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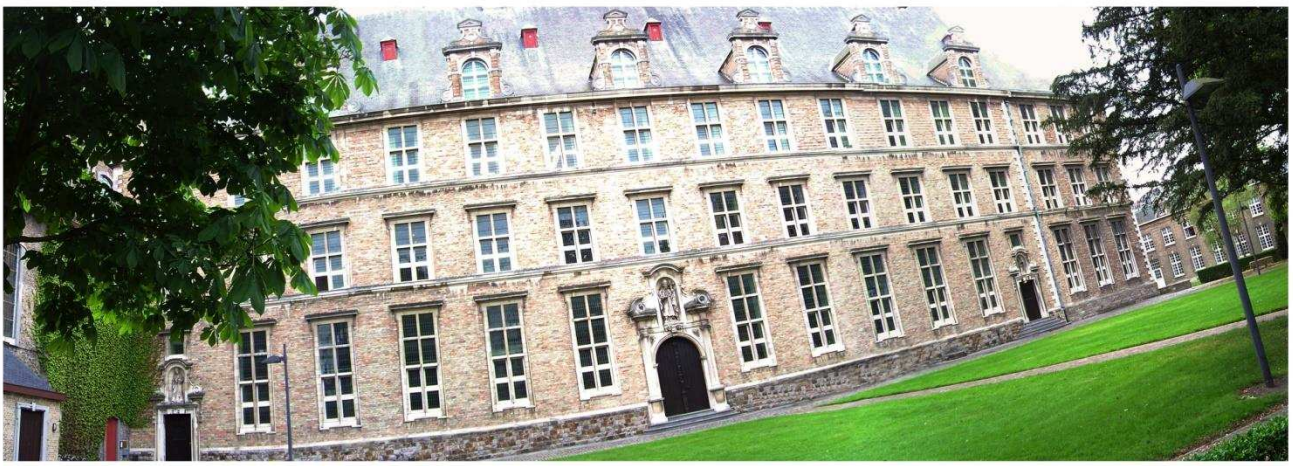
W-2014/13

## Free Trade Agreements and Constitutional Rights: The Ecuadorian Case

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The authors would like to thank Christian Masapanta Gallegos, lecturer in Constitutional Law, and Doreen Montag, Prometeo Professor, at Universidad Andina Simon Bolivar Sede Ecuador for their very useful comments.

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## Abstract

This article discusses how Ecuador's participation in negotiations of Free Trade Agreements (FTA) over the last decade has been shaped by two factors: the involvement of interest groups and other actors who have influenced policy-makers, and the entry into force of a new constitution establishing new principles for the national trade policy, which has a direct impact on trade negotiations. The article is divided into three parts. The first part provides a legal analysis of the terms and scope of the Ecuadorian Constitution of 2008[1] on trade agreements. The second part addresses the application of Constitutional Law in FTA-related matters by public authorities, specifically by the executive branch and the Constitutional Court. Finally, the third part reviews the role of civil society in shaping the content of FTAs and the negotiation process.

[1] Constitution of the Republic of Ecuador, OJ. 449, 20 October 2008.

## Constitution and Trade Agreements

Over the past decade, Ecuador has taken part in two FTA negotiations: 2000-2005 with the United States (US), and 2006-2011 with the European Union (EU). This last negotiation process was completed during the first semester of 2014. The FTAs under negotiation are compatible with the multilateral rules of the World Trade Organization (Article XXIV GATT & Article V GATS). The negotiations also include 'non-trade' matters such as intellectual property, public procurement, foreign investment and the right of establishment.

While the content of both agreements under negotiation is similar, the context in which negotiations took place and their conclusions are completely different. In the case of the United States, the process was bilateral and negotiations were aborted by a decision of the Ecuadorian government, due to commitments made to civil society and interest groups. With the EU, it began as a partnership agreement negotiated as a bloc together with the member states of the Andean Community. In this case, Ecuador initially decided to suspend negotiations because of the repercussions changes in constitutional rules would have had on established rights and principles of foreign trade policy.

The new Ecuadorian rules related to trade, not only provide for a series of principles and rights that are not necessarily compatible with the content of FTAs, but also launched, in accordance with the multilateral trading system, a new negotiation tool called the *Trade Agreement for Development* (TAD). This tool includes political dialogue and cooperation features allowing for the maintenance of a relationship with the counterpart that would go 'beyond trade.'[2] These features make the analysis of the Ecuadorian case a particularly interesting one, since neighbours and partners in the Andean region have already subscribed to FTAs with several partners both within and outside the region.

### Ecuador and Free Trade Agreements

Ecuador, unlike its closest partners in the Andean Community, is a country that does not have an open interest in negotiating Free Trade Agreements. This is demonstrated, for example, by the information contained in the World Trade Organization (WTO) database

[2] Ecuadorian Ministry of Foreign Affairs and Trade, Acuerdos de comercio para el desarrollo (Trade Agreements for Development), http://www.mmrree.gob.ec/acd/docs/noticia003.asp

on the Regional Trade Agreements[3] that have been formally notified. Ecuador is only engaged in three pluri-lateral agreements: the Andean Community, the Global System of Trade Preferences between Developing Countries (GSTP) and the Latin American Integration Association. This database also shows that the neighbouring countries and partners in the Andean Community (Colombia and Peru) both have more than twenty agreements under negotiation.

The lack of openness to negotiating FTAs cannot be attributed to constitutional rules before the entry into force of the Constitution of 2008, but rather related to a factor of continuous shifting political decision-making, which did not allow for continuity and stability. In 2000, there were discussions about the possibility of negotiating an FTA with the US, which were finally made concrete in 2004, when formal negotiations began. The same year marked the start of the negotiations of an EU-Andean Community Association Agreement (which included a free trade agreement as one pillar). These talks were launched at the European Union-Latin America and the Caribbean (EU-LAC) Summit in Guadalajara, Mexico, after an intense process of evaluating the commercial and political relations between both regions.

During the first five years of this century, while the constitution of 1998 was in force and there was a political consensus in favour of negotiating FTAs, there were two negotiation processes in place: a bilateral agreement with the US, and a regional one (as a member country of the Andean Community) with the EU. Civil society and non-state actors represented diverse interests (e.g. businessmen, trade unionists, academia, NGOs, activists). Lobbies were formed by bi-national chambers of commerce, various industries (exporters of agricultural products, seafood, transport workers, etc.) and unionists. However, they did not have significant ability to influence negotiations, much less to define the terms of agreements, which had in fact already been defined by the US and the EU.

In 2005, civil society succeeded in convincing the executive branch to stop negotiating the FTA with the US by arguing it was contrary to the national interest. This decision was entirely political, backed by social sectors (indigenous groups, labor unions, and centre-left wing movements). In 2007, the new government of Rafael Correa raised the idea of changing the structure of government in its entirety. This led to the drafting of a new constitution that would enter into force in late 2008,[4] after a large majority of the population ratified it in a referendum.

[3] See the World Trade Organization database on Regional Trade Agreements (http://rtais.wto.org/ui/PublicMaintainRTAHome.aspx).
[4] Supra note 2.

## Constitutional Rules Relating to Free Trade Agreements and Investments

The Constitution of 2008 established a new form of State, the Constitutional State of Rights and Justice, which has the following basic features according to the Ecuadorian Constitutional Court: 1) the recognition of the Constitution as mandatory rule of governance, 2) the direct application of the Constitution as rule of law, and, 3) the recognition of constitutional jurisprudence as a primary source of law[5].

Similarly, the Ecuadorian Constitutional Court stated that Articles 11.3, 11.5, and 426 of the Constitution establish the principles of effective regulation, direct and immediate application and encouraging the exercise of rights and constitutional norms. They implicitly ensure the rights of people, without the need for a secondary norm to articulate and develop those rights.[6] The Ecuadorian Constitution is based on an ideological trend called neo-constitutionalism, which relies on the care and protection of constitutional rights as the cornerstone of the State (these rights are hierarchically equal in accordance to constitutionalism in Ecuador).[7] However, the ideological standpoint of Ecuador in this regard goes further than European neo-constitutional thought and reflects a number of peculiarities, which tend to generate what many Ecuadorian theorists have called "Transforming Neo-constitutionalism". One of these renowned theorists, Ramiro Avila Santamaría states that

> the term "Transforming Neo-constitutionalism" aims to highlight the legal theories that help understand and construe the Constitution of Montecristi. On the one hand, the term "neo-constitutionalism" gathers the most innovative elements of contemporary constitutionalism developed in Europe since the mid-twentieth century, which marks an important distinction with formalism and legal positivism. Moreover, the term "transforming" aims to show that there is progress in regards to Andean constitutionalism (from the texts in Bolivia and Ecuador, and from case law in Colombia) considered unprecedented in contemporary constitutionalism.[8]

Another feature of the Ecuadorian Constitution is its regulative character as it provides specific rules expressed in *to do* or *not to do* obligations as constitutional imperatives. This is illustrated by the constitutional rule that prohibits the negotiation of international treaties and agreements where Ecuador would be required to cede sovereign jurisdiction

[5] See Constitutional Court of Ecuador, Resolution OJ. 451, 22 October 2008.
[6] See Ibid.
[7] Supra note 2, Art. 11.6.
[8] R. Ávila Santamaría, El neoconstitucionalismo transformador, UASB Ecuador (2011), at 15-16.

to international arbitration bodies in disputes of a commercial nature between the State and private individuals or corporations.[9]

The Constitution of 2008 is an extensive body of laws containing 444 articles that seek to define and directly regulate the branches of government and public policy. For instance, it incorporates a Development Scheme,[10] which is linked to the National Plan for Good Living.[11] Component elements include the enforcement of rights, solidarity, redistribution, care for the environment and natural resources. In this sense, in the national and international context the Constitution is articulated as a system of boundaries and limits of public powers. So, when negotiating international treaties, the representatives of the executive branch (or legislators when it comes to treaty ratification), have to ensure the international treaty is consistent with the constitutional rules and rights as the *conditio sine qua non* for validation. As Agustín Grijalva Jimenez puts it, it is a "protective, egalitarian, participative, and pluri-national constitution."[12]

Ecuador is defined as a "constitutional State guaranteeing rights and justice." This is another feature of the "rights-based" constitution that establishes special rights, such as those related to Good Living (Articles 12-34); Rights of Individuals and Priority Groups (Articles 35-55); Rights of Communities, Nationalities and Peoples (Articles 56-60), Participation Rights (Articles 61-65); Freedom Rights (Articles 66-70); Rights of Nature (Articles 71-74) and Protection Rights (Articles 75-82). The Constitution in effect defines foreign trade as an exclusive competence of the State (Article 261).

The Constitution of 2008 became the supreme law prevailing over any other source, and thus international treaties are subject to its provisions.[13] These treaties are subject to direct constitutional oversight, meaning that all treaties dealing with trade and integration matters must go through a preliminary ruling procedure by the Constitutional Court and the approval of the legislature, before the approval by the executive.[14] The Court carries out a comprehensive and automatic review of the constitutionality of the international agreements related to trade. Despite the complexity of the content, civil society, as well as the President, may call for a referendum to approve any international treaty —even trade agreements.[15]

[9] See Constitution of the Republic of Ecuador, OJ. 449, 20 October 2008, Art. 422.
[10] Ibid., Arts. 275-278,
[11] In Spanish Plan Nacional del Buen Vivir, see Ibid. Art. 280.
[12] See Agustín Grijalva, "Prólogo" in R. Ávila Santamaría, El neoconstitucionalismo transformador, UASB Ecuador (2011), at 7.
[13] See, supra note 9 at Art. 417.
[14] Ibid., at Art. 438.1.
[15] Ibid., at Art. 420.

The following paragraphs highlight some of the special rules that the constitution provides for international trade instruments. The constitution makes clear that the application of international trade instruments "shall not affect, directly or indirectly, the right to health, access to medicines, supplies, services, or scientific and technological advances."[16] Importantly, constitutional limitations to resolve disputes between the State and individuals or corporations, in contracts or international trade agreements, have to be settled through international arbitration. This is unless it is a dispute between States and citizens in Latin America[17] (revival of the Calvo doctrine), where state sovereignty cannot be placed at the same jurisdictional level in international contracts as the concerns of domestic or foreign citizens and entities (individuals or corporations).[18] On this topic, the Ecuadorian Constitutional Court[19] has developed a line of jurisprudence that has been the basis for the claim of so-called treaties on the promotion and mutual protection of capital investments between Ecuador and various states. In this regard, the Court has defended the view that accepting a dispute resolution mechanism in which private entities that are on par with states would undermine the principle of supremacy of the Constitution.

The Court stated that according to current constitutional practice, nothing is exempt from judicial review. Therefore, it rejected the creation of these *ad hoc* tribunals for the settlement of disputes that may arise from the agreements, since that would contradict not only constitutional provisions, but would be an attack on the sovereignty of the people articulated through the Constitution. The Court, following this line of argument, has indicated that for these differences the State cannot be subject to the findings of arbitration tribunals, since that would mean delegating the sovereign jurisdiction of the Ecuadorian State to the authority of international arbitration in contractual or commercial disputes between Ecuador and private individuals or corporations.

Finally, the Constitutional Court has affirmed the view that settlements by these *ad hoc* tribunals could cause serious damage to Ecuador. The Court has been keen to uphold the spirit of Article 416 of the Constitution, which states that:

> Ecuador's relations with the international community respond to the interests of the people of Ecuador, who will report to their managers and implementers, and thus: [...] 12. - Promotes a new system of Trade and Investment between States that relies on justice, solidarity, complementarity, the creation of international

[16] Ibid., at Art. 421.
[17] Ibid., at Art. 422.
[18] Gillman, 'The End of Investor-State Arbitration in Ecuador? An Analysis of Article 422 of the Constitution of 2008', 19 *ARIA* (2009) 2, at 269-300.

[19] Case 0006-10-TI**,** dictamen 023-10-DTI-CC, 24 June 2010.

> mechanisms to control multinational corporations and the establishment of an international financial system, fair, transparent and equitable.[20]

The constitution consistently uses the term "sovereignty." For instance, it contains a chapter on economic sovereignty, which aims to

> "promote domestic production, systemic productivity and competitiveness, the accumulation of scientific knowledge and technology, strategic integration into the global economy, and productive complementary activities into regional integration".

This economic sovereignty is complemented by the development regime, which is composed of "[...] an organized, sustainable and dynamic group of economic, political, socio-cultural and environmental systems guaranteeing the realization of Good Living, sumak kawsay."[21] Good living is enshrined as a constitutional right, so the comprehensive interpretation of the constitution leads to the conclusion that this right resonates throughout the Ecuadorian constitutional framework. Trade policy is an alternative tool that must be used to promote the country's strategic integration into the global economy, to promote the development of economies of scale and *fair trade*.[22] In international relations, the fundamental law of Ecuador "encourages a new trade and investment system between the States that is founded on justice, solidarity, and complementarity."[23] It also supports the establishment of international control mechanisms for multinational corporations and the creation of a fair, transparent and equal international financial system, which is to say creating an alternative system to replace the existing structure of multilateral trade.

Competition with foreign economies is not considered a healthy practice. However, cooperation or complementarity is encouraged, reflecting a classical view of integration and trade relations, shared with political partners of the political integration structure of ALBA:

> The economic system is social and supportive and recognizes individuals as subject and purpose; it tends to create a dynamic and balanced relation between the society, the State and the market, in harmony with nature, and aims to

[20] See, supra note 9 at Art. 416.
[21] Ibid. at Arts. 275-276.
[22] Ibid. at Art. 304.
[23] Ibid. at Art. 416.

ensure the production and reproduction of material and intangible conditions that make good living possible.[24]

This principle places society, the State and the market on an equal footing and balance, all in harmony with nature (*pachamama*), so as to attain the so-called threshold of "good living." The current economic model promotes export and import activities in a selective and conditional way, and applies a protectionist approach to domestic producers, citizens and nature (recovery of market forces).

One of the objectives of the National Plan for Good Living 2009-2013 was as follows: "Ensure the sovereignty and peace, and promote the strategic insertion in the world and Latin American integration."[25] The Plan's strategy to achieve this goal is to create a new international "multi-polar order" with emphasis on the people. This new order will be one which favours multi-lateralism in its institutional architecture and promotes "alternative" integration processes, development cooperation and a harmonic political dialogue. The Constitution and the Plan fail to make reference to free trade or free markets, instead opting for endogenous growth, industrial exports to varied recipients, and diversifying the origin of imports.

## Application of Constitutional Rules in FTA-Related Matters by the Public Authorities

### The New Framework for Trade Negotiations

In Ecuador, the constitutional control of FTAs throughout a governmental period is limited to actions by the executive power as part of the daily management of State affairs. This is done through the National Secretariat of Planning and Development (SENPLADES), the institution that defines public policy through the Plan of Good Living, and the Ministry of Trade and Integration, which is the institution charged with the implementation of Ecuador's foreign trade policy.

[24] Ibid. at Art. 283.
[25] Secretaría Nacional de Planificación y Desarrollo SENPLADES, Plan Nacional para el Buen Vivir 2009-2013: Construyendo un Estado Plurinacional e Intercultural (2009), at 78.

The Ministry implements public policies, established in a main framework by SENPLADES, to build on an active trade policy that allows diversifying markets and products, consolidating Latin American integration, reducing imports through alternative instruments, and supporting a change in the consumer culture.[26] To run a trade policy consistent with the Constitution of 2008, the government defined Trade Agreements for Development (TADs) as a line of action to negotiate with trading partners who are willing to engage in TADs instead of concluding FTAs. The TADs are compatible with the principles of multilateral trade at the WTO. Nevertheless, they also contain specific clauses on non-trade issues such as intellectual property, market access, services and investment and public procurement. As a special feature, the TADs articulate political dialogue and cooperation elements in order to establish a comprehensive relationship with trading partners, favouring the transfer of technology and investment targeted in non-traditional sectors of the economy and small and medium-sized enterprises (SME).[27] The Foreign Trade Committee (COMEX) approved the official content of the TADs in March 2012.[28] For the time being, we consider the most important agreement of this kind has been concluded with the EU in July 2014. It was negotiated in similar conditions like those signed with other Latin American partners (Peru, Colombia and Central America).

In essence, the TADs would be similar to the Economic Partnership Agreements (EPAs) that the EU has negotiated, or is negotiating, with the African, Caribbean and Pacific Group of States (ACP) under the Cotonou Agreement. EPAs with ACP countries are peculiar for a number of reasons. Firstly, these are more extensive than conventional FTAs because of the focus on the development of a country or region, considering their socio-economic circumstances, and the inclusion of cooperation and assistance issues for implementation. Secondly, these agreements establish a comprehensive framework for cooperation in areas such as trade in services and trade facilitation. Thirdly, these seek to strengthen the regulatory structure of States to promote an attractive legal framework for foreign direct investment.[29]

However, the terms of the TADs differ from EPAs. While the development of trade in goods and services are compatible with Article XXIV of GATT and V of GATS, their content is broader on commercial matters. They do not specifically include sections on political dialogue and development cooperation. Meanwhile, the section on trade for development has chapters on investment, trade and sustainable development, which

[26] SENPLADES, Sovereignty, supra note 25 at 61. See, SENPLADES, Plan Nacional para el Buen Vivir. 5 años de revolución ciudadana (2012), at 31.
[27] The Trade Agreement for Development text could be consulted in (http://www.aebe.com.ec/Desktop.aspx?Id=19&art=10154).
[28] Foreign Trade Committee, Resolution 39, OJ. 651, 1 March 2012.
[29] See the Economic Partnership Agreements (EPAs) between the EU and African, Caribbean and Pacific group of countries in (http://ec.europa.eu/trade/wider-agenda/development/economic-partnerships/).

generate a similarity in the definition of the structure between the TADs and the Association Agreements set by the EU.[30] The chapter on trade and sustainable development contains special provisions relating to labour standards, multilateral agreements and the environment, trade relations, sustainable development, biodiversity, climate change, migrant workers, fair trade and SMEs and craft production.

The inclusion of these sections, chapters and articles gives a special character to the TADs. On the one hand, they provide guidelines for negotiation and, on the other hand they provide a different perspective of agreements. The agreements reflect the interest of the state, to define a framework for its trade policy, which is directly linked to the interests of social and productive actors. This is different from the EPA or Partnership Agreements proposed by the EU, whereby the EU tends to mainly determine the issues and trading conditions from the European perspective, both in terms of cooperation, commercial or geopolitical interests.

## The Scope of the Trade Agreements for Development (TADs)

The TADs are trading instruments that establish the terms that Ecuadorian negotiators should use to match the implementation of trade policy with the existing constitutional rules without jeopardizing commitments in the areas previously defined under multilateral, integration, association, regional arrangements such as the Andean Community (CAN) and the Latin American Integration Association (ALADI). The goal of the new Ecuadorian trade policy framework is to make proposals that reflect the ambitions of fair trade and endogenous development indicated by TADs terms. They take into account that those proposals are limited by the nature of an open international trading system.[31] However, this has not negatively impacted the definition of specific terms on development issues in trade relations, including political dialogue and cooperation linking human rights issues, migration, and combating corruption. But they are found in other agreements, such as the EPAs.[32]

[30] See, supra note 27 at 1-8.
[31] Estévez, '¿Hacia dónde va la política comercial ecuatoriana? Nuevos elementos normativos en el ámbito comercial y sus implicaciones para el Acuerdo Comercial Multipartes con la Unión Europea', IAEN (2012) 1, at 30-32.
[32] S. Woolcock, 'EU policy on preferential trade agreements in the 2000s: a reorientation towards commercial aims' (Paper for the UNU-CRIS conference on constitutional issues in EU free trade agreements, Bruges, West Flanders, Belgium, 19 February 2012).

The inclusion of pillars of political dialogue and cooperation in trade agreements generally corresponds to political and strategic interests of the party that initiates them. In specific trade negotiations, as in the case of FTAs, these provisions would be subject to other kinds of agreements and negotiations. In the case of TADs, the aim of the Ecuadorian negotiators has been to maintain and strengthen endogenous development policies and fair trade. These are policies that the State promotes through its constitutional provisions dealing with such aspects including export promotion through SMEs, improving distribution technologies, policies upholding sovereignty and food security, among others; all in a bid to enhance economic development.

TADs contain a comprehensive section on trade for development.[33] The text approved by the COMEX laid down rules on national treatment and market access for goods, rules of origin, competition, sanitary and phytosanitary measures, trade protection, subsidies, technical barriers to trade, trade in services, investment, and trade and sustainable development, which are all fields covered by the multilateral trading system, found in conventional trade negotiations. However, within the conventional negotiation framework, governmental parties have sought to innovate by creating some mechanisms such as S&D provisions for LDCs. This is necessary because when trade complementarity is applied to the competition regime in a context of trade relations based on solidarity, discrepancies on restrictions of merchandise trade are hazardous or damaging to the sustainability of the nature of the territory of the other party. In the case of safeguards, they include a specific measure that is applied in the framework of Andean Community agreements to safeguard economic development.[34] The TADs protect public interests through measures that protect the procurement of services by state agencies and the expropriation of property for reasons of public interest. These are commitments that are established in the multilateral trading system, i.e. negotiations of conventional trade agreements. Within the chapter on trade and sustainable development, innovative aspects of TADs remain, which are consistent with the spirit of the Ecuadorian Constitution. Those innovative aspects, such as the importance of fair trade, trade for sustainable development, sovereignty and support for small and medium-sized production units are designed in accordance with the National Plan for Good Living.[35] Additionally, that chapter refers to international conventions on labour migration, biodiversity, climate change, the environment, and migration. These are also found in other preferential agreements such as the EU's, which include the strengthening of

[33] See, supra note 27 at 16-71.
[34] Estevez, supra note 31, at 32-34.
[35] Ibid., at 34-36.

regional blocs, political cooperation, and human rights protection, established as provisions of "soft law."[36]

The scope of these provisions in a trade agreement, whether preferential or trade for development, depends on the level of commitment by the State and is based on political and strategic interests. The jurisdiction of each party is responsible for compliance and to ensure the provisions are included for monitoring agreements. What remains in doubt is the ability of each party to decide on the suspension of the agreement in the case of a breach of terms of sustainable development. The government uses this legal instrument to implement the constitutional rules on trade policy and the policies outlined in the plan of Good Living.

## Constitutional Court actions on Free Trade Agreements and Constitutional Rights

The Constitutional Court is the structure established by the Constitution of 2008 to interpret, control and manage constitutional justice.[37] At the time of writing, Ecuador had not concluded FTAs with other countries or regions, so the Court has not had occasion to issue any preliminary and binding rulings on the constitutionality in this area. However, the Court has, at the request of the President, ruled on a related topic through a preliminary ruling procedure to denounce bilateral investment protection agreements signed by Ecuador during the 1990s. The grounds for the complaint was the existence of provisions that subject the State to international arbitration to resolve disputes arising with an investor (individual or corporation), which involved giving up the "Jurisdiction of the State." This was held to be inconsistent with the provision (Article 422) of the Constitution of 2008.[38]

## Civil society input to the definition of the content of FTAs and the negotiation process

Ecuador's civil society form a diversity of structures that represent traditional sectors such as production unions, labour, ethnic, thematic interest groups (environmental, political, religious) or academic entities. For civil society, FTAs represent either

[36] Woolcock, Sustainable development provisons, supra note 33.
[37] See, supra note 9 at Art. 436.
[38] Gillman, Investor-State Arbitration, supra note 18.

opportunities or threats, depending on which sector or political orientation they represent. The groups whose positions can be easily identified are business interests who consider it necessary to negotiate trade agreements with other countries or regions, and political groups and local organizations that believe it would be disastrous for the country's sovereignty to conclude any kind of agreements. Other social groups are more or less favourable to agreements; depending on if it can be shown by the results in the mid-term reviews that they are suitable for the country.

From studies carried out on the subject in Ecuador, both domestically and internationally, it is clear that most civil society actors do not possess sufficient knowledge on the content and scope of trade agreements. Their views on these negotiations are often based on press reports, comments from experts, analysis of areas related to the negotiation or information coming from the government. Ignorance of the subject, together with persuasion by political and trade association leaders, resulted in the interruption of the negotiation of the US FTA in 2005. At that time, civil society supported the President on the condition that he did not follow the trade policies of his predecessor. The position of the political and social actors opposed to FTAs was instrumental in the decision to include in the Constitution of 2008 rules defining an alternative trade policy. The goal was to secure a fundamental law that did not refer to the market economy, which they considered a neo-liberal concept.

"Alternative" trade rules included in the Constitution do not sidestep the fact that Ecuador is part of the Multilateral Trading System and that it is subject to an international regime that defines the basis for negotiating at the global level. Social sectors are sensitive to specific issues in the negotiation of FTAs[39] - specifically in the case of the EU. The reduction or elimination of tariffs on agricultural products compete directly with goods produced with high levels of technology (GM seeds, agrochemicals), negatively affecting local farmers and their ancient agricultural practices. This openness directly affects the objective of food sovereignty, the development of policies to encourage domestic production and sovereignty over biodiversity.[40] In terms of intellectual property, it affects the health, agriculture, ancient knowledge and biodiversity. Patent protection, test data, and double use of drug patents for extended periods of time all pose the risk of generating monopolies that limit the right of access to medicines, including generic drugs. In this case, the application of international treaties

[39] See, Ecuador Decide, *Negociaciones con la UE ¡Un TLC disfrazado de Acuerdo de Asociación!*, (2011), at 1-20. H. Jácome, *El retorno de las carabelas: Acuerdo comercial multipartes entre Ecuador y la Unión Europea*, FLACSO (2012). Espinosa, 'Sobre el supuesto retorno de las carabelas o las negociaciones comerciales como una forma de neocolonialismo', AFESE (2012) 57, at 127-132.

[40] See, supra note 9 at Arts. 281, 334.4, 400.

can directly or indirectly affect the right to health, access to medicines, supplies or services.[41] The ability to patent the genes of living organisms (plants and animals) and traditional knowledge accumulated by communities threatens the "privatization of ancestral knowledge" by foreign companies that are keen to take advantage of this possibility.

This is contrary to the law of the State to exercise sovereignty over biodiversity and the prohibition of granting rights, including intellectual property rights over products originating from the collective knowledge associated with national biodiversity.

Regarding investment, it promotes "indirect expropriation" by allowing the declaration of a breach of the agreement and the possibility to sue the State if it establishes rules affecting foreign investment (e.g. taxation, the environment, consumer protection regulations), and submits the State to international arbitration to settle disputes arising from disagreements with private investors. In addition, the mechanisms that regulate international trade, such as the principles of most-favoured-nation (MFN) or national treatment, allow foreign investors to practice unfair competition. In this case, this is done contrary to the prohibition of entering into agreements or international instruments under which the State forfeits sovereign jurisdiction in favour of international arbitration.[42]

In public procurement, the requirement to give equal treatment to foreign and domestic firms in public tenders for services in strategic sectors (water, energy, and telecommunications amongst others) threatens the provision of public services and access for the entire population, regardless of economic capacity.

The Constitution states that public procurement must comply with the criteria of efficiency, transparency, environmental quality and social responsibility. Services and domestic products are prioritized, especially those originating in the real economy.[43] The State has made these approaches key issues for negotiation in the trade agreements (such as that with the EU) through the mechanism of TADs. The different views on negotiating trade agreements have allowed TADs, as a mechanism for implementation of trade policy of the State, to include some aspects of trade compatible with the WTO while proposing an alternative approach in non-trade sectors considered sensitive to civil society. Similarly, there was a breach between decision-makers within the Ministry of Trade and Integration and those from the Ministry of Foreign Affairs: while some are

[41] Ibid., supra note 9 at Art. 421.
[42] Ibid., supra note 9 at Art. 422.
[43] Ibid., supra note 9 at Art. 288.

open to negotiations (trade and integration), others have resisted the prospect of negotiating any kind of trade agreement (foreign affairs).[44]

## Conclusions

A protective State and the adoption of European neo-constitutionalism adapted to the Ecuadorian scenario has set constitutionalism in Ecuador apart from the international context. One of the main contentious topics is the legal enforceability of human rights in an egalitarian and equitable fashion in pursuit of the principle of non-hierarchization of constitutional rights, which accommodates new regulatory and institutional proposals in order to guarantee its effectiveness. The constitutional right to Good Living or *Sumak Kawsay* is one of the main cornerstones of Ecuadorian constitutionalism in economic and trade matters, given that it is pursued through trade and public policy, where planning plays a strategic role. The Ecuadorian Constitution contains specific rules addressed as imperatives to *not do* something; an example of this is the prohibition on negotiating agreements where Ecuador cedes sovereignty to international arbitration mechanisms. This constitutional rule creates difficulties for Ecuador's bilateral trade relations with other states.

The outcome of the negotiations can only be described as uncertain. There are three main factors influencing this uncertainty: the political context, social reforms and misunderstanding of the situation. The political context where, over five years, the government has provided some degree of stability after the succession of short-lived governments at the beginning of the millennium, has helped build a platform for social strength, where the institutions and laws have provided space for all groups in civil society to express their views. This has in turn generated conflicts. Social reforms have constituted a shift in the way of organizing / thinking in and of society. The philosophy of Good Living, bringing ancestral concepts and knowledge into our present day lives, is the point of departure for all the changes that are taking place at the State level and in all other spheres of society.

Civil society, which has an important role in these issues, has failed to provide a firm and coherent view of the negotiation process due to the lack of objective positions and spokespersons who explain the issues clearly to the public. Agreements are seen as only

[44] Until 2012 the Ministry of Foreign Affairs, Trade and Integration was in charge of the foreign affairs and trade policies and negociations. Since then the gouvernment decided to separate trade from foreign policy creating the Ministry of Trade and Integration.

coming from the North and are judged as such. Now more than ever, lobbying by the most well connected special interest groups is decisive in the conclusion of any kind of commercial negotiations. Arguably one can expect that consensus on these issues would only be reached on the basis of objective information provided together with an in-depth analysis of the impact of negotiating such agreements with trading partners.