Resistance to UPOV and the privatisation of life in Costa Rica

29 March 2008

Interview with Silvia Rodríguez Cervantes, member of Costa Rica's Biodiversity Coordination Network and an active participant in the social movement that campaigned for a NO vote in the national referendum on Costa Rica's entry into the US-Dominican Republic-Central America Free Trade Agreement (CAFTA) in 2007. At the time of the interview, the movement was pressing for a referendum on whether or not to approve the UPOV (Union for the Protection of New Plant Varieties) Convention, as required by CAFTA. Two weeks later, on 15 April 2008, the Costan Rican parliament went ahead and approved UPOV despite being presented with more than 100,000 signatures calling for a citizen's vote on the matter instead.

1. What has been the government's course of action after the defeat of the NO vote in the referendum?

The government has sent a series of bills, the so-called "implementation agenda", to the Legislative Assembly. At the moment, this agenda comprises nine national laws, three international conventions or treaties (UPOV, Budapest and Trademarks), and a convention on environmental cooperation, the approval of which would demonstrate that the country is taking the necessary steps, although still not sufficient, to bring national law into line with the demands of CAFTA. Without this legislation in place, the United States will not agree to "certification" and the FTA will not come properly into force in Costa Rica. This is incredible: our country is suddenly obliged to adopt US domestic laws.

2. How have the social movements reacted to losing the Referendum?

During the first few days, we were dazed and bewildered. After the momentum achieved throughout the length and breadth of the country, we couldn't believe we had lost. Six days before the referendum, even the polls commissioned by agencies in favour of the YES vote had been forced to recognise that the NO vote was six points ahead. Despite this, three days before the referendum, some of us had a feeling we would lose.

There were just too many vested interests at stake that were not going to allow us to win. Even the US Ambassador was not going to allow us to win. He spoke publicly and aggressively in favour of CAFTA. Neither were the national and "American" Chambers of Commerce, nor the press and television channels, including the international channel CNN, going to allow us to win. Even more so, the President of the Republic was not going to let the NO campaign take the vote. When running for the presidency, his line was that his government would exercise the "tyranny of democracy". Well, he has put that into practice and kept control over the other powers -- including the legislative assembly, which he dominates by controlling 38 of the votes. He also exercises control over the Constitutional Court (which has been under his orders for three or four years, since he got it to "interpret" the Constitution as permitting presidential re-election, thereby allowing his him to run) and the Supreme Electoral Tribunal.

With this level of across-the-board backing, there was no way we could fight the shameless and alarmist propaganda that continued to circulate even during the pre-vote period, when the two sides were supposedly not allowed to campaign. When consulted, the Tribunal decided that what was being circulated was "news" (which was permitted), not propaganda. This "news" continued to appear in the press and on radio and television as well as on factory walls. It claimed that factories would close, that people would lose their jobs and that it would be impossible to negotiate another more beneficial treaty with the United States, our main trading partner.

Even so, the social movement was bewildered and perturbed once the results were known. There had been only a few sceptics. Despite the non-observance of the pre-polling campaign-free period, people had pinned their hopes on winning.

On losing, as always happens, the movement began to look for scapegoats, and did not know who to target. Many of the 300 patriotic committees broke up. Others continue to work very well, and what has made the difference, from my perspective, is that they understand that the "horizontal" structure that emerged as a reaction to the FTA must now be replaced by a greater degree of "vertical" organisation and a discussion about what kind of society we want and about the tactics needed to continue the work and link up the different committees. During the campaign the movement did not want leaders and wanted only a minimum level of coordination between the committees. Although this was a rich experience, it also made the movement weak. Recently someone shrewdly said, "So much horizontality left us flat on our backs."

3. What laws does the "implementation agenda" cover?

Those at the core of the FTA -- and they will unfortunately overturn the social welfare state so valued by Costa Ricans. For example, the new laws eliminate the state monopoly on energy, telecommunications, life insurance, health insurance and public education. And several laws about intellectual property will now have to be "harmonised" with those of the United States.

4. How many of these laws are about intellectual property rights?

Six of the 13 laws and conventions on the implementation agenda are about intellectual property rights. They are: plant varieties (approval of the UPOV Convention and a national plant variety protection law), the Budapest Treaty, the International Treaty on Trademarks, a law on procedures and observance of intellectual property rights, and a reform of our previous laws on Trademarks and Other Distinctive Signs and the Law on Patents of Inventions, Drawings, Industrial Models and Utility Models. Wasn't "territoriality" supposed to be one of the characteristics of the laws on intellectual property, through which each sovereign country had the right to legislate as it thought appropriate? This now seems to be a thing of the past.

5. How many of these laws directly affect biodiversity in Costa Rica?

Directly, the UPOV Convention and its offspring, the law to protect new plant varieties. Also, the Budapest Treaty. Indirectly, they wanted to include in the reforms the parts of the Law on Trademarks and the Law on Biodiversity that are relevant to intellectual property and that go some way to stopping biopiracy. They had to retreat, because there were problems due to what in legal

parlance is called "a lack of connectivity". In brief, "biodiversity has nothing to do with trademarks and other distinctive signs". But we are well aware that they will soon raise this again, because otherwise the United States will not agree to "certification". And the Law on Biodiversity has obstacles to "free trade" and "intellectual property" that will have to be eliminated.

In addition to these conventions and treaties that the FTA's chapter on intellectual property forces us to approve, there are some articles in the FTA that also affect biodiversity. For example, there is an article that surreptitiously, as though it doesn't really want to, closes the possibility of requiring a certificate of origin (which includes proof that the biopirates took the material following all the steps required under the Biodiversity Law). The requirement for such certificates is beginning to gain acceptance among the memberstates of the Convention on Biological Diversity while these FTAs are getting rid of what has taken years to gain such acceptance.

I would like to emphasise that we, in the Biodiversity Coordination Network, are well aware that accepting certificates of origin means accepting intellectual property over our resources (and in the final analysis our loss of control over them) in exchange for biopirates agreeing to follow "legal" procedures, including the obligation to make payments to the country of origin and the community where the extraction of resources takes place. While we are aware of this, what I am trying to say here is that not even this is acceptable to the United States.

6. Tell us briefly the history of the struggle to defend biodiversity in recent decades in Costa Rica.

I think the presence of a biodiversity institute in the country (INBio), which signed a contract with a multinational pharmaceutical company (Merck) in 1993, even before we ratified the Convention on Biological Diversity, made many Costa Ricans want to better understand what was going on than they could learn through the press. They began to wonder about the nature of this institute, and how a private body could gain such easy access to the biodiversity of the national parks, and why the terms of the contract were private if the institute was selling public goods, and so on.

We gradually formed small groups of people with environmental organisations, academics, peasants and indigenous groups who were interested in finding out about the international frameworks that were beginning to impose new directions on our countries, not only in the field of biodiversity, strictly speaking, but also in terms of free trade agreements. We made some progress and managed to get a few seats on the committees drafting the Biodiversity Law and so were able to participate directly in that process. We were certain that this was an issue that should not be left only to technicians and scientists and that it was of great interest to all Costa Ricans. This is how the Biodiversity Law was adopted. Even though this law has many inconsistencies and weaknesses, not only because we were international pioneers, but because it was the result of a consensus of a special mixed legislative commission with representatives from political parties, ecologists, peasants, indigenous groups, chambers of commerce, academics, it is also a landmark. There was popular participation in its preparation and it has, to some extent, acted as a brake on those who wanted legislation that was more favourable to trade policy and to the ideology of "sell to save".

This first experience gave birth to the Biodiversity Coordination Network and encouraged us to continue the fight, which was also very related to agricultural biodiversity, as in the fight against approval of the UPOV Convention and the corresponding national law. In 1999, there were only a

few people (no more than ten) who realised the significance of this convention, including a former President of the Republic, Rodrigo Carazo, who was willing to provide political backing to those of us who had none and who had only a certain amount of knowledge about the extent of its impact on peasants and biodiversity. Along with others, we were able to develop the arguments with which we not only twice stopped approval of UPOV but also developed an alternative proposal, a bill to protect plant breeders' rights, which was formally introduced into the legislature in 2003 but then held up by the obligation to approve UPOV, as imposed by CAFTA.

In addition, the network has also been active on biosafety issues and in defending the most important articles of the Biodiversity Law.

7. How do the implementation laws affect these achievements?

We will soon be members of the UPOV Convention and the Budapest Treaty, with all that this means in terms of the loss of peasant control over seeds and other plant reproduction material. We will also lose the most significant articles in the Biodiversity Law, especially those that act as a brake on intellectual property rights.

8. What impact do you think UPOV will have on Costa Rica?

Learning lessons from other countries, we know it will have an economic effect, because plant variety rights provide enormous royalties to their owners. A recent example is South Korea: it has been a member of UPOV since 2002, and has had to pay out tens of millions of dollars as a consequence. The case of Argentina is also significant. As for the impact on the loss of biodiversity, we know that the imposition of plant varieties that come under these rights, and that will also certainly comply with the laws on seed certification and marketing, will gradually eliminate peasant varieties and decimate agricultural biodiversity. Finally, we are concerned that the control of seeds, especially staple grains, is being monopolised by a few transnational companies who have benefited from intellectual property rights and other technological forms of control (sterile and zombie seeds, including hybrids) of a contractual nature. Peasant seeds will be considered “illegal” if they do not fully comply with the certification and quality control procedures being imposed in other countries.

9. What has been the reaction of the social movements (patriotic, indigenous and peasant movements) to these laws?

Many of these laws are not easy to understand for most people. They don’t understand how someone could be able to prevent farmers from using seeds from their own crop, or only allow them to do so as a special “privilege”, or on condition that the farmers use the produce only for their own consumption at home. They don’t understand they will never be able to sell these seeds as “seeds”. The environmental movement tried to promote a referendum on the UPOV Convention, but this meant having to obtain 135,000 signatures within a month or a month and a half (see box).

In practical terms, most of the population is not aware of the true scope of these laws which, in addition, were not the subject of great debate during the months prior to the CAFTA referendum. The hundreds of meetings and roundtables focused more on CAFTA’s impact on employment, the

privatisation of state companies, the price of medicines, the impact on health and changes to export rules. The general public was not as concerned about UPOV and biodiversity.

10. How do these laws affect the "institutionality" so valued by the people of Costa Rica?

They definitely make a major impact on the country's democratic system and the body of social law. I am of Mexican origin and upbringing, and greatly value the efforts of previous generations of Costa Ricans to make Costa Rica into the kind of society it is today, which, although far from perfect, has enjoyed major social gains. The new situation means that it will no longer be possible to continue to improve this model and this is one of our major concerns at the moment. We know it will take many years to recover from this blow if we do not act quickly and if we do not make alliances with other countries that are also subjected to the same demands of these free trade treaties.

11. How do you think the social movements will react to these issues?

One important characteristic of the social movement is the participation of the universities and many committed academics who have contributed generously to the analyses and debates on the FTA. Many of them have continued contributing ideas to the committees about the society we want, what to do now, on what basis, and with a constructive critique of what we have done or not done in these almost five years of struggle against the FTA.

The patriotic committees that have survived are now interested in making an impact at the municipal level. Many of them are in the middle of a debate about whether to do so as civil society organisations or whether to work towards the creation of small local political parties. We are all involved in this, and trying to be hopeful and keep up our spirits. When one of us encounters a problem, there is someone ready to help. I think we can use the metaphor of birds to explain what I mean. I am referring to the flocks of birds which fly hundreds of thousands of kilometres seeking a better climate, with birds taking turns to lead the way and to protect the others from the full force of the onrushing air, before dropping to the back and being replaced by another.

Box 1: What is the impact of the FTA and the implementation agenda on Costa Rica's Biodiversity Law?

Costa Rica's Biodiversity Law (No. 7788) was the result of co-operation between many people and institutions who wanted the country to have legislation regulating the conservation of biodiversity, the sustainable use of resources and the fair and equitable distribution of benefits derived from their use, in accordance with the guidelines of the Convention on Biological Diversity (CBD). The collective rights of local communities and indigenous peoples occupy an important place in the law, and they have the power to veto the extraction of material from their territories on "cultural, spiritual, social, economic or other grounds" (Art. 66).

Costa Rica ratified the CBD in 1994. The law was approved in May 1998, and the General Regulations on Access to Genetic and Biochemical Elements and Resources of Biodiversity were published by executive decree in December 2003.

As some of the articles of this law contradict the FTA and other treaties that the FTA compels us to adhere to (for example, the Budapest Treaty and UPOV-91 Convention), much of the product of the national effort made over almost ten years will have to be revised. This includes articles that many Costa Ricans are proud of because of their progressive character and the way they promote biodiversity and the interests of their guardians, the local communities and indigenous peoples.

The harmonisation of national legislation with the FTA is taking place through the approval or amendment of nine laws, and the approval or ratification of three treaties and one environmental co-operation convention. This group of laws and covenants is known as the Implementation Agenda of the FTA and constitutes the United States' minimum requirement for agreeing to "certification" so that Costa Rica can become a full member of CAFTA. Further amendments, new laws and national decrees will be necessary given that the FTA moves from the WTO "positive list" system, in which areas open to investment are specified, to a "negative system" that specifies sectors in which investment is not allowed, with all other sectors being open to investment.

Below are extracts from articles of laws about the requirements to grant access permits to biodiversity resources. It has already been announced that articles 78, 80 and 81 will be amended soon, as they relate to intellectual property. Official documents have not yet set out all the reasons for amending them or provided a new draft of the articles, so this analysis is only comparative in nature.

Examples of conflict between Costa Rica's Biodiversity Law and CAFTA and other intellectual property treaties, with regard to access permits:

Biodiversity Law	CAFTA and other treaties
Article 69 grants access permits to biodiversity but they are neither contracts nor "investment agreements"	By contrast: According to Annex 1, Costa Rica List I-CR-31, scientific research and bioprospecting are "cross-border services" and therefore subject to the provisions of Chapter 11 of the FTA[1] that protect

[1] Chapter 11 of CAFTA: Cross-Border Trade in Services

	these services. That is, the character of research and bioprospecting changes in CAFTA. According to the Biodiversity Law, researchers and bioprospectors require an access permit but in the definition of "investment", in Chapter 10,[2] Art. 10.28, paragraph g of the FTA states that "authorisations, permits (…) conferred pursuant to domestic law" are investments. In this same definition, investments are considered "assets" of the investor. Therefore, although the interested party carrying out a scientific or bioprospecting service must be authorised to do so in accordance with internal legislation, the permit is automatically considered to be an investment. Access permits, like any other permits, become "investment agreements" and the investor will have rights "with respect to natural resources or other assets that a national authority controls." (Art. 10.28, paragraph b)
Art. 78 contains exceptions to intellectual property rights, including: • Unmodified sequences of deoxyribonucleic acid (DNA). • Plants and animals • Non-genetically modified microorganisms • Inventions that, when exploited commercially in a non-monopolistic way, might affect agricultural processes and products that are basic for the food supply and health of the country's inhabitants.	By contrast: - The Budapest Treaty facilitates patenting of DNA and unmodified microorganisms; it is sufficient to have isolated them. - The definition of microorganism is changed in the Biodiversity Law in order to facilitate approval of the Budapest Treaty. - The FTA requires signatories to "undertake all reasonable efforts to make such patent protection (for plants) available" (Art. 15.9.2).[3] - Any barrier to intellectual property rights could be questioned in the FTA, as the latter are protected as "investments".
Art. 79. Congruence of the system of intellectual property. (…): resolutions taken about the protection of intellectual property that are related to biodiversity must be congruent with the objectives of this law (of Biodiversity) in application of the principle of integration. Art. 80. Obligatory prior consultation. (…) consultation with the Technical Office of the National Commission for the Management of Biodiversity is	By contrast: Art. 10.9.2: Performance Requirements on investments, states that no party may condition the receipt of an (…) investment, on compliance with any of the following requirements. So the requirements set out in articles 79 and 80 of the Law on Biodiversity can be rejected because they impose measures that could constitute "disguised restriction on international trade and investment" (Art. 10.9.3. c). The above-mentioned is especially true with regard to the requirement to present a certificate of origin when

[2] Chapter 10 of CAFTA: Investment
[3] Chapter 15 of CAFTA: Intellectual Property

obligatory before granting protection of intellectual or industrial property to innovations that involve elements of biodiversity. Such innovations must always have a certificate of origin issued by the Commission's Technical Office and the prior consent (of the respective authorities in the area where access to the resources is obtained). If the Technical Office provides grounds for refusing a request, this will prevent registry of a patent or innovation.	requesting patents, which the United States has always opposed. Art. 15.9.9 of the FTA would appear to eliminate such a requirement because it makes a small but significant change in the dissemination requirements of art. 29 of TRIPS.[4] This amendment is included even though there is increasing international acceptance of certificates of origin within the WTO[5] and CBD[6] with which it enters into contradiction. The FTA would prevent a reconsideration in this sense. Presentation of the certificate of origin of the resources is not considered in either the Budapest Treaty or the UPOV Convention.
Art. 81. Obligatory licences. Private beneficiaries of the protection of intellectual or industrial property with regard to biodiversity shall be obliged to transfer a licence to the state that will allow it, in cases of a declared national emergency, to use such rights in benefit of the collective, with the sole aim of resolving the emergency, without the need to pay royalties or compensation.	Law to Protect New Plant Varieties. Art. 28 Obligatory licences. Licences issued by executive decree for reasons described as of public interest, shall limit the rights of the owner but the owner will always receive equitable remuneration.

Other articles will have to be amended because of obvious incompatibilities with the FTA: for example, the rights granted to communities and indigenous authorities to veto permits, and the requirement for the transfer of technology in exchange for access permits.

Box 2: What is the situation at the moment in the fight against UPOV?

In November 2007 a group of ecologists led by the Federation for the Conservation of Nature (FECON), requested the Supreme Electoral Tribunal (SET) to hold a referendum on the UPOV Convention and the corresponding national law to "Protect New Varieties of Plants". In December, the SET authorised a citizens' referendum on condition that those in favour collected the signatures of five per cent (135,000) of people on the electoral roll. When issuing authorisation, the Tribunal accepted that the country had not been consulted on either the Convention or the law in the referendum on the FTA in October 2007.

From the beginning, the initiative had various problems, which should be evaluated adequately at the right moment. What I can say now is that some of the problems were internal, such as the way in which it was decided to request a referendum and the organisation and financing of the movement to collect signatures. Other problems are external, such as the conditions demanded by

[4] TRIPS: Trade Related Intellectual Property rights.
[5] WTO: World Trade organisation
[6] CBD: Convention on Biological Diversity

the tribunal for the collection of signatures. One was that there would be no suspension of the procedures for the approval of the Bill in the Legislative Assembly until the official announcement of the referendum was made. The official announcement would be made only after the presentation and verification of all the signatures collected by the SET, but would also have to wait until 7 July, that is, three months before the next referendum, which can only be held one year after the last. Another condition was that the referendum would not be held should UPOV and the national law be approved by the legislative assembly in the meantime.

Although the movement understood the conditions laid down by the SET, the campaign continued because it was felt that presenting over 135,000 signatures for verification as soon as possible would constitute an effective demonstration that could influence legislators to reject the bills in question.

On 23 January 2008, in the presence of a large crowd, the campaign was formally launched under the title "I Sign for Life". Various patriotic committees from the campaign against the FTA, three minority political parties and several peasant organisations and trade unions promised to assist in the collection of signatures.

Initially, objectives were proposed that were impossible to achieve for various reasons. For example, that signatures would be presented to the tribunal in less than a month, between the launch of the campaign on 23 February and 28 February. The real reason behind this was the desire to present signatures before the definitive approval of the Law to Protect New Plant Varieties. More time was available for the UPOV Convention.

Results:

- The Law to Protect New Plant Varieties was approved on 27 February, which meant that only signatures against the UPOV Convention were now valid.
- By 14 March, 52,000 signatures had been collected. With an influx of new support, 61,247 signatures had been collected by 26 March. Although we are very far from the target, we have to give credit to the enormous efforts made in such a short time. The Law on Referenda provides for a period of nine months for the collection of signatures, a period that could not be used because of the circumstances mentioned above.
- It is expected that the UPOV Convention will be given its second reading some time in the first half of April, so our aim will be simply to present the greatest number of signatures to the legislative assembly and demonstrate public support, through our actions and organisation, and by showing how much has been done by citizens in such a short time and without resources.