

Analysis of the Unconstitutionality of CAFTA The Case of El Salvador

**Citizen Action Network on Trade and Integration
Sinti Techan-El Salvador/Red de Acción Ciudadana frente
al Comercio e Inversión Sinti Techan-El Salvador**

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Contents

1. Regression and lack of legal protection on labor issues
2. Breaking the legal framework of Central American integration
3. Violations of the Constitution in CAFTA's government procurement and investment rules
4. Violation of the principle of popular sovereignty
5. Loss of state obligations of international character
6. National Treatment and the principle of equality

1. Regression and lack of protection of labor issues

Chapter 16 of CAFTA, on labor rights, has been promoted as a clause that will protect and ensure labor rights. However, on reviewing its main contents, it becomes clear that it offers a weak and regressive framework that is not consistent with the constitutional framework.

The Salvadoran Constitution recognizes the right to work in two senses: a) individual, as each worker's right, which implies a series of prerogatives and benefits (the right to a minimum wage, to the year-end bonus, to vacations and other rights considered in Article 38 of the Constitution); and b) social, as an expression of the State's obligation to employ those resources available to it to provide employment to workers and to ensure economic conditions for decent living standards.

In either of these two dimensions, it is understood that the human rights recognized by the Constitution, especially those of a social nature, should tend to expansion and greater coverage, in light of the State's main objective, which is the human person (Article 1 of the Constitution). The Constitution itself recognizes the right to the legal protections that all citizens enjoy when attempts are made to deny them these rights (Article 2 of the Constitution).

To the contrary, CAFTA's labor chapter is regressive in that it is limited to recognizing as commitments by the State Parties to only five of the rights recognized in the International Labor Organization (ILO) declarations and in the Salvadoran Constitution. CAFTA's labor chapter does not even establish restrictions on countries that have not signed or ratified the conventions considered to be fundamental by the ILO, as in the case of El Salvador, which has not ratified two key conventions (Conventions 87 and 98 on union freedom and collective bargaining).

On the other hand, the labor chapter lacks effective mechanisms for complaints on violations of those rights, much less for challenges to acts arising from the implementation of other chapters of the FTA that could result in harm to labor rights.

Likewise, in order for an issue to be considered a labor violation under the agreement, the State Party must have, "...a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties." (Art. 16.2.1 DR-CAFTA), which, as it is ambiguous and unclear text, is subject to many interpretations. In addition, there are a series of dispositions that invalidate any attempts at complaints such as:

- (1) CAFTA establishes that each State Party has the right to exercise discretion. This is interpreted as not violating the obligation established in Art. 16.2.1 when the course of action or inaction reflects *a reasonable exercise of such discretion*.
- (2) Art. 5 of the Constitution, however, recognizes recourse to a review of the decisions of labor tribunals. It does not recognize the same recourse utilizing as a basis the contents of Chapter 16.

- (3) CAFTA does not recognize the right of action of a State Party against another for having acted in a manner that is inconsistent with Chapter 16.
- (4) While CAFTA does establish the possibility for individuals to direct communications on their complaints to the State Parties based on Chapter 16, it leaves it to each State to resolve the matter according to its domestic procedures.
- (5) The entities responsible for matters related to violations of the Chapter and for decision making are governmental.
- (6) The Council must give its approval for an indication of a violation of the Chapter to be dealt with in a corrective procedure.

In conclusion, Chapter 16 on labor rights does not recognize or protect all rights recognized by the Constitution or international conventions, nor does it ensure protection from violations arising from CAFTA.

2. Breaking the legal framework for Central American integration

Article 89 of the Salvadoran Constitution establishes that “El Salvador will encourage and promote human, economic, social and cultural integration with the American republics and especially with that of the Central American isthmus,” and promotes the signing of supranational conventions and the convening of supranational organizations.

The Tegucigalpa Protocol to the Charter of the Organization of Central American States (ODECA), signed in 1991 by the Central American countries, indicates that, “The Central American Integration System is the institutional framework for Central American regional integration (Art. 2), and that “The protection, respect and promotion of human rights constitutes the fundamental basis of the Central American Integration System” (Art. 4).

The Tegucigalpa Protocol establishes the institutional framework for integration and, having been signed and ratified by the Central American countries, the countries commit to respect the principle of good faith or “pacta nun servanda” (Art. 4H of the Protocol) that obligates them to refrain from establishing, convening or adopting any measures that are contrary to the dispositions in the Protocol or that hinder compliance with the fundamental principles of the Central American Integration System or the achievement of its objectives.

Article 35 of the Protocol indicates that it prevails over any Convention, Article, or Protocol signed among the Member States, whether bilaterally or multilaterally, on matters related to Central American integration. That is to say, the legal instruments of Central American integration have precedence over others that touch those issues.

The implementation of the U.S.-Central America Free Trade Agreement entails a rupture of the legal framework for Central American integration, especially in regard to the Salvadoran Constitution, for the following reasons:

- (1) Article 1.3.2 of CAFTA indicates that, for greater certainty, nothing in the agreement “*shall prevent the Central American Parties from maintaining their existing legal instruments of Central American integration, adopting new legal instruments of integration, or adopting measures to strengthen and deepen these instruments, provided that such instruments and measures are not inconsistent with this Agreement.*” That is to say, that while it does not prevent the States from perfecting the instruments of integration, it does limit their powers on issues that could turn out to be inconsistent with CAFTA. This violates Art. 35 of the Protocol of Tegucigalpa, which gives preeminence to this instrument over any other.

- (2) As CAFTA is a treaty on investment and trade¹, it is counterproductive to give it preeminence over a more general legal framework such as that relating to Central American integration. If we consider that the issues regulated by CAFTA (investment, government procurement, sanitary and phytosanitary measures, intellectual property) are issues of integration, it is logical to assume that this framework should be consistent with the general legal framework that regulates human, economic, and social aspects, beyond commercial matters. Otherwise, it would limit the ability of the Salvadoran government to comply with Art. 89 of the Constitution.
- (3) The Tegucigalpa Protocol reaffirms certain principles of Central American integration (Art. 3 of the protocol), such as the consolidation of democracy and the strengthening of its institutions, the specification of a new model of regional security or the achievement of a regional system of welfare and economic and social justice for the Central American peoples. It is doubtful that CAFTA is compatible with this framework as long as its application entails impacts that are difficult to measure on such sensitive areas as labor, environment, and health, among others, as covered in other sections of this analysis. Subordinating the legal framework for integration to CAFTA violates Art. 89 of the Constitution and Art. 35 of the Tegucigalpa Protocol, as it prevents or hinders compliance with the objectives of Central American integration.

¹ Among the objectives enumerated in Art. 1.2 of Chapter 1 are the following: to stimulate the expansion and diversification of trade among the Parties, to eliminate obstacles to trade, to promote conditions of fair competition, among others.

3. Violations of the Constitution in CAFTA's government procurement and investment rules

Chapters 9 and 10 of the free-trade agreement between Central America and the United States contains provisions that violate the Constitution of El Salvador, particularly Article 2 on the right to life, Article 3 on the right to equality, Article 23 regarding freedom of contracting, Article 65 on the right to health, Article 101 regarding the State's obligation to establish an economic order that responds to principles of social justice and ensures decent living standards for human beings, Article 102 regarding protection that the State should provide for private initiative to foster growth in national wealth, Article 101, subsection 2 regarding protection of consumers' interests, and Article 145, which prohibits the ratification of treaties that affect or restrict Constitutional provisions, among others.

In the first place, the rule on non-discrimination for foreign companies contained in this and nearly all chapters of CAFTA obligates States to provide equal treatment to parties in unequal conditions. Many Salvadoran companies find themselves in a situation of extreme disparity in confronting U.S. businesses on technology, commercial and industrial matters. Under those circumstances, they will be forced to compete in a situation of frank disadvantage in public bidding for contracts to provide goods or services. This rule appears to seek to prevent recourse to discriminatory practices, but in reality it will translate into effective discrimination, based on the conditions of real inequality among many companies, a situation that will also affect peoples' rights to freely enter into contracts (Art. 101 of the Constitution). Contracting is not free when it occurs in a situation of such sharply contrasting conditions.

Second, the fact the Salvadoran government accepts the implementation of commercial practices and investment under these conditions implies its abandonment of the constitutional obligation set out in Article 102 that seeks to protect private initiative. The realization of trade and investment under conditions of inequality will condemn those businesses to possibly bankruptcy.

Third, the leeway that companies have in the area of government contracts and investments is extremely broad and covers investments related to natural resources (see definitions of investment in article 10.28 of CAFTA) or the administration of public works in contracts for public works (Art. 9.17).

In our country, it has been clearly demonstrated that privatization, whether through the sale of assets or subcontracting the provision of public services, has negatively affected the exercise of economic, social and cultural rights, since this transfer has resulted in an increase in user fees for public services, affecting the population's ability to pay, or limits to access to such essential services. We should not forget that the logic of business is centered on obtaining the greatest profits for the least possible cost, and, in fact, the definition of investment in Article 10.28 of CAFTA, refers precisely to every investor's "expectation of gain or profit".

In El Salvador, the risks of continuing to open the door to subcontracts for public services are enormous. For example, the privatization of potable water would worsen the already difficult situation confronting the population and would cause disastrous impacts on the right to health (Art. 65 of the Constitution) and on people's very lives (Art. 2 of the Constitution) to mention just two examples.

Finally, CAFTA, far from establishing the basis for "increasing national wealth" (Art. 102, subsection 2 of the Constitution) will expand the existing gap between the countries signing the agreement, not only from the point of view that one of the attractions for investment in the region is low wages, but also from the perspective of the prohibitions included in CAFTA, for example, that would ban technology transfer, which would make strengthening local capacities to promote national development or to increase national wealth impossible.

So, ratifying CAFTA also means infringing on Article 145 of the Constitution, which establishes the obligation not to ratify treaties that restrict or affect constitutional provisions.

4. Violation of the principle of popular sovereignty

The Constitution of the Republic of El Salvador, in Art. 83 literally prescribes: “El Salvador is a sovereign state. Sovereignty resides in the people and is exercised in the prescribed form and within the limits of the Constitution.”

This definition means that sovereignty is the original power – (which implies that sovereign power is not dependent on any other power) and that it is superior – (which implies that the power of the state is imposed on all other powers within territorial boundaries) of the political community; from an external point of view, state sovereignty implies independence from external state powers; it is in this sense affirmed that sovereign power is exclusive.

From this perspective, the “principle of non-intervention in the internal affairs of another state” acquires particular relevance. At the level of international law – as indicated by El Salvador’s Constitutional Court² -- *sovereignty encompasses full and equal legal capacity and action on the part of all states to create international obligations which respond to the coordinating character of international law*; this means that the assumption of these obligations by means of treaties, does not automatically limit external sovereignty of states, but they do become limiting when obligations of an international character are assumed which limit or restrict the arena of action of the internal sovereignty of the Salvadoran state.³ In other words, the State may not adopt obligations of international character that limit or restrict the only legitimate power of the state – the power of sovereignty -, to which all other powers are subordinate – be they economic, ideological, etc., of the community.

Because of the unequal nature of CAFTA, the sovereignty of disadvantaged people and states, in this case El Salvador is violated. With this normative body, the way is opened for widespread intervention in the internal affairs of these states.

An examination of the contents of CAFTA reveals the negation of the State’s sovereign ability to protect its inhabitants through the creation of public policies consistent with the pursuit of the principles of justice, judicial security and the common good. To the contrary there must be congruence with the objectives and interests encompassed in the treaty, which is demonstrated in the previously cited Art 1.1 paragraph 2, where this congruence is limited to the compatibility and consistency that these policies should have with the content of the treaty.

In addition to the violation of State sovereignty by the Treaty, there was also a breach of constitutionality at the moment of ratification of CAFTA in our country. Art. 146 of the Constitution states that “*It is not permitted to conclude or ratify treaties or authorize concessions which in any way alter the form of government or injure or erode the*

² Constitutional Chamber of the Supreme Court of Justice, decision on recourse of unconstitutionality, 7 September 1999, Ref. Inc. 3-19.

³ 7 September 1999 decision, Ref. Inc. 3-91

integrity of the territory, the sovereignty and independence of the Republic or the rights and fundamental guarantees of the human person”. Therefore it can be concluded that in addition to being unconstitutional by undermining the sovereignty of the Salvadoran State, the act of ratification on the part of the National Assembly is also unconstitutional having occurred without the constitutional obligation required for execution, which is that the normative body for the treaty may not violate the constitution in any way, particularly by diminishing State sovereignty.

5. The loss of state obligations of international character

The content of CAFTA violates the order of ranking established in Article 144 – 2 of the Constitution in that it does not observe what is prescribed in instruments of international character which form part of International Human Rights Law⁴ in the following areas: Art. 1 and 2 of the Declaration on Economic, Social and Cultural Rights (DESC) regarding the obligation of the state to adopt necessary measures, domestically and through international cooperation, to make progress towards full achievement of these rights and the prohibition on regression; the same obligation is also imposed on the state under Art. 26 of the American Convention on Human Rights, the “Pact of San Jose”.

States must comply with obligations to respect, protection and guarantee of human rights and fundamental guarantees of the person in order to achieve full protection of these rights. In this sense Art. 144- 4 Subsection 2 of the Constitution, connected to the personal concept (concept of the individual) of the state, and Art.1 and the Preamble, from which the hermeneutic rule is derived in favor of dignity: **restrict what is limiting and expand the favorable**, not only determines the strong linkages and normative hierarchy of international human rights treaties, but also permits a normative opening toward them. In this sense it should be understood that the Constitution is transgressed in article 144-2 when the sub-constitutional norm is emitted contrary to the sense, criteria and principles contained in the international norms that develop fundamental rights; thereby violating respect for the order of ranking prescribed in the Constitution.

We should also remember that the treaties that develop fundamental rights pertaining to International Human Rights Law ratified by the country constitute a norm prior to CAFTA and therefore, according to international law the prior treaties prevail. In addition, the Constitution declares that no international treaty which is active in a country can be modified or revoked by law. In the case of CAFTA, which constitutes a new law, it may not modify or revoke the obligations of international character in the areas of human rights which the state has previously acquired. Reversal of this premise would violate the principle of the “Pact of Sun Servanda” ruling international law, and the personal principle, which governs the Constitution of the Republic of El Salvador, making it unconstitutional.

Regarding aspects of CAFTA that restrict or limit the progressive protection on the part of the state of fundamental human rights, we can say that they are particularly found in the areas of social, economic and cultural rights. These include the recognition of just five labor rights, the tacit revocation of national stipulations regarding the environment through the reduction of requirements for facilitating commerce contributing to state non-compliance with its constitutional obligation to conserve and improve management of the environment, permitting privatization of basic goods and services thereby contributing to the degradation of the environment and exacerbating the already difficult access to them,

⁴ In addition, as previously mentioned, it violates provisions in international treaties related to Central American integration, such as the Tegucigalpa Protocol.

which does not contribute to the capacity of the majority of the population to meet minimal standards for life – among others.

6. National treatment and the principal of equality

Article 3 of the Constitution establishes that *All people are equal under the law*, but we must understand that this equality⁵ appears as a requirement of equalization that gives equal treatment in circumstances or situations that are not identical, which must be considered irrelevant to the exercise of certain rights, or for the application of legal decisions. Therefore, the important issue about raising a case of equalization is to establish the criterion of relevancy in such a way that the data is considered, as essential or irrelevant, to speak about equality among different situations or people. The effort is to not put on an equal level, in an arbitrary way those situations or people in which there are relevant differences.

On the other hand, even though it seems paradoxical, equality could mean the requirement for differentiation, in other words, in differentiated treatment with circumstances or situations that are apparently similar, but which require a different judicial regulation. This demand for differentiation entails considering that term in a dynamic, rather than static, sense. If these structural conditions of reality are not taken into account, equality would become an empty notion.

Therefore, establishing rules in CAFTA on National Treatment, giving the same treatment to both parties (countries that sign CAFTA) which have completely different conditions and characteristics, within a highly unequal relationship, implies a clear violation of the constitutional principal of equality as long as demands for the necessary equalization and differentiation are not concretely defined. Under those conditions, the principle becomes an empty notion which is devoid of meaning.

⁵ This is exactly how the Constitutional Branch of the Supreme Court of Salvador has interpreted this issue.