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Mike Leffert

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Costa Rica Denies Indigenous Right To Consult On Cafta, And Only Pretends To Consult On Autonomy

by Mike Leffert

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Legislators in favor of ratification and implementation of the Central America Free Trade Agreement (CAFTA) have turned away indigenous communities seeking participation in making the trade decision. In turning away indigenous claims, the legislators have violated Convention 169 of the International Labor Organization (ILO), say supporters, to which Costa Rica is signatory.

Violating this convention also means violating Costa Rica's Constitution, whose Article 7 declares that international treaties and conventions ratified by Costa Rica are of a higher authority than is the national law. Claimants contend that the legislators specifically ignored Article 6 of the ILO Convention, which states, "In applying the provisions of this Convention, Governments shall: (a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly."

Deputies of the official Partido Liberacion Nacional (PLN), the Movimiento Libertario (ML), and the Partido Unidad Social Cristiana (PUSC), spurred on by President Oscar Arias, voted against consultation with indigenous organizations, citing the urgency to pass CAFTA. Their legal position, sustained by the opinion of the Ministry of Foreign Trade, was that the accord does not directly affect indigenous populations.

Further, the indigenous claim that they would be adversely affected by CAFTA's provisions on intellectual property, which permits commodification of their traditional knowledge and the traditional uses of medicinal plants (see NotiCen, 2006-06-22), was cast aside on the grounds that their rights are protected elsewhere. The claim is that the International Union for the Protection of New Varieties of Plants (UPOV) affords protection.

Marginalizing the indigenous again

The advocate who brought the indigenous claim before the Comision de Asuntos Internacionales of the Asamblea Legislativa (AL) was Jose Merino del Rio of the Frente Amplio (FA). He was acutely dissatisfied with the committee's treatment of the issue. "I'm convinced that this is an obligatory consultation that the majority of the committee sadly did not accept, taking advantage of petitions made by some so-called specialists who tried to justify legally the reasons why the consultation was not necessary," he said. "But what was said by people who know the subject well, plus the decision of the Department of Technical Services, constituted sufficient reasons for consulting the indigenous communities."

The sole member of the committee to agree with Merino was Alberto Salom of the Partido Accion Ciudadana (PAC), who said, "It is once again making the indigenous invisible, marginalizing them

yet again, and this is not good for the international image of Costa Rica." The ML's Evita Arguetas summed up for the majority, saying, "I think that, as we have seen generally, this project, this treaty in itself is not what affects or does not affect a sector. It is simply a free-trade agreement, it is a commercial instrument utilized at the global level, which the country can take advantage of, provided that the country does what it should in its agenda of development and competition."

The communities were outraged. "It's a lie. Those who say that kind of thing are ignorant people; they don't know the indigenous tradition, the culture, much less the laws. It is very clear that the free-trade agreement touches upon part of our culture, our lives, and of course they have to consult. CAFTA will drive the indigenous communities away," said Odir Blanco, director of the Comision Nacional de Asuntos Indigenas (CONAI). Blanco is a member of the Maleku. CONAI president Genaro Gutierrez said the committee's decision showed a lack of respect for the rights of the indigenous and their communities. There is some likelihood that indigenous groups will do more than just express their feelings about the legislature's snub.

Cristina Zeledon and Javier Rodriguez of the Programa Indigena del Instituto Interamericano de Derechos Humanos (IIDH) saw the consultation as legally obligatory. Zeledon said the communities must file suit alleging a violation of the Constitution. Rodriguez noted there is precedent for such a move. "There are precedents such as the oil-exploration law in the Atlantic zone, where the lack of consultation of that population invalidated international bidding," he said. "That is, for exactly the same reasons involved in this CAFTA agreement, the Sala Constitucional annulled it."

Indigenous-rights specialist Ruben Chacon agrees the communities have a case but sees a more nuanced scenario for pursuing it. He said that the consultation is legally obligatory and that, if there is no consultation, then CAFTA cannot have any effect within indigenous territories. "To decide not to do the consultation is practically to liberate the indigenous territories from any direct effect, and with respect to indirect effects, a process strictly confined to the negotiation of rules will have to be raised at the time that any activity is carried out in the territories. The indigenous have more legal tools to stop production activities on their lands than we have in our neighborhoods," he said.

Chacon said the Comision de Asuntos Internacionales should put a footnote in the CAFTA texts that says that a specific law exists that could contradict the terms of the treaty. But, in reality, said the lawyer, no one should have any illusions about the effects of CAFTA on these indigenous rights, and what is needed is a sound legal system, which, when it comes to indigenous rights, Costa Rica does not have. Chacon questions the basis on which a decision on whether a given action does or does not affect a specific population is made under the current circumstances. "If someone comes and builds a highway in the middle of the mountain, those who decide whether it affects them are the indigenous; but to know if it affects them, you have to consult them," he said.

He warned that these are people who have become very aware of their rights, they have legal alternatives at their disposal, and they have the sophistication to use them effectively. Costa Rica has about 70,000 indigenous citizens living in 24 territories. As a rule, they have little access to health care, high illiteracy rates, and are very poor. Their territories were defined and set aside for them in 1972, but, since that time, more than one-third of the land has been usurped by nonindigenous owners, according to the Instituto de Desarrollo Agrario (IDA).

Another law, another boondoggle

At the same time that indigenous are receiving short shrift on the CAFTA issue, legislators have resurrected a bill long buried in the legislative process that would create a Law for Autonomous Development of Indigenous Communities. The law would do away with existing state institutions serving and regulating the people and provide an opportunity for them to have their own governments, require hospitals to provide translators for non-Spanish speaking patients, incorporate their own cultural elements in school curricula, provide housing, and return to them their lost lands.

But members of the communities see the law as a boondoggle, nothing but words put together by nonindigenous legislators. On this issue, legislators have been more than happy to hold consultations and have traveled hither and yon to visit the communities for this purpose.

Many consultees are unimpressed. "Indigenous people are already guaranteed rights under the law, but their rights are not being enforced," said Victor Mena, a leader in the community of Quitirrisi. He tried to block the consultation there. CONAI's Genaro Gutierrez was similarly unmoved. He told reporters, "We're protesting because the law wasn't made by indigenous people. It was made by legislators." The bill is dividing people and creating new organizations.

Pablo Sibar, a member of one such organization, the Mesa Nacional Indigena, insisted that "80% of that law was written by indigenous people." The 57-member legislature has no indigenous members.

In all, 2,200 indigenous people were involved in the consultation, their contributions and suggestions to be incorporated into the bill. Plans call for delegates elected at these consultations to come together in San Jose to give final suggestions prior to the legislature's vote to pass it into law. A public forum about the bill will be held Sept. 8, and indigenous delegates elected at each consultation will meet in San Jose to give final suggestions Sept. 21 PLN legislator Ofelia Taitelbaum, president of the social affairs committee, described the process in a way that brings to mind US treatment of its indigenous. "In the majority of territories we've had the consultation. If there is opposition, we'll try to do it with those who are willing."

In Quitirrisi, that meant consulting with about a dozen of the community's 2,000 residents. This dozen actually broke into groups to discuss the legislation and then came back together to elect a delegate. It remains unknown how many people felt about the bill. Said Quitirrisi resident Rafael Angel Hernandez, "These things happen and nobody knows about them. If they had invited me I would have gone."

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