

CAFTA: Constitutional Analysis

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Introduction: Adjustments to Nicaragua’s Legal Order

Since 1990, changes have been made to Nicaragua’s legal order to facilitate the process of globalization, subordinating national interests to those of foreign capital and transnational corporations (TNCs).

In 1995, the first reforms to the Constitution were implemented in order to conform to the new economic model. The changes initiated by the reforms included the recognition of the primary role of private investment, the minimization of the State in economic issues, and limitations on public action. The reform also changed the country’s penal code, adopting something similar to the U.S. criminal code—a system more familiar to TNCs. The design and implementation of this and other reforms, including changes to the business code, the laws regarding market transparency, and laws regulating industrial property, were financed by USAID. These changes, not surprisingly, coincide with IM and World Bank imperatives as well.

In addition to signing on to CAFTA, the FTAA, and the WTO, Nicaragua has also been included in the Highly Indebted Poor Countries (HIPC) initiative, which requires the imposition of further reforms related to deregulation of the economy and the reduction of the State’s role with regard to new laws.

I. The Constitution as Supreme Law

In the famed *Marbury vs. Madison* case of 1803, the Supreme Court of the United States, represented by Justice John Marshall, recognized the legal supremacy of the Constitution:

“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.”

Europe and the rest of the Western nations have also assumed this position. The Constitution of Nicaragua also recognizes the supremacy of its laws above all other laws, stating in article 182, “The Political Constitution is the fundamental charter of the Republic, all other laws are subordinate to it. Laws, treaties, orders or provisions that oppose or alter its positions are void.” Clearly, then, international agreements can only be valid within the country if they are subject to and comply with the rules and regulations of the Nicaraguan Constitution.

II. On the Legal Nature of International Treaties

International agreements, like national laws, must be discussed and ratified by Nicaragua’s National Assembly in order to be valid. The obligatory nature of any such agreement is based on the recognition that it is in line with the Constitution and does not violate any of its precepts.

The Nicaraguan Constitution also recognizes the right of any citizen to address the unconstitutionality of any law, decree or ruling before the Supreme Court of Justice (article 187). This must necessarily include any international treaty, which are, under the Constitution, to be treated equally with any national law.

III. CAFTA and Nicaragua’s Constitutional Precepts

Nicaragua’s Constitution clearly establishes citizens’ social and economic rights. Economic freedom is expressed in three basic rights

- right to employment
- right to free enterprise
- property rights

Citizens have the right to undertake economic activities and to enter the market, the right to private enterprise. This includes the right to participate in business free from social, economic, political, religious, or gender discrimination, as indicated in article 27 (All people are equal before the law and have the right to equal protection. Discrimination is not permitted on the basis of birth, nationality, political beliefs, race, sex, language, religion, opinion, origin, economic position or social condition.). With regard to property, the Constitution guarantees the right to private property, limited only by social interests and public utilities governed by the law (article 44).

Article 99 of the Constitution clearly lays out the rules of the market economy and the role of the State in developing that economy. It states that the State is responsible for promoting the country's development and will guarantee the individual, social, sectoral and regional interests and necessities of the nation. The State is also responsible for protecting and promoting private, state, cooperative, associative, and community enterprise. The Constitution also recognizes that economic activities correspond primarily to the individual. The Central Bank is recognized as the state entity responsible for regulating the monetary system, and other state financial institutions responsible for promoting growth and investment, emphasizing small and medium producers. Finally, article 99 indicates that "external business activities and private and state insurance will be regulated by the law."

The Constitution explicitly recognizes the role of the State in ensuring the right to education and health (articles 59, 119, 121); ensuring the just distribution of natural resources and the implementation of public services (articles 102 and 105); recognizing the struggle for peace and the establishment of a just international order and thereby opposing all forms of domination and colonial/imperial exploitation (articles 3 and 4); and promoting and guaranteeing social and political advances for the common good and the protection of all citizens against all forms of exploitation, discrimination, and exclusion (articles 3 and 4).

CAFTA is in conflict with numerous Constitutional precepts and cannot be approved by the National Assembly until the unconstitutional elements are addressed and resolved. What follows are descriptions and explanations of the largest violations

1. National Treatment of Foreign Companies and Investors:

In Chapter 10, CAFTA affords TNCs considerable preferential treatment in Nicaragua's domestic market stating, "Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory."

This condition gives TNCs the same advantages in Nicaragua as a national business, even when the TNC is in a vastly superior technological and economic position; a competitive situation involving a TNC is almost guaranteed to bankrupt the smaller national business that cannot compete in the market under the same conditions.

Nicaragua's inclusion in the HIPC initiative indicates that a national business cannot compete against a U.S. company under equal conditions. National treatment for TNCs, then, is clearly a form of economic domination, as well as a violation of the right of Nicaraguans to free private enterprise, granting foreign businesses advantages on top of the rights of citizens, without regard for their well-being (article 3).

Article 98 of the Constitution states "The principal function of the State in the economy is to develop the country, overcoming backwardness and harmful dependencies, improve living conditions and realize a more just distribution of wealth." CAFTA, in imposing the following regulations, clearly does not allow the State to comply with this function or address other related responsibilities detailed in article 99 of the Constitution:

CAFTA Article 10.9: Performance Requirements

1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory:

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory

2. *Submit before Supranational Tribunals Conflicts that might be Provoked between Foreign Companies Based in Nicaragua and Public Administration Regulations, Legal Tribunals, or National Interests*

CAFTA includes mechanisms for resolving disputes between TNCs and national corporations, civil service organizations, or judicial powers when they affect the interests of a foreign investor. The

advantages a TNC has in an arbitration tribunal are obvious: 1.) arbitration requires a significant amount of money to conduct; 2.) TNCs have more extensive knowledge of the tribunal process; 3.) TNCs are better able to manipulate the outcome of a tribunal (given the influence of money). According to CAFTA regulations, only a government can be brought to a tribunal by a corporation, not vice versa, because it is the government that is a party to CAFTA; CAFTA is an agreement between states, not an agreement between states and corporations or investors.

These mechanisms are a threat against national sovereignty: internal events will be resolved outside the country in an unknown jurisdiction separate from the country's recognized national tribunals. The Nicaraguan Constitution clearly establishes the jurisdiction of its courts (article 34); removing anyone from their "competent judge," i.e., judgement before an international tribunal, is a violation of the Constitution. Nicaragua's constitution also states that for *internal* affairs, which would include a conflict with a foreign corporation in Nicaraguan territory, it recognizes the validity of only national and military tribunals (article 159); it is not, therefore, Constitutionally bound to recognize the authority of any international tribunal proposed by CAFTA.

Ratification of an international agreement indicates that that agreement is being integrated as part of the national law. Therefore, any conflict regarding its internal application should be resolved in a national court, as detailed in article 159 of Nicaragua's Constitution. CAFTA, however, includes the establishment of a separate commission (article 19.1) to address CAFTA-related issues within the country. This commission is responsible for

- supervising the implementation of the agreement
- overseeing the further elaboration of the agreement
- seeking to resolve disputes that may arise regarding the interpretation or application of the agreement
- considering any other matter that may affect the operation of the agreement

The commission is also authorized to "modify in fulfillment of the Agreement's objectives and issue interpretations of the provisions of this Agreement."

CAFTA's creation of a Free Trade Commission to resolve these issues is also a violation of the Constitution, as it steps on the toes, so to speak, of the justice department and the National Assembly, which, among other things, is solely responsible for interpreting the law.

3. Access to the Market: Tariff Reduction

The timetable established by CAFTA for the reduction of tariffs brings up two significant points. First, the products that maintain protective tariffs are those controlled by large economic groups with influential political power; small and medium producers are left out. Second, the tariff reductions mean that the State will stop receiving revenue from the importation of products for which tariffs have been reduced or eliminated. The reduction in public revenue will have to be compensated for with increased taxation. These outcomes violate several Constitutional precepts, including the guarantee of equality, specifically equal protection, under the law and the stipulation that foreigners cannot interfere in the internal politics of the country (article 27).

4. Government Procurement

The activities that fall under “government procurement,” according to CAFTA, are extensive (“applies to any measure adopted or maintained by a Party or an entity listed in Annex 9.1, relating to procurement by any contractual means, including purchase and rental or lease, with or without an option to buy, build-operate-transfer contracts, and public works concession contracts”), and CAFTA’s government procurement regulations impose unconstitutional limitations on the State, which is solely responsible for acquisition of goods and services.

Annex 9.1 (Parties and entities included in the procurement rules) includes 56 Nicaraguan municipalities whose local governments were not consulted about the agreement and who are guaranteed by the Constitution financial and administrative autonomy (article 177). This annex also indicates that Universities are bound by the procurement rules for purchases made with State funds, despite the fact that article 125 of the Constitution indicates that Universities also enjoy financial, organizational and administrative freedom.

CAFTA also imposes conditions for the purchase of public goods and services, stating in chapter 9 that public purchases cannot discriminate against TNCs. This severely limits the State’s ability to comply with article 98 of Nicaragua’s Constitution, which indicates that the primary role of the State is to develop the country materially and “overcome backwardness and harmful dependencies.” Purchasing goods and contracting for services from TNCs rather than small and medium national companies will not contribute to the material development of the country or reduce “harmful dependencies.”

5. Privatization of Public Services

CAFTA also includes public services as part of the “market,” with the presumed objective of placing these services in the hands of the TNCs. The services that may be privatized include electricity, water, education, health, ports and airports, highways and forests; everything is negotiable.

Forced privatization violates numerous articles of the Constitution, specifically those that guarantee citizens’ property rights and the right to free and private enterprise (article 99), which would be severely restricted by the entrance of TNCs into markets currently dominated by small and medium nationally-owned businesses; the control, development, and distribution of natural resources by the State (article 102), which would be eliminated with private foreign investment in these areas; and universal access to public services, specifically health, education and social security (article 105), which would also be impossible to guarantee given private foreign ownership.

6. Labor Clauses

Though CAFTA has been lauded as a means to generate more employment, the agreement itself does not recognize the right to employment guaranteed by article 80 of the Constitution (“Work is a right and a social responsibility.”). In further violation of Constitutional supremacy, CAFTA grants TNCs the ability to establish their own regulations for labor relations at companies within the country, separate from those currently guaranteed by the Constitution.

While CAFTA’s labor chapter does include provisions regarding the right to association, organization and collective bargaining, prohibition of slavery, child labor, and minimum wage, it leaves out important labor considerations addressed by the Nicaraguan Constitution, including vacation, social security, the right to strike, and rules regarding dismissal (articles 82 and 83).