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Costa Rica's Supreme Court to Decide CAFTA Constitutionality

by Mike Leffert

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Costa Rica's constitutional court, Sala IV of the Corte Suprema de Justicia (CSJ), has agreed to hear a case involving the Central America Free Trade Agreement (CAFTA) that could scuttle plans to hold a popular referendum on whether to ratify it. The justices announced May 11 they would hear the question of constitutionality of the trade agreement and issue a verdict within a month. Judges said they would begin deliberations as soon as they received a copy of the 2,000-page agreement. Residents Defense office spokesman Ahmad Tabash subsequently told the media that the text has been delivered and that a decision is expected by mid-June.

It was this office, the Defensora de los Habitantes, that brought the case. One question at issue is whether, if the court finds the agreement unconstitutional, the planned referendum on it could still be held. Luis Antonio Sobrado, interim president of the Tribunal Supremo de Elecciones (TSE), would not speculate. "It depends on how the Sala resolves the consultation. For the moment, we're continuing to organize the referendum," he said. Sala IV opinions on legislation that has not been voted on is binding only if there are procedural errors in the way the bill was handled, not on the content.

That leaves the CAFTA question open to a separation-of-powers conflict. "There's a well, I'm not sure whether to call it a legal void but it's a very new situation," said Deputy Rafael Madrigal. "If there's a problem, if the Sala IV says the trade agreement is unconstitutional, I don't think the TSE can contradict what they say." Madrigal heads the delegation of the Partido Accion Ciudadano (PAC), an anti-CAFTA party. For him, the TSE should not continue with the referendum if the Sala rules against it, regardless of whether they could legally do so. "It won't be binding, but if the Sala finds constitutional violations, the logical thing would be for the executive to move forward to renegotiate," he said. "It makes no sense to go to a referendum if the Sala tells us it's unconstitutional."

Renegotiation of the terms of the agreement is what the PAC has campaigned for and is the position its presidential candidate Otton Solis ran on (see NotiCen, 2006-03-02). The PAC position is very much like the argument Defensora de los Habitantes Lisbeth Quesada presented when she requested Sala IV take up the case on April 27. "There are 1.5 billion reasons why the Sala IV should admit to and make a pronouncement about the extremes of what is suggested [in the agreement]," she said. She was referring to the 1.5 billion colones (US\$2.9 million) estimated cost of the referendum. Among the "extremes," she listed worker's rights, health benefits, intellectual property, and protections for minorities.

President Oscar Arias, intensely pro-CAFTA, appears to have taken a fallback position. "I committed myself to boosting the FTA with the United States, and I want to tell you that, if it goes badly for us, if we observe that we did not do the right thing, well, then we simply withdraw," he told listeners at

a meeting between federal and local governments. "The truth is, we can denounce the treaty and in six months we are out." But, he continued, "There is no country that has signed an FTA with the US and has left." Arias has also resorted to doing away with the need for collecting signatures from 5% of the nation's voters prior to the referendum by sending a request for it to the legislature himself. That move was originally seen as a presidential effort to stave off a street crisis, but later thinking is that it denies the opposition a valuable opportunity to organize a house-to-house campaign during a nine-month period.

Referendum as expiation

The referendum was also originally seen (see NotiCen 2007-04-19), and heralded, as a great democratic exercise, but in that, too, there has been some rethinking. Attorney Elais Soley Gutierrez wrote in the newspaper La Nacion that taking the matter to the people was a way to atone for "political original sin." He wrote that, for Costa Rica, the treaty was always something more than just another trade pact because it breaks the near-sacred telecommunications and insurance-business state monopolies and that the former government, which negotiated it, did so without divulging these details. "This was a great political sin because breaking the monopolies..., the changes in intellectual property, and incorporating the mechanism of resolution of controversies, among others, merited a different political treatment, with greater transparency and openness, so that the interested or affected parties could participate with equal possibilities."

It is true enough that this is precisely the way other CAFTA countries got away with ratification and implementation (see NotiCen, 2005-01-06 and 2005-03-17), but Costa Rica fancies itself more politically advanced and so was not able to follow suit. Therefore, says Soley Gutierrez, "The lack of adequate representation upon negotiating CAFTA justifies the plebiscite as the only recourse to be certain that this is the direction that the majority of Costa Ricans want to take." He said the legislature's failure to provide an account of the true content of the pact has resulted in its loss of credibility with the people to undertake approval of the treaty.

Legislative delegations of parties opposed to CAFTA agree the court has a role to play. Deputies of three parties sent Sala IV a second challenge to the constitutionality of the text on May 24, containing many of the same objections found in the May 11 filing. Jose Merino of the leftist Partido Frente Amplio (FA), Oscar Lopez of the centrist Accesibilidad sin Exclusion, and the 17 PAC members sent the court a 130-page constitutional complaint against 15 items in the treaty.

The world is watching

The referendum has become a cause celebre in the Latin American left, much to the irritation of President Arias. In a recent iteration of Cuban President Fidel Castro's new op ed forum in Cuba's Granma, the comandante encouraged social movements to show solidarity and "go to Costa Rica as international observers to the referendum process," which he characterized as "a chance to stop the advance of the neoliberal agenda" in Latin America.

The Arias government has expressed concern that foreign governments, most particularly Cuba and Venezuela, would finance Costa Rican trade unions in their campaign against the treaty in

contravention of national law, which prohibits foreign participation and donations. A statement from Arias' office said, "The government of the Republic of Costa Rica expresses its concern and unease at a foreign government's interference in the internal affairs of Costa Rica," and went on to charge, "The declarations of the president of Cuba...fomenting an external interventionism and insinuating the possibility of fraud in the referendum...represent a serious affront to the residents of a sovereign, democratic, free, and independent Costa Rica."

Arias is fighting to keep Costa Rica and the referendum from becoming the center of the ideological battle between the competing worldviews of Washington and Havana-Caracas. He has even said he has "nothing against" Costa Rica becoming a member of President Hugo Chavez's *Alternativa Bolivariana para las Americas (ALBA)*. He said this reportedly in response to an April ALBA summit at which several social-movement organizations pledged to support CAFTA opponents in Costa Rica, the last battlefield for the five-country agreement.

Arias may be hamstrung in his campaign by his own success. Economically, Costa Rica is doing just fine without CAFTA. After a year in office, the president is praised even by opponents for good macroeconomic results. GDP increased 17% last year. The annual inflation rate of 9.4%, though high by international standards, was the best showing in a decade. Large numbers of people seem not to trust him with their constitutional rights in the CAFTA wars, but still, 82%, according to a CID-Gallup poll, rate his government as "good," or "reasonably good." Half said their living standards had improved, while 21% said they had worsened. This is the best rating for a first-year administration in more than two decades. So, many wonder, why bargain away constitutional prerogatives, an enviable social order, sovereignty, and a significant piece of the national patrimony for CAFTA?

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