

# Trading Rights? Analyzing the Role of a Rights Discourse in Free Trade Agreements (FTAs) in Colombia

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## Introduction

Trade is much more than the exchange of goods and services (Feinberg, 2003, “The Political Economy of United States’ Free Trade Arrangements”, *The World Economy*, vol.26, no.7, pp. 1019-1040). Historically, trade has been linked to the dissemination of ideas and political systems. Many credit growing trade for greater global peace. Most recently, the promotion and signing of Free Trade Agreements (FTAs) among countries with the purpose of establishing preferential conditions for accessing each other’s markets has put on the table the need to better understand how economic and other (political and social) interests become intertwined in the promotion of trade between countries.

In this article, we will briefly analyze one recent example of trade negotiations to illustrate how, in addition to specific economic conditions, negotiators on all sides develop and design agendas to further political interests. Specifically, we will focus on the FTAs that one Latin American country, Colombia, has developed with its two main commercial partners: the United States (Colombia-US FTA, approved in 2006) and the European Union (Colombia/Peru-EU FTA, signed in

2012). By focusing in detail on one case, we hope to provide useful hints to better understand similar situations elsewhere, as FTAs become a growing trend for deepening relations among countries.

Negotiations among Colombia, the US, and the EU over the past fifteen years revealed that FTAs were as much about increasing volumes and content of trade as they were about promoting specific values and ideas, seeking geo-political and security objectives, promoting policy and regulatory preferences, pursuing domestic political goals, or protecting rights. In this context, various rights, ranging from intellectual property to health, a safe environment, and life were routinely invoked as being imperiled as a result of FTA enactment. Much like has been documented for other trade negotiations (e.g. the case of NAFTA, Thacker, 1999, “NAFTA Coalitions and the Political Viability of Neoliberalism in Mexico”, *Journal of Interamerican Studies and World Affairs*, vol. 41, no. 2, pp. 57–89), political coalitions both in favor and opposing FTAs brought together affinity groups across borders. In the Latin American context, it is clear that NAFTA, but especially the negotiations on the Free Trade Area of the Americas (FTAA) have played a catalytic role in the politicization of FTA negotiations. In the case of the Colombia-US FTA, the US Democratic Party allied with Colombian trade unionists, whereas the Colombia/Peru-EU FTA saw alliances between Human Rights NGOs on both sides of the Atlantic. Domestically in Colombia, the judiciary has been involved in the debates not only via the traditional automatic control of constitutionality of international treaties, such as FTAs, but also because the various actors used the constitutional framework and, more specifically, the constitutional popular action to protect their interests (Lizarazo, De

Lombaerde, Ortiz, Parra and Rettberg, 2014 “Constitutional Aspects of FTAs: a Colombian Perspective”, in *European Law Journal*, vol.20, forthcoming). In this sense, in addition to the usual actors involved in trade negotiations (labor unions, environmental groups, patenting companies, and companies prone to be affected by distributive impacts of commerce) the FTAs under discussion here were marked by the active involvement of non-traditional actors such as courts and rights-based international non-governmental organizations, who made systematic use of constitutional norms and rights to question the contents and procedures of Colombian FTAs and to mobilize the support of relevant social groups (Lizarazo et al., 2014).

Colombia’s commercial relationship with both partners is clearly of an asymmetric nature (Garay, De Lombaerde and Barberi, 2011 “Negotiating the Colombia-US FTA: A Colombian Perspective”, in: Bilal, De Lombaerde and Tussie (eds.), *Asymmetric Trade Negotiations*, Ashgate). Together, they receive over 50 percent of Colombia’s exports, while Colombia was the destination of only 0,9% of total US exports in 2012, and only 0.3% of EU total exports in 2011 (Colombian Ministry of Commerce, Industry and Tourism, and DANE). In addition to this fundamental reality, this article shows, however, that export and import volume alone reveals little both about the political implications and about the way in which trade discussions showcase the development of political agendas and serve to foster, further and defend interests linked to specific social groups within societies. We will argue that the strategic use of a rights discourse—or a set of political arguments addressing different generations of fundamental rights—by domestic and international actors involved in FTA negotiations explains both delays

and timing in the negotiation and contents of resulting FTAs.

We argue that actors involved in free trade negotiations develop a rights discourse based both on measurable and expected risks to specific rights *and* on the need to mobilize and build legislative and judicial support. We also suggest that actors involved in FTA negotiations learn about the most fruitful way to pursue their interests and apply lessons to subsequent negotiations. The following sections will develop these arguments.

### **Colombian Trade Policy: Contents and Implications of Colombia-US FTA and Colombia-EU FTA**

Central to Colombia’s recent economic expansion have been economic adjustment policies adopted since the 1990s and a turn to the promotion of “new generation” FTAs (Colombia currently has 20 active FTAs), expected to boost the country’s export capacity and to consolidate economic growth.

#### *The Colombia – US FTA*

Although Colombia had already initiated preliminary contacts with the US to seek the signature of an FTA since the early 1990s, the agreement was only signed on November 22<sup>nd</sup> 2006, after fourteen rounds of negotiations and sixty regional fora. In July, 2008, the Colombian Constitutional Court declared the Colombia- US FTA as conforming to the rules and principles of the Colombian Constitution. However, approval of the FTA stalled in the US Congress for five years, until it was signed by the Obama administration on October 21<sup>st</sup>, 2011. Over 80 percent of U.S. exports of consumer and industrial products to Colombia will become duty free

immediately, with remaining tariffs phased out over 10 years.

The Colombian government estimated that the Colombia-US FTA will help Colombian exports grow 6%, and will attract investment in infrastructure, industry, and rural development. In a Heckscher-Ohlin world, expected winners of the Colombia-US FTA therefore are (formal and informal) unqualified labor intensive sectors and agriculture. In addition, the tourism sector and the autoparts industry expressed support for the upcoming FTA. Expected losers are formal and qualified labor intensive sectors and capital intensive sectors.

#### *The Colombia/Peru – EU FTA*

The negotiations of the Colombia/Peru-EU FTA started after the signature of the Colombia – US FTA in 2007. The treaty was signed in June 2012, and the European Parliament approved the treaty in December of 2012. After ratification by the Colombian Congress in June, 2013, the Colombian government proceeded to temporarily implement the agreement. Once approved by the Constitutional Court and by each of the 27 EU member states (as of December 2013 ten countries had approved the agreement), the FTA will eliminate tariff barriers for all industrial and fishery products, broaden access to market for agricultural products, improve access to state contracts, services, and investment markets, reduce technical barriers to trade, and adopt common rules regarding intellectual property, transparency, and competition. As stated by the European Commission upon approval of the FTA, the agreement is expected to raise Colombian GDP by 1 percent. Both treaties give high relevance to the respect of human rights in general, but the Colombia-US FTA gives more importance to labor rights than the Colombia/Peru-EU FTA.

### **The Strategic Use of a Rights Discourse: Context, Actors and Strategies**

Non-trade issues figured prominently in the public discussion on the desirability and on the content of both FTAs. Overall, the debate made apparent the strategic use of a rights discourse by the involved actors who became mobilized favoring or opposing FTAs. The rights discourse not only defined identification and collaboration among actors but was also linked to delays and progress in negotiations as well as to particular contents.

While FTAs are an important element of the US's and the EU's commercial expansion strategies, non-trade reasons were important for both actors when pursuing FTAs with Colombia: In the case of the Colombia-US FTA, complementing the war on drugs with strengthening the domestic economy in order to provide legal alternatives for generating income to drug-dependent local economies was a prominent policy goal. In addition to the war on drugs, the US strategy was also marked by the need to strengthen ties with Colombia in the face of growing efforts by the now defunct president of Venezuela, Hugo Chávez, to consolidate his role as a regional leader, with growing animosity against the US. In brief, FTA negotiations between Colombia and the US were part of a larger political and economic agenda aiming to promote trade as well as develop other political and strategic interests.

Similarly, the European Union has invested significant amounts of human and material resources in peacebuilding programs—most notably “Peace and Development Laboratories” in over ten Colombian regions, in addition to numerous programs and organizations promoting respect for Human Rights. Discussions of the Colombia/Peru-EU FTA underscored the need to promote

sustainable efforts to continue and consolidate their decade-long engagement as a motivation for deepening and diversifying the EU's investments and commitments in the country. The Colombia/Peru-EU FTA was thus shaped by the EU's experience and larger goals in the country and region.

Non-trade reasons were also important for Human Rights organizations, who argued that the US and the EU should not engage with a government linked to Human Rights violations, especially those of labor unionists. From an opposite perspective, FTA defenders argued that trade liberalization increases overall wealth and supports human rights, such as the right to property, non-discrimination and the right to trade.

Both the Colombia-US and the Colombia/Peru-EU FTAs met with fierce opposition from groups pointing to possible negative effects of the implementation of the agreements in several areas. In a number of cases, these alleged negative effects have been linked to transgressions of fundamental rights. Lizarazo, De Lombaerde, Ortiz, Parra, and Rettberg (2014, cited above) include a list of potential conflicts between FTA provisions and fundamental rights (life, quality of life, access to medical care, culture, environment, dignity, privacy, and property, among others), involving different vulnerable groups, such as women and indigenous people.

The discussion of the FTA in the Colombian Congress and in the Colombian Courts unveiled expected (and unexpected) domestic winners and losers. However, reflecting the fact that labor unions have been historically weak, Colombian labor was less efficacious in bringing their point to the table, in contrast with the powerful AFL-CIO alliance with the Democratic Party in the US Congress. In contrast with the rights discourse used in the US, in Colombia emphasis was made on the risks of the FTA for the sovereignty of the

Colombian state, for the right to health as a consequence of increasing cost of drugs, and for the future of Colombian agriculture. And in addition, opposition to the FTA was functional in more general strategies to politically oppose the government in power.

The judiciary played a double-sided role in this debate, both during negotiations and via constitutional control after approval by the Colombian Congress. On the one hand, the Constitutional Court consistently upheld the FTAs, arguing that FTAs are part of a legitimate development policy of the Colombian state (via trade expansion and foreign direct investment). On the other hand and at the same time, by further developing a jurisprudential line on the constitutional supremacy of fundamental and constitutional rights vis-à-vis other treaties, including FTAs, it firmly claimed authority to remain involved in trade issues. This is one manifestation of the recognized judicial activism and illustrates how courts have become important fora for the discussions on trade policy. This might have contributed to channeling and coordinating coalitions among domestic and foreign labor and Human Rights organizations.

Discussions in the US were marked by the prominent role of labor unions, a focus on labor rights and violence against labor unionists in Colombia as a central concern. In alliance with US labor unionists, Colombian labor unions found a way to effectively advance their preferences and influence in the ratification process of the Colombia-US FTA. Groups pursuing these interests were supported by members of the Democratic Party in Congress, under the direction of then Speaker of the House, Nancy Pelosi. Human Rights groups added that the FTA would especially hurt peasant populations, pushing them into illicit crops, and affecting the right to life and to a healthy environment.

The strategy by FTA opponents in the US was effective, as FTA approval stalled for five years in the US Congress. A visit by Democratic Party members Harry Reid, Nancy Pelosi, and James McGovern to the Colombian presidential palace in 2007 was effective in conveying a central concern: As long as Colombia did not address questions about pending links between the government and regional political elites and right-wing extremists linked to the killing of unionists, a Colombia-US FTA was not feasible.

Negotiations with the EU followed a similar pattern. Actors who had become mobilized and learned in the context of the Colombia-US FTA were able to transmit their knowledge and capacity to the process with the EU. Whereas the strongest partner for FTA opponents in the US was the Democratic Party, in the case of the EU Leftist and Green European parties and powerful European Human Rights groups played this role. Ongoing Human Rights violations in Colombia and the risk of their continuation was, thus, the politically most sensitive issue. The Colombia/Peru-EU FTA was criticized because it was perceived as a means by which Europe provided legitimacy to Human Rights violations in Colombia and because of fears that an FTA with Colombia would stimulate conflict over land ownership and other forms of Human Rights violations amidst the ongoing internal armed conflict. Some of these claims were echoed by Members of the European Parliament who argued that the EU should not approve an agreement with a country that has been unable to protect fundamental rights.

### **Interpreting the Findings**

The summary above illustrates that trading rights, in addition to goods and

services, stands at the center of current commercial discussions. In this sense, actor capacity to exert influence on trade negotiations is shaped not only by control of measurable resources but also by the strategic use of intangible sources of power, such as legitimacy or the ability to recruit support from like-minded actors (within and across borders).

Our case study of FTA negotiations between Colombia, the US, and the EU illustrates, first, that even structurally weak actors like Colombian unions were able to influence the FTA negotiation processes. This was possible because the Colombian constitutional context provided those who opposed FTAs with a wide range of instruments to advance their interests. And although the Colombian Constitutional court has so far always upheld the FTAs, it has been explicit on its capacity and willingness to balance the contents of the FTAs (and of the implementing laws, for that matter) with the fundamental rights provisions in the Constitution. In addition, Colombian unions and Human Rights organizations developed effective strategies with political and civil society allies in the US and the EU, on the basis of a rights discourse which resonated on both sides of the Atlantic Ocean. This strategy was able to delay approval of FTAs and also provided public and international visibility to the concerns being raised. Both conditions—domestic institutional support and external allies—point to the possibility for political actors to overcome—or at least partly counterbalance—structural power imbalances.

Second, the case illustrates how actors choose multiple strategies to advance their interests, depending on available institutional opportunities. Groups involved in the FTA debate unleashed their persuasive capacity both domestically and internationally and on different institutional

scenarios. Multiple strategies proved effective in providing visibility, and in shaping timing and content of FTAs. Thus, even in the absence of an active promotion of ideas, intangible resources such as legitimacy and credibility may play a role in actors' decisions and strategies to engage in discussions about trade.

The description of the process and actors leading up to two FTAs that will mark Colombia's imminent future offers new possibilities for analyzing the political economy of trade policy. In addition to contemplating gains and losses for specific sectors and products, the framework broadens our scope of actors, power resources, and implications beyond trade. Developed here to understand the generation of trade policy, such a framework will also be useful to evaluate the process of implementation in the coming years, in Colombia and elsewhere.