

Nearly 5 Years of DR-CAFTA and Its Constitutional Challenge

# EL SALVADOR - Free Trade's Dubious Blessings

Leonard Morin

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"They close on one corner and open on another. The workers don't have any protection at all," says Marielos DeLeón of the National Coalition for a Safe Country without Hunger (*Concentración Nacional por un País sin Hambre y Seguro, CONPHAS*), a group comprising trade unionists and other social justice activists. "The *maquilas* come to the country and claim that they're going to create more employment, but in the end they just undermine stability for workers," she says. "CAFTA has generated more poverty, more precarious wages." Oscar Rivas of the Hospital Bloom Workers Union points out that the FTA has made hospital supplies imported from the US more available, but distribution in El Salvador tends to be controlled by one company. He says, "The FTA has led to monopoly commerce."

DR-CAFTA, the Dominican Republic-Central America-US Free Trade Agreement, entered into effect in El Salvador on March 1, 2006, making it the first country to implement the accord. Despite over 4 ½ years' experience with the FTA, politicians, pundits, and activists in the Central American country seem to stand firm in the positions they held during the treaty's secret negotiations. Now the battle over "free trade" has moved from the streets and the legislature to the court, as civil society groups challenge DR-CAFTA's constitutionality, claiming that, not only is the free trade agreement harmful to El Salvador, but it violates the country's supreme law. I spoke to some of those involved in the debate and the litigation in San Salvador.

How Has DR-CAFTA Treated El Salvador?

"A much more rigorous study is needed," says Angel Tolentino, Coordinator of the Program for Integration and Trade at the Foundation for Economic Development (*Fundación para el Desarrollo Económico, FUNDE*), who denies there is as yet conclusive evidence that DR-CAFTA has failed. "And it's quite complex because there are many variables that affect corruption, the economy, and trade - some of which can be blamed on the treaty and others can't." He concedes that "in general, there are not more jobs, nor has the massive attraction of investment occurred as predicted. Of course income of poor people in particular has not increased, and therefore there hasn't been a reduction in poverty. But the massive displacement predicted by the more pessimistic forecasts didn't occur either." Regarding the surge in emigration to the north, which has made Salvadorans the second-largest group of immigrants in the United States, he says, "It has been a constant" for a long time and "there are other variables beyond crime and, of course, beyond the FTA..."

Indeed, skyrocketing crime seems to be the main topic on people's minds in El Salvador these days, where they are "living a war because of the high levels of crime that has exploded in the country," says Marielos Pleitez, also of the Hospital Bloom Workers Union, drawing a comparison between the current situation and the bloody conflict of the 1980s. She says, "Whether it's because of politicians or common criminals, the truth is that human beings are being killed in the country every day, between twenty and twenty-one a day." [1] A fierce debate rages in El Salvador as to who is to blame for a worsening crisis on many fronts. Is it FMLN President Mauricio Funes? Is it CAFTA? Is it the legacy of decades of right-wing rule?

Roberto Rubio, Executive Director of FUNDE, says that, since the inception of CAFTA, exports have increased but imports have risen even faster. Rubio observes that those who have benefited from the FTA are exporters of ethyl alcohol and sugar. Tolentino points out that importers of grains, meat, dairy products, and rice have also been big winners. Roberto Góchez, an economist with the Central American

University (UCA), notes that trade has declined since the global recession began in 2008.

Tolentino argues that it is critical for the Central American country's economy to optimize the conditions under which it imports from and exports to the US because "two thirds of the [Central American] region's total trade is with the US." He also highlights the importance of US investment in El Salvador, the large number of Salvadorans living in the United States whose remittances account for "about 17% of the Salvadoran GNP," and the "direct or indirect participation" of the United States in Salvadoran political decisions.

Others, of course, might argue that this preponderance of US influence on the country is unhealthy and should be opposed. Wilfredo Berríos, also of CONPHAS, notes the "major asymmetry that exists between transnational corporations and [Salvadoran] micro, small, and medium-sized businesses. They obviously can't compete with these big transnational corporations because, in addition, the US government subsidizes them, and, technologically speaking, the micro, small, and medium-sized businesses don't have that capacity. Besides, there are quality standards that the US requires for products that our [companies] can't fulfill. Due to this asymmetry, our countries, in this case El Salvador, are importing more, and there is little opportunity to export to the United States."

"You won't see the benefits of the FTA in the short term," says Mario Magaña, Director of Economic Affairs at the Salvadoran Chamber of Commerce and Industry; "we're going to see them in 10, 15, 20 years." It would also be unfair, he argues, to measure the FTA by its first five years "when one of these five years was the year of the financial crisis."

But, according to Gilberto García of the Center for Labor Studies and Support (*Centro de Estudios y Apoyo Laboral, CEAL*), "the Salvadoran and US authorities told us in 2003, 2004, and 2005 that the FTA was going to be the solution, that the FTA was going to solve all this...The governments of that period said 'No, now everything is going to be different, everything is going to change. There are going to be more jobs, more investment, more economic prosperity,' etc., etc. . . . Now they tell us: 'aha, you can't show a relationship between problems worsening and the FTA,' but what we can show is that what they said was going to happen never happened!"

## **The Constitutional Challenge**

Raúl Moreno of The Foundation for the Application and Study of Law (*Fundación de Estudios para la Aplicación del Derecho, FESPAD*) says that the constitutional challenge that his organization and the Salvadoran Ecological Association (*Unidad Ecológica Salvadoreña, UNES*) initially brought on March 1, 2007 presents evidence that "the text of CAFTA violates the [Salvadoran] Constitution and that one year after its implementation CAFTA was already having negative impacts on human rights, the environment, and the sovereignty of the Salvadoran people." The court did not respond until the plaintiffs filed a complaint against it for delaying the administration of justice. Moreno says he then received a notice asking him to "explain the 11 pages or so of observations of the constitutional challenge that I had filed a year earlier." Then "in October of 2009, the new Constitutional Chamber of the Court notified me that it had admitted the constitutional challenge, dismissing many of the arguments, but recognizing at least four that are fundamental to the treaty."

First, the trade agreement's national treatment and most-favored-nation clauses violate the Salvadoran Constitution because they put Salvadoran businesses and government at a disadvantage by requiring the Salvadoran government to always treat US corporations at least as well as or better than domestic enterprises. The principles of equality before the law and non-discrimination are enshrined in the Salvadoran Constitution. CAFTA's national treatment and most-favored-nation clauses nominally prevent discrimination, but in reality offer preference to US multinationals that already started out with an advantage.

Second, DR-CAFTA obliges the countries that have joined the treaty to eliminate customs tariffs, which is a function the Salvadoran Constitution reserves for the Salvadoran National Legislative Assembly.

Third, the FTA is in conflict with provisions of the Constitution and the Tegucigalpa Protocol to the Charter of the Organization of Central American States regarding Central American integration. The Constitution and the Protocol state that they shall supersede other treaties in matters of Central American unification; CAFTA states that it has precedence.

Finally, Chapter 10 of DR-CAFTA, regarding investor-state disputes, violates article 106 of the Salvadoran Constitution [2] by giving US corporations the right to sue the Salvadoran government via a World Bank arbitration panel if a public policy of the government affects its expected earnings. Such “indirect expropriation” concerns theoretical projected revenue that a company might have earned if the government in question had allowed it to operate. This applies to the cases of Pacific Rim and Commerce Group, mining corporations that have brought investor-state arbitration suits against the government of El Salvador for not being allowed to extract gold. [3]

On December 7, 2009, the court notified Raúl Moreno that it had summoned President Mauricio Funes and the Legislative Assembly to prove to it that the aspects that the court had recognized as unconstitutional were indeed constitutional. They had not done so as of October 1, 2010.

“For us it would be an unusual thing” to win the lawsuit, says Moreno, because it would have a devastating effect politically, with “implications for every free trade agreement to come and every free trade agreement that already exists.” He pointed out that, for the first time, the Constitutional Court is composed of independent judges who could clear the ground for such a change. If, in the end, the court dismisses the four arguments it has admitted, the plaintiffs, FESPAD and UNES, will appeal to the Inter-American Commission on Human Rights.

Luis González of UNES sent me an e-mail in August stating that, while President Mauricio Funes’ government “hasn’t touched the [constitutional challenge] at all, it is even negotiating new FTAs with Europe and Canada. The new Supreme Court justices, although they are very progressive, haven’t dealt with this topic and have been caught up in other matters.”

Francisco García of CONPHAS is more pessimistic: “We believe that the Supreme Court’s acceptance of the constitutional challenge doesn’t mean that it will go very far. Obviously, the interests of big capital are going to stop any action by the Supreme Court to declare the FTA unconstitutional. Let’s not forget that the entire judicial system in our country is not independent, honest, and transparent. The interests of big capital play a major role and, although the court’s acceptance of the constitutional challenge is a positive sign, we don’t believe this means the court is going to declare the FTA unconstitutional. In our judgment, the court will come up with arguments that guarantee the status quo.”

On September 30, subsequent to González’s and Francisco García’s statements above, González sent me another, more optimistic e-mail highlighting three recent “innovative” rulings by the Constitutional Court, one concerning the participation of independent candidates in national elections, another concerning the president’s authority to administer public funds, and a third limiting the rights of the mass media to make offensive remarks. “This lays the foundation,” says González, “for the constitutional challenge of the FTA being decided in accordance with the law when the case is settled and, finally, after an arduous struggle, the treaty being declared unconstitutional.”

### **Enforcement of Corporate Privilege**

Raúl Moreno sees investor-state disputes as the biggest threat to El Salvador under DR-CAFTA because “the construct of indirect expropriation allows US companies to protect themselves against any public policy whatsoever, if in their judgment this public policy negatively affects their profits or expected profits.” He goes on to say, “It’s very probable, highly probable that the ICSID (the World Bank arbitration panel) will rule against the government of El Salvador” in the Pacific Rim and Commerce Group arbitration proceedings. He says that FESPAD studied 28 investor-state disputes under NAFTA, and US companies almost always win. An egregious example he cites is the Metalclad case in which the Mexican government was penalized for closing a toxic waste dump as a public health hazard that already had harmed the local population. In contrast, the US government has never lost as a defendant in such FTA

arbitration. [4]

I asked Moreno if he sees this as part of an underlying US policy in Latin America. He said that, indeed, the United States uses a legal framework (such as bilateral treaties), infrastructure projects (such as the Longitudinal Northern Highway project meant to facilitate mineral extraction), and militarization (such as the International Law Enforcement Academy, ILEA, a police academy that follows in the tradition of the infamous School of the Americas), in order to secure access to raw materials for US multinationals in El Salvador as in Latin America generally.

Others I spoke with also linked free trade to an unsavory agenda. “The forces that impel and support CAFTA, the free trade agreements, are conservative forces,” explains Roberto Góchez of the UCA, “that is to say the most powerful sectors of local and foreign capital. So, very often, any minimal change that happens or that affects their interests . . . they are going to attack.” He says, “I think that the coup d’état in Honduras has to do with that.”

Gilberto García points out that in Honduras “the same entrepreneurs who were behind the lobby in favor of CAFTA were all also implicated in the coup d’état against [Honduran President] Manuel Zelaya.” [5] He also warns: “The fact that we are enjoying relative calm at this moment politically in El Salvador is no guarantee” that what happened in Honduras cannot happen in El Salvador. The attempted coup against Ecuadorian President Rafael Correa on September 30, after I spoke to García, is sobering support of this claim.

When I asked Rubio and Tolentino of FUNDE, the center-right think tank, whether they see any link between free trade policies and state repression, they seemed not to understand the question. Nor did Magaña: “What type of repression?” he asked. I cited Honduras, and he went on to clarify that the Salvadoran Chamber of Commerce and Industry had opposed the coup d’état in Honduras, but that Honduran President Manuel Zelaya had violated his country’s constitution, and that now the situation has been normalized.

## **Implications of a Repeal**

Repeal of the law implementing the FTA would send a signal to US investors that El Salvador is unstable for their investments, says Moreno, but “there wouldn’t be enormous changes.” He says that as far as trade is concerned, for example, El Salvador and Central America already had two tariff mechanisms with the United States, the Generalized System of Preferences (GSP) and the Caribbean Basin Initiative (CBI), which are unilateral tariff support programs by the United States in Central America that allow zero-tariff exportation of the majority of products to the US. The only thing that has changed under DR-CAFTA is the increase in the export quota of sugar and organic coffee, he says.

In fact, says Moreno, CAFTA’s investment and intellectual property provisions were already provided under the Bilateral Investment Treaty (BIT) between the US and El Salvador. “This didn’t justify a free trade agreement to incentivize trade. It wasn’t necessary, there was already a framework. Does this arrangement change without CAFTA? It doesn’t change! It doesn’t change significantly.” One should note that, even though the BIT has never been ratified, the redundancy of DR-CAFTA with other international agreements will make opposing corporate “free trade” in El Salvador a long battle.

If El Salvador does withdraw from DR-CAFTA, the US government is very likely to intervene, as it often has in the past, for instance with training and military aid to death squads during the country’s civil war in the 1980s, [6] and more recently through statements by US politicians that probably influenced election outcomes. [7] Moreno says, “Whether the government of the United States has the face of an African-American or that of a fascist, it will always respond to corporate interests. That isn’t going to change even if the grandparents of the current president had worked as slaves on the construction of the White House.” But the Salvadoran social movement has a long track record of standing up to power.

Although the US government and corporations have a nefarious history in El Salvador that heartily

persists in the present, not all Salvadorans resent the US. As a cab driver in San Salvador named Jorge told me, "We Salvadorans are very grateful to the US. You've given us many things. You brought us the Gospel. The Americans brought the word of God to El Salvador." Indeed, US evangelists have made a major impact on the country's religious landscape.

But, in general, Salvadorans I met during my visit there, some of them radical leftists, showed enormous appreciation for the work of concerned US citizens in solidarity with their country. They are counting on us. Salvadoran activists are certainly doing their part to fight abuses of social and political human rights and the environment, but global political and economic power radiates from centers in the developed world, first and foremost from the United States.

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## Footnotes

[1] The Mara 18 and Mara Salvatrucha street gangs nearly shut down the country for 72 hours in early September by a "strike" in protest against a new law that criminalizes membership of a gang. "Gang strike paralyzes El Salvador," BBC, September 9, 2010. [online article and video report] Accessed October 2, 2010. Available from <http://www.bbc.co.uk/news/world-latin-america-11255138>

[2] Vaquero, Marcela. "Organizaciones civiles piden agilizar proceso de inconstitucionalidad CAFTA," *ContraPunto*, February 4, 2010. [online article in Spanish] Accessed October 2, 2010. Available from [http://www.contrapunto.com.sv/index.php?option=com\\_content&view=article&id=2293:organizaciones-civiles-piden-agilizar-proceso-de-inconstitucionalidad-cafta&catid=58:categoria-sociedad-civil&Itemid=64](http://www.contrapunto.com.sv/index.php?option=com_content&view=article&id=2293:organizaciones-civiles-piden-agilizar-proceso-de-inconstitucionalidad-cafta&catid=58:categoria-sociedad-civil&Itemid=64);

*Unidad de Investigación, FESPAD*. "El CAFTA-DR y la vulneración del orden constitucional," *Políticas Públicas HOY*; San Salvador: FESPAD, 2010. [online bulletin in Spanish] Accessed October 2, 2010. Available from <http://fespap.org.sv/documentos/pphoy46caftainconstitucional.pdf>

[3] See my article "El Salvador's Misfortune in Gold: Mining, Murder, and Corporate Malfeasance," *Alterinfos*, April 21, 2010. [online article] Accessed October 2, 2010. Available from <http://www.alterinfos.org/spip.php?article4368>

[4] *Unidad de Investigación*

[5] García published an article establishing the links between the perpetrators of the coup d'état in Honduras and their support of DR-CAFTA. García, Gilberto. "Cuando las barbas de tu vecino veas pelar..." *UITA*, July 28, 2009. [online article in Spanish] Accessed October 2, 2010. Available from [http://www.rel-uita.org/internacional/honduras/cuando\\_las\\_barbas\\_de\\_tu\\_vecino.htm](http://www.rel-uita.org/internacional/honduras/cuando_las_barbas_de_tu_vecino.htm)

[6] Pyes, Craig. "ARENA's Bid for Power," in *EL SALVADOR: Central America in the New Cold War*, ed. Marvin E. Gettleman, Patrick Lacefield, Louis Menashe, and David Mermelstein; New York: Grove Press, 1987. pp. 167 and 172 (editor's Note 4).

[7] CISPES (Committee in Solidarity with the People of El Salvador) "Republicans in U.S. Congress Intervene in Salvadoran Elections–Take Action NOW!" CISPES 2009 Salvadoran Elections Blog, March 12, 2009 [online alert] Accessed October 2, 2010. Available from <http://cispes.org/09electionsblog/?p=299>;

Vinke, Kira, COHA Research Associate. "Mixed Results in Salvadoran Elections," Council on Hemispheric Affairs, January 27, 2009. [online article] Accessed October 2, 2010. Available from <http://www.coha.org/mixed-results-in-salvadoran-elections/>