



THE COLOMBIA FTA: BAD FOR THE ENVIRONMENT

The effects of the Colombia Free Trade Agreement (FTA) on U.S. exports would likely be insignificant,ⁱ but its environmental effects would be unfortunate. Although it calls on both parties to enforce their environmental laws and observe certain multilateral environmental agreements,ⁱⁱ the Colombia FTA, which is based on the failed NAFTA/CAFTA model,ⁱⁱⁱ raises two serious environmental concerns, among others: (1) the investment chapter of the Colombia FTA allows foreign corporations to challenge environmental regulations and seek money damages in compensation for the alleged cost of compliance; (2) agriculture provisions in the agreement are likely to undermine efforts to achieve sustainable and peaceful development of rural Colombia.

The Colombia FTA investment chapter threatens the environment.

Investment: U.S. Impact

- *A Separate Court for Foreign Capital.* Similar to previous U.S. FTAs, the investment chapter of the Colombia agreement provides foreign investors with expansive rights. If approved, it will allow these investors to bypass domestic courts and demand uncapped awards of money damages by challenging environmental and other public interest regulations, including climate change measures,^{iv} in proceedings before international tribunals.^v Even judgments of state supreme courts and the U.S. Supreme Court are subject to review. For example, Massachusetts Chief Justice Margaret H. Marshall was surprised to learn in 2004 that a decision of her court in a land use case was to be reviewed by a NAFTA tribunal. “I was at a dinner party,” she said. “To say that I was surprised to hear that a judgment of this court was being subjected to further review would be an understatement.”^{vi}
- *Greater rights than the U.S. Constitution.* Specifically, the investor-state dispute mechanism allows foreign investors to sue governments directly when they believe laws or regulations impinge upon their rights under the agreement. These rights are far more broadly defined in the Colombia FTA and similar agreements than in U.S. constitutional law. They include the designation of expected future profits as a property interest^{vii} and procedural rights that are unavailable under the U.S. law.^{viii}

Investment: Latin American Context

- *Deregulatory agenda.* Multinational corporations are eager to extend investor-state dispute resolution across Latin America and the developing world.^{ix} Many of these firms appear to be motivated by a desire to avoid new environmental and other regulations or tax and royalty adjustments that could affect their expectations for return on investment. Evidently, these corporations want to freeze regulations and revenue measures in place once they make an investment,^x thus potentially indemnifying them from strengthened environmental or other measures in the future.
- *Environmental consequences.* Across South America, a region that accounts for 40% of the world’s plant and animal species,^{xi} multinationals are now making investments in vast tracts

of land to be cleared for factory farming, as well as claims for new mines, oil and natural gas wells, and other projects. These investments are likely to result in increased threats to species survival, global warming, displacement of small farms, and depredation of the air, land and water.^{xii}

Investment: Colombia Examples

- *Corporate plantations.* Because it could chill new environmental regulations as well as provide a friendly forum in which to sue the Colombian government, the FTA investment chapter would facilitate the continued rapid expansion of Colombia's corporate palm oil plantations - fostering both environmental harm and human rights abuses in Afro-Colombian, indigenous, and campesino communities.^{xiii} Already, the land area devoted to oil palm plantations in Colombia has increased from 145,027 hectares in 1998 to 400,000 hectares in 2011, causing large scale deforestation and an increase in global warming pollution.^{xiv} For example, the Choco region of 145,000 square kilometers is a biodiverse environment of lowland forest, rain forest, mountain ranges, and coastal areas, in which rare plants and animals survive. Every year, palm oil plantations and other economic projects destroy about 154,000 hectares of forest in Chocó.^{xv} Furthermore, work conditions in the palm oil industry can be exploitative and local residents may be threatened and displaced. In the Tumaco region of Colombia, for example, "paramilitary groups linked to palm oil plantation owners have carried out a number of massacres and are causing significant displacement."^{xvi}
- *Mining & oil.* Similarly, the investment chapter would encourage further the boom in multinational investment in mining and oil drilling operations, many of which deteriorate unique ecosystems and displace local populations.^{xvii} For example, the United Nations reported in March of 2011 that at least 1,000 community members in the Anchicayá River and the Chocó regions were forced to flee because of violence between groups vying to control mining operations.^{xviii}

Agriculture provisions in the FTA threaten national security and the environment.

- *Impact on small farmers in Colombia.* The Colombia FTA provides market access for U.S. exports of corn and other grains, beans, chicken, and pork, among other products.^{xix} Small Colombian farmers cannot compete on price against these U.S. products, many of which are heavily subsidized. U.S. imports are projected to drive down value of production in Colombia by more than 50% for many of these goods, and by as much as 65% for pork, 68% for chicken, and 79% for beans.^{xx}
- *Environmental and security consequences.* The agriculture provisions in the FTA are projected to drive scores of small farmers in Colombia, who constitute 10% of the workforce, out of business.^{xxi} Many are expected to turn to coca production under the protection of FARC insurgents, paramilitaries, or drug cartels. This will provide fuel for the armed conflict, which takes place largely in the forests and wilderness areas of Colombia. The impact of insurgent warfare in pristine ecosystems is well documented.^{xxii}

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- ⁱ M. Angeles Villarreal, Proposed U.S.-Colombia Free Trade Agreement: Background and Issues, p. 20, Congressional Research Service, April 12, 2011, 7-5700, www.crs.gov, RL34470.
- ⁱⁱ Colombia FTA, Ch. 18, Arts. 18.2 and 18.3; Annex 18.2.
- ⁱⁱⁱ Todd Tucker, "A Bad Trade," *Foreign Policy*, April 18, 2011.
- ^{iv} See generally, Kate Miles, *International Investment Law and Climate Change: Issues in the Transition to a Low Carbon World*, Society of International Economic Law, Working Paper No. 27/08 (2008). www.ssrn.com/link/IIEL-Inaugural-Conference.html.
- ^v The investment chapter of the Colombia FTA, for the most part, follows the template of the 2004 U.S. Model Bilateral Investment Treaty. See generally, Testimony of Robert Stumberg, Professor, Georgetown University Law Center, *Reform of Investor Protections*, U.S. House Committee on Ways and Means, May 14, 2009, <http://waysandmeans.house.gov/media/pdf/111/stumberg.pdf>.
- ^{vi} Adam Liptak, "Review of U.S. Rulings by NAFTA Tribunals Stirs Worries," *New York Times*, April 18, 2004, <http://www.nytimes.com/2004/04/18/us/review-of-us-rulings-by-nafta-tribunals-stirs-worries.html>.
- ^{vii} Colombia FTA, Ch. 10, Art. 10.8.
- ^{viii} Colombia FTA, Ch. 10, Art. 10.15-10.27.
- ^{ix} For example, see: Emergency Committee for American Trade, Statement on the Administration's Review of the Model Bilateral Investment Treaty, July 31, 2009, <http://www.ecattrade.com>.
- ^x *Occidental Petroleum v. Ecuador, para. 191 (UNCITRAL Arb.)(2004)*; See generally, Matthew C. Porterfield, An International Common Law of Investor Rights? 27 U. Pa. J. Int'l Econ. L. 79 (2009).
- ^{xi} Milgranos Salazar, "South America: Rich in Biodiversity, Lagging in Protection," May 20, 2009, Inter Press Service New Agency, <http://ipsnews.net/newsasp?idnews=46926>.
- ^{xii} Nancy Lopez, "Mining and Oil Boom Propel Investment in Colombia," ABC News/Money, August 15, 2010, <http://abcnews.go.com/business/wirestory?id=11405615>. Marcela Valente, "Curbing Foreign Ownership of Farmland," Aljazeera English, May 22, 2011. <http://englis.aljazeera.net/indepth/features>.
- ^{xiii} Friends of the Earth-Europe, Rights and Justice Center, Submission to UN High Commissioner for Human Rights, 29 August, 2008; see also, Cristian Garcia, "Colombia: the Palm Trees' Bloody Oil," *Tropenwald*, 2007. http://www.robinwood.de/german.magazine/200703/94-3-7-kolum_eng.pdf. TransAfrica Forum. Colombia: Policy Overview. <http://transafrica.org/category/policy-overview/latin-america/Colombia>.
- ^{xiv} TD Waterhouse Markets News, "Colombia's Nascent Agricultural Sector," <http://tdwaterhouse.ca/research/public/Markets/Commodities?News?documentkey=1314-N1924182-1>; USDA, Foreign Agricultural Service, Colombia Oilseeds and Product, 2000, 2/1/2000. <http://www.fas.usda.gov/gainfiles/200002/25606984.pdf>; FoE-Europe, *supra*.
- ^{xv} World Wildlife Fund, Choco Colombia, <http://www.klm.com/crs/en//images/choco-en-tcm696-305177.pdf>
- ^{xvi} FoE-Europe, *supra*.
- ^{xvii} Lopez, *supra*; Halifax Initiative, Dirty Business, Dirty Practices, Mining Code Reforms, Direct Support in Colombia, <http://www.halifaxinitiative.org/dirtypractices/mining-code-reforms.html>; <http://www.bdlaw.com/news-862.html>
- ^{xviii} UN News Center, Violent Struggle over Illegal Mining in Colombia Forces Hundreds to Flee, <http://www.un.org/apps/news/story.asp?NewsID=37796&Cr=colombia&Cr1=>.
- ^{xix} Villarreal, *supra*, pp. 5-6; Colombia FTA, Ch. 2, National Treatment and Market Access of Goods; Embassy of Colombia, U.S. Colombia Free Trade Agreement (in the agricultural sector, the U.S.-Colombia FTA fully eliminates the price band system...), http://colombiafta.com/Free_Trade_Agreement.
- ^{xx} Salamanca, Gomez, & Landines, *Impact of the Colombia FTA on the Small Farm Economy in Colombia*, Oxfam International, Bogota, 2009. <http://www.oxfamamerica.org/files/Colombia-fta-impact-on-small-farms-final-english.pdf>.
- ^{xxi} *Ibid.*
- ^{xxii} For a general review of armed conflicts and environment, see, Shambaugh, Oglethorpe, and Hssam, "The Trampled Grass: Mitigating the Effects of Armed Conflict on the Environment," <http://www.worldwildlife.org/bsp/publications>.