaciones (MINAET) to adopt a national frequency allocation consistent with the International Telecommunications Union's (ITU) regulations, which Datzap's operations were already adhering to. Thus, the foundation was set for implementation of a simple compliance and licensing procedure, consistent with those already established in the region.
- Prior to January 1, 2009, Datzap purchased advertising in a Costa Rican newspaper but, after approved, the advertisements were pulled by the newspaper because Datzap was not yet licensed to provide the advertised service.
- Initially, Datzap could not even obtain an application, as none existed in early 2009. *See Transcript, January – May 2009*, at pp. 4 - 5.
- After submitting a confidential Report of Trade Barrier with the United States Department of Commerce, Trade Compliance Center, Datzap obtained an application form from SUTEL and, pursuant to SUTEL's instructions, filed the same with SUTEL seeking a concession to operate in the KU band in May 2009. *See Transcript, January – May 2009*, at p. 5.
- Meanwhile, the Instituto Costarricense de Electricidad (ICE), Costa Rica's primary, government-owned telecommunication provider, publicly vowed "to stall, if not block, competition." *See ICE, SUTEL Feud Continues, Inside Costa Rica* (May 21, 2009) (available at <http://insidecostarica.com/dailynews/2009/may/21/nac06.htm>).
- On September 19, 2009, SUTEL sends a letter ("First Technical Report") to Costa Rica's Vice Minister of Telecommunications which cited alleged regulatory issues with Datzap's application. These issues were caused by MINAET's failure to adopt regulations consistent with the ITU's regulations. *See Transcript, September 2009*, at pp. 5 - 6.
- In late 2009, Datzap discovers that SUTEL's instructions were incorrect and that its application should have been filed with MINAET, which is the agency responsible for granting frequency concessions. Instead of filing a new application with MINAET, Datzap requested that SUTEL simply transfer its application to MINAET. However, SUTEL informed Datzap that it had no record of its application. *See Transcript, October - November 2009*, at p. 7.

- On April 23, 2010, MINAET amended Costa Rica's National Frequency Allocation regulations (PNAF) to correct the regulatory issues cited in SUTEL's First Technical Report. These amendments were necessary because MINAET deviated from the ITU's regulations, which were required to be adopted by the GTL. *See Transcript, April 2010*, at pp. 10 - 11. This would appear to reflect Costa Rica's intent to cause needless delays.
- On May 17, 2010, Datzap filed a second application with MINAET, again seeking a frequency concession for the KU band. *See Transcript, May 2010*, at p. 12.
- Over approximately the next year, MINAET and SUTEL disputed the procedure for granting direct concessions (i.e., concessions for nonexclusive frequencies, such as the KU band).
- When no progress was being made, and in light of the endless hurdles, Datzap contacted the United States Trade Representative (USTR) in September 2010 to accelerate the Costa Rica agencies' determination on Datzap's application. *See Transcript, August – October 2010*, at pp. 16 - 17. During several communications with the USTR, Costa Rica's trade representative (COMEX) and SUTEL represented that SUTEL would be completing its technical report with respect to Datzap's second application in a matter of weeks – this technical report ("Second Technical Report") was not issued until March 17, 2011 and failed to even address the specific merits of Datzap's application, but instead raised additional regulatory issues with the procedure for granting direct concessions. *See Transcript, March 17, 2011*, at p. 20 - 21.
- Datzap met with the Vice Minister of Telecommunications on March 25, 2011 at MINAET's headquarters to discuss the issuance of a temporary/provisional concession until MINAET and SUTEL could settle on the procedure for processing applications for direct concessions. At the conclusion of the meeting, the Vice Minister committed to providing a formal report to Datzap by March 31, 2011 outlining how MINAET planned to proceed after discussing the proposed course of action with others within MINAET and SUTEL. No such formal report has been provided. *See Transcript, March 25-31, 2011*, at p. 22.
- On April 7, 2011, the USTR issued its 2011 Section 1377 Report addressing Datzap's situation and recommending that Costa Rica "act expeditiously to grant authorization (including, if necessary, a temporary authorization) to [Datzap] while SUTEL and the telecommunications ministry (MINAET) seek to resolve any outstanding issues regarding Internet service provided via satellite." The USTR's requests for action have been totally ignored. *See Transcript, April – May 2011*, at p. 23 - 24.
- Nonetheless, MINAET abandoned the idea of a temporary/provisional concession and, in August 2011, distributed a prolonged timeline outlining actions necessary for the issuance of the requested direct concession. This timeline began with a second amendment to PNAF to remedy the issues identified in SUTEL's Second Technical Report, again resulting from MINAET's failure to adopt the ITU's regulations as set forth by Costa Rica's GTL. *See Transcript, June – July 2011*, at pp. 27 - 29.

- According to the timeline, Datzap will be issued a concession on January 23, 2012 – over three years after Costa Rica was required to open its market to Internet providers from other nations agreeing to CAFTA. Of course, this assumes additional unnecessary hurdles are not raised to further delay this process.

Based on the most recent schedule, Costa Rica will have clearly, undisputedly and consistently refused to comply with its CAFTA obligations for more than three years. To date, Costa Rica's Internet market remains closed to private enterprises, such as Datzap, seeking to provide Internet service via satellite, as Costa Rica has refused to establish the proper regulatory framework. Just in Datzap's case, Costa Rica's refusal to open its telecommunications market has stopped the creation of an estimated 25 jobs in Akron, Ohio.

MINAET and SUTEL failed to implement the appropriate procedure, in part, by failing to follow the ITU's regulations, as required by the GTL. There is little optimism the current path will result in private businesses being allowed into Costa Rica's market in the near future. Based upon its experience as reflected in the Transcript, Datzap is obviously skeptical that MINAET will issue Datzap a direct concession in January 2012, as Costa Rica's modus operandi throughout this process has been to continuously raise new roadblocks as quickly as Datzap overcomes those placed in its path.

### **3. CAFTA'S EFFECT ON U.S. TRADE AND BUSINESS**

CAFTA was promoted as a revolutionary FTA benefiting United States businesses by providing access to new emerging markets in Central America. Now-Senator Portman's 2005 statements on CAFTA's effect:

The main effect of CAFTA isn't to open our market, because we're already very open. The main effect of CAFTA will be to open Central America and the Dominican Republic to U.S. goods and services. That's a great opportunity to gain increased sales and to support U.S. jobs.

Unfortunately, these advertised benefits have proven to be illusory, at least in Costa Rica. Further, in 2005, Senator Portman boasted that CAFTA was estimated to "reduce the overall trade deficit by \$756 million." Astonishingly, CAFTA has caused the reverse effect to Costa Rica's advantage, nearly seven times in magnitude! By Senator Portman's own standard, CAFTA has been a monumental failure.

In 2008, the year before CAFTA went into effect in Costa Rica, the U.S. had a trade surplus with Costa Rica of slightly more than \$1.7 billion (\$5.7 billion in U.S. exports to Costa Rica, compared to \$3.9 billion in U.S. imports from Costa Rica). However, immediately upon CAFTA becoming effective, this trade surplus turned to a substantial trade deficit. In 2010, the U.S. had a trade deficit with Costa Rica of \$3.5 billion (U.S. exports totaled \$5.2 billion, while U.S. imports totaled \$8.7 billion), and this deficit trended upwards during the first half of 2011. *See* Foreign Trade – U.S. Trade with Costa Rica (available at <http://www.census.gov/foreign-trade/balance/c2230.html>). So, while CAFTA has opened many opportunities in the U.S. for Costa Rica business, there has been no reciprocal benefit realized by U.S. businesses. This bears

repeating – in the two years it has been effective, CAFTA turned a \$1.7 billion trade surplus with Costa Rica into a \$3.5 billion trade deficit.

As an example of the detrimental effect on United States business, while Datzap has been unfairly excluded from Costa Rica's market, ICE and RASCA (Costa Rica's two government-owned telecommunication providers) have used the last two-plus years to update their network improving their satellite Internet service (*See Transcript, February 2010*, at pp. 8 - 9) and secure long-term contracts with several large Costa Rican businesses that had previously shown interest in subscribing to Datzap's service (*See Transcript, Datzap Considers Investor-State Arbitration*, at pp. 24 - 26). When (and if) Datzap is permitted to provide service in Costa Rica, the market for its service will be significantly diminished compared to that anticipated in 2009.

Clearly, the benefits for U.S. business that CAFTA supporters cited have not been realized, at least with respect to Costa Rica – the largest U.S. trading partner amongst the nations agreeing to CAFTA. One can only conclude that Costa Rica has intentionally delayed implementation of CAFTA to continue the monopoly ICE and RASCA have on its telecommunications market. This has resulted in significant losses/waste for at least one U.S. small business and the loss of approximately 25 Ohio jobs that would have been created had Costa Rica's market been opened to Datzap. Meanwhile, Costa Rican business has enjoyed the intended benefits from CAFTA because the U.S. has honored its obligations from inception.

#### **4. WHAT MUST BE LEARNED FROM CAFTA**

Unfortunately, to the shame and embarrassment of the U.S. and our Congress, Costa Rica has provided the blueprint for every country entering into an FTA with the U.S. to avoid its obligations. As Costa Rica has shown, a country can simply represent that it is working towards compliance, but not really make any progress for several years (at least 6 years in this case, including the 3 year delay in Costa Rica's original deadline for complying with CAFTA). The U.S. must carefully select trading partners to confirm their commitment to comply with their obligations, including dedicating the necessary resources to do so. Costa Rica has not.

Further, one major issue with CAFTA, and all of the U.S.'s FTAs, is that the enforcement mechanisms are completely inadequate. During this process, Datzap has explored its options to compel Costa Rica to comply with its commitments under CAFTA and/or recover damages resulting from Costa Rica's CAFTA violations. The only option available to private investors is an investor-state action in an international arbitration forum – an extremely long and drawn out process that could take several years and cost \$1 million, or more, in legal fees and costs, making it a limited option except for the largest of businesses.

The USTR is also limited and only willing to use traditional diplomatic channels to encourage Costa Rica to voluntarily comply with its trade commitments. Although a state vs. state claim can be brought under CAFTA, the USTR has been reluctant to proceed down this path since initiating such a claim can freeze cooperation from the other nation. Additionally, it is understood that the U.S. has never initiated such a dispute under any of its FTAs.

There is no practical way for an investor or the USTR to compel another nation to comply with its commitments under CAFTA or the three FTAs currently being considered by Congress. Without voluntary compliance by the other parties, these FTAs are worthless. Based on the foregoing, the contention that FTAs open markets for U.S. business and increase U.S. exports is a fallacy used by their promoters, with short-term interests, to sell these agreements to the American public. In reality, the greatest benefits resulting from these FTAs are realized by the countries that refuse to comply with their commitments without any risk of adverse consequences.

When considering the FTAs with South Korea, Panama and Columbia, Datzap encourages you to consider its experience in attempting to obtain the “protections” and “guarantees” of CAFTA. America does not need more FTAs when it cannot, or will not, enforce those already in effect. At the same time, Datzap encourages a review of existing FTAs, including CAFTA, and amendments to preserve American interests therein.