

# **CONDUCTING A HUMAN RIGHTS IMPACT ASSESSMENT OF THE CANADA-COLOMBIA FREE TRADE AGREEMENT: KEY ISSUES**

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# CONDUCTING A HUMAN RIGHTS IMPACT ASSESSMENT OF THE CANADA-COLOMBIA FREE TRADE AGREEMENT: KEY ISSUES

## 1.0 INTRODUCTION

The Parliamentary Standing Committee on International Trade (CIIT) has recommended that a Human Rights Impact assessment (HRIA) be carried out of the Canada-Colombia Free Trade Agreement (FTA). This paper explores some of the key issues that need to be considered in working towards the implementation of this recommendation. Section II explores what an HRIA is and what it can be expected to achieve. Section III sets out details of previous human rights impact assessments and social impact assessments of trade agreements and, on the basis of these experiences, makes a series of recommendations regarding how the Canada-Colombia FTA assessment should be conducted. Section IV considers the Recommendation of the CIIT for an HRIA, and suggests a model for oversight of the process. Section V provides outline methodologies for assessing the impacts of different types of FTA provisions – agricultural liberalisation provisions, investment provisions and labour protection provisions. Section VI summarises the key steps that should be demanded of any HRIA of the Canada-Colombia FTA and suggests some follow-up strategies. Finally, Appendix 1 provides references to key resources, which will be useful in further work on HRIAs of trade agreements.

It is generally assumed throughout that the focus of the HRIA will be on the human rights impact of the FTA in Colombia rather than Canada, unless otherwise stated. This was the focus of the Standing Committee on International Trade and there do appear to be a far greater range of potential human rights impacts of the FTA in Colombia as opposed to Canada. The methodological approach would not change should the focus be instead on the potential for human rights violations in Canada.

## 2.0 WHAT IS A HUMAN RIGHTS IMPACT ASSESSMENT (HRIA) OF A TRADE AGREEMENT?

### 2.1 Key Characteristics of HRIAs

Impact assessments are an increasingly widely-adopted tool for evaluating the effect of policies, programmes and regulatory interventions across a wide range of different fields.<sup>1</sup> Economic, social and environmental assessments have been particularly prevalent forms of impact assessment. Human Rights Impact Assessments (HRIAs) are also an increasingly widely used instrument to assess the impact of policies, programmes, projects and interventions on human rights. Their aim is to help prevent or otherwise address violations of human rights. Before being recognised as a separate form of assessment, human rights impact assessment was considered as part of social impact assessment, but more recently a number of actors have begun to utilise it independently. HRIAs have been used to examine the impact of development programmes on

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<sup>1</sup> See the International Association for Impact Assessment at <http://www.iaia.org/modx/>

beneficiary countries, the impact of domestic government policy and legislation on protection of human rights, the human rights impact of multinational companies (MNCs), and the extent to which human rights non-governmental organisations (NGOs) have achieved their policy aims and objectives. The Human Rights Impact Resource Centre provides details of many of these assessments, as well as methodological guidance on how HRIAs might be carried out.<sup>2</sup>

All HRIAs are concerned with attempting to measure concrete human rights impacts through some form of evidence-based analysis (as opposed to a purely theoretical hypothesis). But because the concept of human rights impact assessment has evolved in a very piecemeal fashion and has been used by a wide variety of different actors for different purposes, the term can mean very different things to different people. There is certainly no one size fits all model to impact assessment and the model adopted, as explored below will depend on the nature of what is being assessed as well as a series of strategic decisions made about that assessment process, in particular the time frame within which it must be produced. It is therefore necessary to consider key features of an HRIA of the Canada-Colombia FTA before exploring how it might best be carried out.

## **2.2 Key Characteristics of an HRIA of the Canada-Colombia FTA**

HRIAs will differ greatly depending on the type of assessment being undertaken. We therefore need to understand key features of what will be assessed in the Canada-Colombia Free Trade Agreement in order to understand what type of HRIA needs to be carried out:

- ❑ **The Timing of the Assessment:** HRIAs can take the form of both *ex ante* assessments (undertaken before or during the negotiation of a new rule or policy), and *ex post* assessments (undertaken with regard to rules or policies after a period of implementation). The Canada-Colombia FTA is an *ex ante* assessment. *Ex ante* assessments present more complex methodological challenges. In *ex post* assessments, it is possible to consider evidence of the actual impact of the trade agreement that is in force, and attempt to measure actual impacts on the population in question. In an *ex ante* assessment like the Canada-Colombia FTA, this is not possible because the impacts have not yet happened. Therefore we need to find mechanisms for measuring *potential* impacts of the agreement.
- ❑ **The Subject-Matter of the Assessment:** The HRIA of the Canada-Colombia Free Trade Agreement (FTA) seeks to assess how *the legal obligations of that agreement* will affect the human rights of people in Canada and Colombia and the legal human rights obligations of the States involved.. It will therefore be very different from an HRIA that assesses the impacts of a particular project or programme of activities (e.g. a development co-operation programme, the construction of a pipeline) or those that assess the impact of an organisation (e.g. multinational companies, NGOs). The focus on international trade law obligations and their impact at the national level means that a specific methodological approach must be developed, particularly in relation to complex issues of causation (e.g. how might we demonstrate whether agricultural liberalisation commitments have caused human rights violations among semi-subsistence farmers?).

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<sup>2</sup> The Human Rights Impact Resource Centre can be found at <http://www.humanrightsimpact.org/>.

- ❑ Different approaches will also be required to measure the impact of different types of provisions within the FTA. In particular, the HRIA may assess both provisions of the FTA that directly aim at the protection and promotion of human rights (e.g. any Labour Side Accord) and provisions that have an indirect human rights impact (e.g. agricultural liberalisation provisions, investment provisions, etc.). Examples of such different approaches are provided in Section V below. The fact that the Canada-Colombia FTA is a bilateral trade agreement is also relevant. There is generally very limited transparency in the context of such bilateral negotiations even when compared, for instance, to the WTO context. During the negotiation process, no draft text was publicly available of the Canada-Colombia FTA, and attempts at public consultation over the process were negligible. This means that, as well as the substantive provisions of the FTA itself, the HRIA should also consider assessing key procedural mechanisms of the negotiation process and the extent to which they have promoted transparency and participation in accordance with key human rights principles.
- ❑ **The Time Period of the Assessment:** It is a key feature of this HRIA that, as recommended by the CIIT, it must be carried out before the Canada-Colombia FTA has been ratified so that the findings can be taken into account in the decision to ratify / amend the FTA. This means there is a very short timescale for any assessment (a few months, one would assume). There is therefore a trade-off between the optimal methodology for the HRIA and a methodology that produces a timely output. In the former we would want extensive and long term consultations with potentially affected communities, original case studies of a range of other countries, specifically commissioned economic analysis of the FTA, etc. In the latter scenario we may have to rely on more limited consultations and case studies and existing economic analysis so far as it is available. This trade-off will be explored further below. If the FTA is ratified without an HRIA, then consideration should be given to an ex-post assessment. In such a scenario, the time period of the assessment will be less crucial, but other methodological issues will arise, which are identified in the final section of this paper.

### **2.3 Limitations of the HRIA in the Context**

All *ex ante* HRIAs are concerned with attempting to measure potential human rights impacts of the trade agreement in question through some form of evidence-based analysis. An HRIA of the Canada-Colombia FTA therefore seeks to address what will be the likely concrete human rights impacts of various aspects of the agreement (e.g. investment provisions) on the human rights of the affected populations. It must therefore be recognised that an HRIA of the FTA will not be able to address some of the more fundamental ideological schisms that may have an influence on this debate. For example, it cannot effectively engage in an ideological discussion about the purposes of or overall justifications of the neo-liberal trade agenda. Nor will it be able to pass judgment on whether a country should be *eligible* for a trade agreement.

An HRIA is also highly unlikely to be able to provide objective and undeniable truths about the impacts of an FTA. Predicting future outcomes inevitably involves a degree of conjecture, based on analysis of the local context and the terms of the agreement, which is open to dispute. But an HRIA, when taken up seriously is an important step of due diligence in meeting human rights obligations, and can ensure trade policy-makers confront a range of issues that would not normally be part of the mainstream trade agenda, such as the degree of impact of trade obligations on poor producers in terms of their access to food, land, livelihood, education,

healthcare and housing, etc. As a result, both the methodology and conclusions are likely to be highly contested by those who doubt the relevance of human rights to trade debates.

For HRIAs of trade agreements to maximise their effectiveness, they need to engage those audiences beyond the human rights community who have power with regard to trade policy. This is why coherent methodological frameworks and clear and directed recommendations for actions are absolutely vital. The dangers and limitations of a poorly constructed HRIA will differ depending on who produces them. If the HRIA is produced only by those with expertise and interests in human rights, they are likely to sing only to the choir, and fail to influence key non-human rights actors.

On the other hand, poorly constructed or unbalanced impact assessments produced by key government actors (e.g. government ministries) might be utilised in future to short-circuit important debates about the human rights impacts of FTAs. It has been suggested, for instance, in relation to EU impact assessments in other fields that evaluations that are made by unaccountable policy experts may then be viewed as providing definitive conclusions about human rights impact, rather than critically evaluated by politicians, judges, etc.<sup>3</sup> If an assessment concludes there is no substantial human rights impact of an agreement, it may be difficult to force policy-makers to re-engage with the issues (“We have undertaken an assessment and there is nothing to worry about!”).

### **3.0 LEARNING FROM EXPERIENCES OF PREVIOUS IMPACT ASSESSMENTS OF TRADE AGREEMENTS**

#### **3.1 Description of the Key Human Rights / Social Impact Assessments**

There have been two HRIAs of trade agreements that provide some potential lessons for how any Canada-Colombia HRIA should be carried out. In addition, there are a much greater number of impact assessments of trade agreements that conduct some form of social impact assessment of the trade agreement in question. The approach taken by these social impact assessments (SIAs) is also very relevant, in that they cover many of the same issues that HRIAs cover, albeit using a different methodological approach (e.g. how will the health of the population be affected by intellectual property provisions that restrict access to generic medicines). Details of the key assessments are set out below:

- ❑ In 2006, the Thailand National Human Rights Commission (TNHRC) produced a draft report of what was widely reported as the first national HRIA of an international trade agreement. TNHRC considered the human rights implications of the free trade agreement that Thailand had been negotiating with the US before the military coup in Thailand stalled those talks. The draft report covers four substantive areas – agriculture, environment, intellectual property, and services and investment – as well as the process of negotiation and the apparent lack of public participation and dissemination of information in this process. It is an *ex ante* assessment, in that it assesses the potential future impact of the Thailand-US bilateral trade agreement.

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<sup>3</sup> See Helen Toner. Impact Assessment and fundamental rights protection in EU law *European Law Review* Vol.31 316-341 at 337.

- ❑ The second HRIA was produced in 2007 and consisted of three studies commissioned by the Ecumenical Advocacy Alliance (EAA) in collaboration with FIAN. It considered the impact of trade liberalisation on the right to food of rice farming communities in Ghana, Honduras and Indonesia.<sup>4</sup> It is an *ex post* assessment, in that it assesses past impacts of trade liberalisation in each of these countries. While its findings are more relevant to the States, responses to the structural adjustment programmes of the IMF and the World Bank, the methodological framework is directly applicable when considering liberalisation commitments of international trade agreements.
- ❑ The EU systematically conducts economic, social and environmental impact assessments of all major multilateral and bilateral trade negotiations. These are known as Sustainability Impact Assessments. Social impacts are measured separately according to social indicators and impacts are assessed as of greater / lesser / no significance.
- ❑ The United Nations Environment Programme has over thirty years of experience of conducting environmental impact assessments of trade agreements. Over the last decade it has also developed an impact assessment methodology that incorporates integrated environmental, social and economic assessment.
- ❑ Other “social” impact assessments of trade agreements have tended to be conducted on an ad hoc basis by a range of different actors – national governments, NGOs, intergovernmental organisations or academic institutions. The greatest number of these impact assessments have been conducted in Central and South American countries. Others have been undertaken in Australasia, the Pacific region and Africa. Altogether, extensive research of existing impact assessments of trade agreements identified approximately 30 assessments that contained some kind of social impact analysis.

A table with electronic links to the majority of these impact assessments can be accessed through the University of Nottingham Human Rights Law Centre website.<sup>5</sup>

### 3.2 **Key Findings**

On the basis of extensive analysis of the above assessments, which has been undertaken by this author elsewhere,<sup>6</sup> there are clear lessons to learn for conducting an HRIA of the Canada-Colombia FTA:

1. **The Legal Obligations and Key Principles of Human rights Must be Central to the Assessment:** In the Thailand HRIA, key principles of human rights are often absent from the assessment process. On agriculture, for instance, the report makes no explicit reference to the

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<sup>4</sup> Armin Paasch (editor), Frank Garbers and Thomas Hirsch. “Trade Policies and Hunger: The Impact of Trade Liberalisation on the Right to Food of Rice Farming Communities in Ghana, Honduras and Indonesia” (Ecumenical Advocacy Alliance, 2007) available at [http://www.e-alliance.ch/trade\\_policiesandhunger.jsp](http://www.e-alliance.ch/trade_policiesandhunger.jsp) .

<sup>5</sup> [http://www.nottingham.ac.uk/law/hrlc/business-trade/Human\\_Rights\\_Impact\\_Assesments.php](http://www.nottingham.ac.uk/law/hrlc/business-trade/Human_Rights_Impact_Assesments.php).

<sup>6</sup> See James Harrison, Alessa Goller. “Trade and Human Rights: What Does Impact Assessment Have to Offer?” (2008) Human Rights Law Review 8 (4) Forthcoming.

poorest and most disadvantaged farm workers, as we might expect from a human rights perspective. In the discussion of the services and investment provisions of the agreement, the focus is on broader social issues (e.g. the impact of the agreement on the tourism industry) without reference to relevant human rights standards at all. In contrast, the EAA study begins by setting out a detailed methodological framework for the right to food, based upon the International Covenant of Economic Social and Cultural Rights and the General Comments of CESCR. In each country report, macro and micro-level analysis is evaluated in terms of this methodology, and an assessment is made of the extent to which relevant State actors and international institutions have met their obligations in terms of their obligations to protect, respect and fulfil the human rights of relevant populations (the Ghana case study is by far the most successful in utilising this methodology).

**Recommendation:** The Canada-Colombia HRIA must be based on an explicit evaluation of the impact of trade law obligations on relevant, codified human rights obligations that apply to the State in question. Otherwise there is a danger that human rights become merely window-dressing for the assessment. Relevant obligations should be clearly and fully explained. Guidance from expert bodies, such as the General Comments of the Committee on Economic Social and Cultural Rights, should be utilised to flesh out the content of obligations. A set of indicators will need to be developed by which impacts can be measured.<sup>7</sup> The impacts of trade law obligations must then be measured against the relevant human rights standards to see if violations of human rights will occur.

- 2. Findings should be Limited to Impacts of Specific Provisions Within the Trade Agreement:** Existing HRIAs of trade agreements have focused upon particular violations that might occur as a result of specific aspects of trade-related policy (e.g. how do liberalisation requirements in agriculture affect the right to food of local communities). HRIA methodologies may in time develop sufficiently to allow us to assess the human rights impact of all the areas covered by an FTA and to weigh and balance positive as well as negative impacts. But attempting to measure the *overall* human rights impact of an agreement is a monumentally complex task, particularly given the potential for long, intermediate and short term impacts. Attempts to measure the overall “social” impact across an entire trade agreement have tended to become superficial exercises. Instead many of the better SIAs have conducted initial scoping studies that identify the key issues for further analysis in the full assessment study. There is no recognised methodological framework for carrying out such a scoping study, and different HRIAs tend to use very different methodologies. The most detailed guidance on how such a process should be carried out is in relation to the EU Assessments and there is also some relevant guidance to how to conduct scoping studies more generally on the Human Rights Impact Resource Centre website.<sup>8</sup>

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<sup>7</sup> A starting point for this is the work of the Office of the High Commissioner for Human Rights on this issue. See Office of the High Commissioner for Human Rights, OHCHR, *Report on Indicators for Promoting and Monitoring Implementation of Human Rights* (6 June 2008) HRMI/MC/2008/3.

<sup>8</sup> With regard to the EU process see European Commission, *Handbook for Trade Sustainability Impact Assessment* (March, 2006) and for the Human Rights Impact Resource Centre see <http://www.humanrightsimpact.org/>.

**Recommendation:** The Canada-Colombia HRIA should involve an initial scoping study of those aspects of the Canada-Colombia FTA most likely to lead to human rights violations (e.g. investment provisions, agricultural trade liberalisations provisions). The scoping study could also recommend analysis of the extent to which provisions aimed at protecting and promoting human rights are likely to be effective (e.g. the Labour Side Accord). The detailed HRIA could then study in detail only the human rights impacts of the provisions identified in the scoping study.

- 3. Other Methodological Issues in Measuring Human Rights Impact:** A number of the SIAs analysed were clearly very much ideologically opposed to the agreement being evaluated, and made strong statements about negative impacts that were not directly linked to any evidence presented. On the other hand, the EU assessments have been widely accused of taking an excessively pro-liberalisation stance. Measuring the human rights or broader social impact of any trade agreement is a very complex process and must be based on some form of empirical analysis. Unsubstantiated ideological opposition / support for the agreement in question is likely to undermine its perceived objectivity. Furthermore, where there is strong evidence of human rights violations occurring, a number of alternative causes may be still possible for their occurrence, (e.g. domestic government policies and practices) and these need to be explored in any HRIA. Conclusions may point also to the interaction of various elements leading to violations.

A further issue is that many HRIAs / SIAs tend to concentrate on detailed economic analysis with little attempt at the more complex social / human rights analysis. Studies and analysis of the EU SIAs and the South American impact assessments in particular, have been critical of their methodologies. Most have utilised traditional economic models to assess social impacts and this has been found to have its limitations. There is often insufficient data to do economic “modelling studies” to predict future outcomes with respect to social impact, and effects are so complex that it is difficult to predict outcomes with any certainty. Consideration of a diverse range of mechanisms for measuring impacts is therefore required. This may include causal-chain analysis, pro-poor modelling studies, empirical and analytical studies and estimation techniques.<sup>9</sup> Those impact assessments that have been most successful in terms of identifying severe social impacts on specific populations have tended to employ case studies, with participatory interviews of affected populations (e.g. the EEA Study, certain EU studies).

But it must be remembered that even an optimised impact assessment methodology will fall short of hard science where definitive answers can be provided based on incontrovertible “evidence”. What is important is that every effort is made to utilise methodologies that have the potential to capture the social impacts being considered, rather than concentrate on economic impacts. Thereafter, a judgment will have to be made about what those findings show (e.g. are the findings of our case study from this area relevant for the wider population?).

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<sup>9</sup> See Simon Walker. Human Rights Impact Assessments of Trade-related Policies in Gehring and Segger (eds.) Sustainable Development in World Trade Law (Kluwer, The Hague, 2005) at 234f.

**Recommendation:** The Canada-Colombia HRIA must have a robust methodological framework that clearly demonstrates that assessments are not simply being driven by pre-existing ideological positions. A diverse range of mechanisms for measuring human rights impacts will have to be considered. Decisions on appropriate methodologies will depend on the nature of the trade provisions being analysed (e.g. investment / labour provisions), and also what can be achieved within the timeframe available. The methodology should certainly include case studies of affected populations. If the Canada-Colombia HRIA will be an *ex ante* assessment, case studies will have to be found of countries that have previously implemented similar trade law provisions (e.g. the impact of the NAFTA Labour Side Accord on Mexico) in order to predict potential affects of this agreement. The team undertaking the assessment must then be sufficiently experienced and knowledgeable to be able to make reasonable judgments that will be widely respected with regard to the findings that can be made on the basis of the assessment.

- 4. The Importance of Extensive Participatory Methodologies:** The EEA Study utilised extensive interviews with affected populations in order to ascertain if price fluctuations in rice as a result of imports had led to human rights violations on the ground. Interviews were conducted with affected individuals and groups and the findings were directly cited in the final assessment report. It is difficult to see how an HRIA can be conducted according to human rights principles without such mechanisms. Participatory methodologies of other assessments have been more widely criticised. NGOs and other commentators have been very critical of the participatory mechanisms utilised in many of the EU SIAs of trade agreements; the way relevant actors, particularly in third countries, are informed about the SIA, consulted as to their views, and those views taken into account in the ongoing conduct of the SIA.

**Recommendation:** In an *ex ante* assessment there are two types of person with whom consultation is important:

1. Those persons in Colombia and Canada who know the baseline human rights situation in those countries, as well as those who will be affected by this FTA once it comes into force.
2. Those persons in third countries who have already been affected by similar trade provisions that are already in force (e.g. NAFTA) so as to measure the actual human rights impact of the agreement on those persons.

The time taken to conduct these consultations will be a function of the data already available from previous studies and the time that is available for the assessment. But minimum levels of consultations should be demanded. It is suggested that, there should be at least one case study of a local community that is particularly vulnerable to identified human rights issues. Members of the community should be interviewed individually and in groups in order to ensure a range of opinions are heard, with guaranteed anonymity to all participants, and if considered necessary, interviews away from locations where interviewees might be intimidated. This should be augmented by interviews with key officials in appropriate ministries, civil society representatives and a range of other key stakeholders depending on the type of human rights issue (e.g. union officials on labour rights issues, health experts on

access to essential medicines, etc.). Details of the HRIA should be widely publicised and accessible channels of communication opened so that individuals and groups can contact the assessment team to make unsolicited submissions. Details of the consultations and their findings should be explicit in the final report of the HRIA.

- 5. The Importance of Including Appropriate Recommendations for Action:** Many of the SIAs / HRIAs analysed included no detailed recommendations for the action required to deal with any negative impacts. Other SIAs (in particular EU SIAs) focused almost exclusively upon mitigation measures (i.e. dealing with negative impacts after the relevant agreement came into force), rather than amendments to the relevant agreement to prevent negative impacts, or recommendations that the agreement should not come into force as currently constituted. Other recommendations were insufficiently precise or did not state who needed to take action in order to ensure that the change occurred.

**Recommendation:** The Canada-Colombia HRIA must include precise and directed conclusions and recommendations. Findings should not be limited only to mitigation measures, but to amendments required to the text of the agreement, or recommendations that it should not be ratified in its current form. The HRIA needs to specify the actors required to take action in relation to each recommendation. The HRIA should also include provisions for continued monitoring of the ongoing impacts of the trade agreement once it has come into force.

- 6. The Need for an Interdisciplinary Team:** There are difficulties in creating robust frameworks that are able to gather reliable information about human rights impacts on particularly vulnerable and disadvantaged groups, and demonstrate whether or not these are caused by trade agreements. Some of the SIAs analysed reflected the difficulties inherent in this analysis. Those dominated by economists tended to concentrate on the economic impacts of the agreement and social impacts were often marginalised. Those without sufficient trade or economic expertise tended to under-explore the complex issues of causality and predicting future consequences inherent in a trade agreement of this type.

**Recommendation:** The creation of appropriate methodologies will require interdisciplinary teams of persons with complimentary knowledge and skills including, at a minimum, human rights and trade law experts, economists and other social scientists, particularly those with expertise in participatory methodologies.

#### **4.0 THE RECOMMENDATION OF THE ADVISORY COMMITTEE**

The Standing Committee recommended (Recommendation 4 of the Final Report) that “an independent, impartial, and comprehensive human rights impact assessment should be carried out by a competent body, which is subject to levels of independent scrutiny and validation; the recommendations of this assessment should be addressed before Canada considers signing, ratifying and implementing an agreement with Colombia.”

An oversight body (“the Oversight Committee”) therefore needs to be created that is demonstrably independent of those making decisions with regard to signing the Colombia-Canada FTA, and will not be perceived as capable of being influenced by those decision-makers. Such a body must also have sufficient expertise in the issues that will be the subject of the HRIA, that they are able to provide effective scrutiny and validation. The Oversight Committee must therefore have expertise in human rights, trade and a range of other issues that we might broadly describe as “developmental”. The author lack of detailed knowledge of the relevant Canadian actors means that inevitably this suggested framework would benefit from input from those with more expertise. It is clear that there are multiple models and precedents in Canadian political history that could be drawn upon.

The model chosen will depend, to a certain extent, on the timescale for the assessment. An *ex ante* assessment, as has already been discussed, is likely to require a much speedier process than an *ex post* assessment. An oversight body for an *ex ante* HRIA will need to be sufficiently streamlined so that it is capable of effective decision-making in what may be a short time-frame in which to achieve the HRIA. In the light of this, such a body might include a very limited number of senior personnel in the fields of trade, human rights and development – potentially as few as three persons – in order to ensure understanding of the breadth of issues likely to be covered by the assessment, but also take decisions quickly. Even such a streamlined oversight body should also contain at least one representative from Canadian and Colombian civil society, who would be present for all meetings, but without decision-making powers in order to ensure transparency of the oversight process. An *ex post* assessment will be far less time-sensitive and so a more extensive oversight committee, with representation of a greater number of stakeholders and interest groups would be possible and desirable.

Whatever the form of the oversight committee, it should be empowered to undertake the initial scoping assessment of the Colombia-Canada FTA and identify those issues that require more detailed assessment in the full HRIA. The oversight body would identify (or tender for, depending on time limits) an interdisciplinary team of experts capable of undertaking the full assessment in line with the recommendations made above. The Assessment Team would have full operational independence in order to develop an appropriate methodology for the conducting of the assessment. The oversight body would review the HRIA and make suggestions for amendments or issues that needed to be addressed in more detail. The Assessment Team would then produce a final HRIA. The oversight body would produce an oversight report, which, inter alia, would identify the appropriate actors who needed to deal with the conclusions and recommendations from the Assessment Teams final HRIA. The Assessment Team s report must be publicly available.

## **5.0 OUTLINE METHODOLOGIES FOR ASSESSING THE IMPACTS OF DIFFERENT TYPES OF FTA PROVISIONS**

Up until this point, we have discussed only general methodological issues for conducting an HRIA. But assessment of the impact of different types of trade rules will inevitably require different types of approaches, so it is considered useful to sketch some more detailed approaches here. It has been suggested that an initial scoping study should identify those trade law provisions that are likely to have significant human rights impacts and that these should be the

focus of the detailed HRIA. Based on limited knowledge of the nature of the negotiations themselves, consideration of similar agreements signed with other countries by Canada and consideration of the Report of the Standing Committee, three different sets of provisions are analysed below that could have substantial human rights impacts and are therefore potentially could be subject to assessment in the full HRIA (It is understood that there are no provisions relating to intellectual property protection in the FTA, other than the investment provisions, and so these are not considered here. If there were IP provisions, these would very likely have potential human rights impacts worthy of detailed assessment).

A further issue that could be the subject of assessment, but which is not considered here, is the process by which the FTA has been negotiated. Has it included the type of transparency and participatory mechanisms that are apposite from the human rights perspective? The Thailand HRIA is an impact assessment that makes limited efforts to develop such a methodological approach, but a great deal more work is needed in order to understand how the legal standards on participation contained in key human rights instruments translate to obligations that need to be taken into account in the negotiation of trade agreements.<sup>10</sup>

## **5.1 Obligations to Reduce Tariff Barriers and Other Barriers to Trade With Regard to Agricultural Products**

An assessment of these provisions could analyse the extent to which agricultural liberalisation requirements in the FTA will lead to the lowering of tariffs and other restrictions on trade that might then lead to increased competition from foreign exports for local producers in Colombia. There are dangers that this might lead to human rights violations among semi-subsistence farmers and farm workers who would be unable to sell produce as a result of competition and therefore be unable to purchase essential goods and services in violation of various human rights (e.g. right to food, housing, education, etc.). The assessment would therefore require at least the following key methodological steps:

1. Map the baseline human rights situation in Colombia including relevant human rights law and the identification of key stakeholders who are poor, vulnerable or otherwise disadvantaged and whose human rights are most likely to be endangered by the provisions in question (e.g. semi-subsistence farmers, farm workers and associated communities).
2. Identify agricultural products from Canada that would be likely to compete with the products of Colombian producers in the Colombian market.
3. Assess the level of tariff reductions and reductions in other barriers to trade specified in the FTA that apply to the identified agricultural goods and develop an understanding of any safeguards that might protect domestic producers from foreign competition.

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<sup>10</sup> Article 25 of the International Covenant on Civil and Political Rights states that “Every citizen shall have the right and the opportunity... (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;” But the case has not as yet been convincingly made, to my knowledge, that this extends to an obligation to be consulted in the negotiation of a treaty with a foreign state, and, more importantly what form that consultation that should take in order to be effective.

4. Undertake modelling studies and other economic forms of analysis in order to predict likely impacts of FTA on prices and sales of Colombian products.
5. Create a series of indicators utilised to measure whether human rights violations have occurred and the extent of such human rights violations (e.g. in respect of the right to food: “the involuntary reduction of the meals in terms of quantity or a deterioration of the food quality due to a forced reduction in variety of food, for example through a reduction of food ingredients such as vegetables”<sup>11</sup>).
6. Analyse a range of other countries who have already implemented trade measures of a similar type / extent to determine extent of impact on affected farming communities in those countries.
7. Undertake consultations in those countries with particular communities and determine the extent to which foreign competition has negatively impacted upon domestic products and the extent to which human rights have been violated, taking into account other factors that might have led to violations occurring (e.g. natural disasters, withdrawal of domestic support, etc.).
8. Undertake consultations with key Colombian and Canadian stakeholders including government officials, farmers, farm workers, etc. in order to identify what domestic measures are in place to deal with negative impacts, the extent to which there are differences between scenarios in Colombia and other countries studied that had already undertaken commitments.
9. Assess the dangers that violations of human rights will occur as a result of these provisions and, to the extent considered appropriate, make recommendations with regard to amendment / rejection of the provisions in question and / or mitigation measures required to deal with any adverse consequences once the agreement was in force.
10. Make recommendations on the nature of the monitoring that is required, post-implementation in order to assess any human rights violations that actually occur.

## **6.0 PROVISIONS PROVIDING PROTECTIONS FOR FOREIGN INVESTORS**

This type of assessment is very different from previous HRIAs of trade agreements, which have focused on trade in goods, services and intellectual property protection. There are a number of different types of assessment that could be undertaken with regard to these investment provisions. One could, for instance, analyse the extent to which any “stabilisation clauses” in the agreement might lead to governments not bringing in legislative or other policy instruments to protect human rights that they otherwise would. The propensity for stabilisation clauses to lead to such regulatory chill is a major concern.<sup>12</sup> Similar analysis has been undertaken of investor state dispute settlement provisions. But conducting an impact assessment of such clauses and provisions can be very difficult, particularly in respect of the extremely complex causation issues.

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<sup>11</sup> Indicator utilised in the EEA Study, *supra*, at 28.

<sup>12</sup> See Andrea Shemberg. *Stabilisation Clauses and Human Rights* (11 March 2008) <http://www.reports-and-materials.org/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf>.

The clearest issue for analysis by an HRIA is the extent to which provisions in the FTA that protect foreign investors, (and in particular the ability of MNCs to invoke international investment arbitration procedures) might lead to increased investment in Colombia by Canadian firms who might then commit or be complicit in human rights violations.<sup>13</sup> This type of assessment would require at least the following key methodological steps:

1. Map the “baseline” human rights situation in Colombia including relevant human rights law (national and international) and the identification of key communities and other groups whose human rights are most likely to be endangered by the provisions in question (e.g. workers in the extractive industries and communities otherwise directly impacted upon by extraction activities).
2. Develop an understanding of the investor protection provisions in the FTA, and how it compares and contrasts with other investor protection provisions that Canada already has in place with other countries (e.g. under NAFTA).
3. Make an assessment of the predicted increases in Canadian investment in Colombia as a result of those provisions (through case studies of countries that have already implemented similar provisions in other trade agreements, modelling studies, etc.), with a particular focus on areas of investment where human rights violations are more likely (e.g. in mining and extractive sectors).
4. Create a series of indicators utilised to measure whether human rights violations have occurred and the extent of such human rights violations.
5. Analyse the type and extent of human rights violations committed by investors already operating in Colombia in those industries and / or investors operating in other comparable countries.
6. Consult with local communities and other key actors in order to ascertain particular communities where violations have occurred and the nature and extent of those violations, measured against the indicators developed. This stage could utilise HRIAs already undertaken of investment projects undertaken with regard to Canadian firms.<sup>14</sup>
7. Analyse how investor protections might lead to increased activity by companies responsible for / complicit in human rights violations and conclude on the likely nature of those violations.

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<sup>13</sup> More generally on the potential dangers of international investment arbitration for the protection of human rights see Stephen Shrybman, *Preliminary Submissions of the Council of Canadians Blue Planet Project, In the Matter of the United Nations Human Rights Council Decision 2/104: Human Rights and Access to Water* (15 April, 2007).

<sup>14</sup> Rights and Democracy, *Human Rights Impacts for Foreign Investment Projects: Learning from community experiences in the Philippines, Tibet, the Democratic Republic of Congo, Argentina and Peru* (Rights and Democracy: Montreal, 2007).

8. Make recommendations, as necessary, with regard to how investor provisions need to be amended / rejected in order to prevent likelihood of human rights violations being caused by the agreement.
9. Make recommendations on the nature of the monitoring that is required, post-implementation in order to assess any human rights violations that actually occur.

## 7.0 PROVISIONS PROTECTING LABOUR RIGHTS

As with any other set of provisions in the FTA, provisions protecting labour rights can be assessed separately, and conclusions reached on their impact. Such an assessment will be attempting to gauge the extent to which provisions in the agreement (or in any side accord) effectively protect the rights of workers, particularly those in Colombia and will lead to a decrease in the violation of labour rights in Colombia. They will therefore be concentrating primarily on the degree of *positive* and *intentional* impact such additional labour regulation might produce, as opposed to the potential *negative* and *unintentional* impact of investment provisions. Therefore, it will be important to make sure that, to the extent that such provisions are found to have a positive impact, this does not lead to an endorsement, from the human rights perspective, of the FTA as a whole.

In terms of the methodological approach of any assessment undertaken, this should include the following key steps:

1. Map the “baseline” human rights situation in Colombia including relevant human rights law and the identification of the type of labour rights violations that are currently prevalent in Colombia and workers most likely to suffer from those types of violations.
2. Identify the type of labour provisions set out in the Side Accord and their method of enforcement / promotion.
3. Consult with key stakeholders (workers, union representatives, government officials, etc.) in Canada and Colombia regarding the perceptions of the likely impact of the labour provisions.
4. Identify other countries with comparable labour issues to those faced in Colombia and with similar labour provisions in trade agreements already in force.
5. Assess the effectiveness of the Side Accord in enhancing labour rights protection in identified countries. This will include quantitative analysis of the numbers of labour rights violations pre- and post-Accord, qualitative analysis of the perceived impact of the Accord in changing practices through interviews with government officials, union officials, workers in key industries, etc. in those countries.
6. Take into account alternative causal explanations for increase / decrease in labour protection in identified countries (e.g. increased national protection of labour rights unrelated to the trade agreement in question, etc.).

7. Assess the likely impact of these provisions in Colombia in light of the above analysis and, to the extent considered appropriate, make recommendations with regard to amendment / rejection of the provisions in question and/or alternative forms of labour protection.
8. Make recommendations on the nature of the monitoring that is required, post-implementation in order to assess the impact of the provisions as enacted.

## **8.0 KEY RECOMMENDATIONS AND FOLLOW-UP**

The CIIT's recommendation for a HRIA is significant, in the domestic context, as well as internationally as a statement from Canada's parliament that the impact of trade and investment agreements on the protection and promotion of human rights needs to be considered. But if the government proceeds with an HRIA it will be extremely important to ensure that the key methodological steps set out above have been followed. In outline, this means:

1. Independent oversight of the HRIA by a competent Oversight Committee.
2. A scoping study of the entire Canada-Colombia FTA that identifies key issues to be addressed in the full assessment.
3. The creation of an inter-disciplinary team with sufficient expertise to carry out an effective assessment.
4. An assessment that follows key guidance set out above (e.g. on participatory methodologies, development of indicators, use of case studies in measuring impacts, etc.) and is sufficiently rigorous and detailed so as to identify the full extent of any human rights violations occurring but also sufficiently timely to allow amendment of the FTA in response to concerns raised.
5. Precise conclusions and recommendations that identify concrete actions, which must be taken by appropriate decision-makers and other stakeholders.

As has been highlighted, there are dangers that a methodologically deficient HRIA may either be ignored, or worse, reach unsound conclusions that are then hard to challenge. It is extremely hard to predict how long it will take to complete an HRIA, given that there are so many variables. But it is suggested that a minimum timeframe of six months would be required for a generously staffed and resourced team conducting a streamlined assessment process and reporting to an efficient and speedy Oversight Committee.

In the event that the government does not proceed with an *ex ante* HRIA, APG could conduct its own *ex ante* HRIA of the Canada-Colombia FTA. There will inevitably be resource constraints to such an undertaking above and beyond those faced by government. But it should be possible to conduct such an assessment on the basis of more extensive use of desk-based research and reduced levels of field research. The work commissioned by the Ecumenical Advocacy Alliance demonstrates that it is quite possible for non-governmental organisations to undertake effective impact assessments.

Whether or not *an ex ante* HRIA is undertaken, it is important that the impact of the trade agreement is monitored, should it come into force – i.e. some form of *ex post* assessment is undertaken. This is important both in the context of Colombia, and in terms of providing data in respect of *ex ante* assessments of trade agreements that Canada will sign in the future. *Ex post* assessment can be undertaken in a variety of different ways, including (separately or in combination):

1. A single formal assessment process that takes place a number of years after the implementation of the trade agreement, and assesses the impact over that time period, as was the case with the EEA Assessment.
2. A less formal ongoing process of assessment where there is a periodic review (e.g. every six months) of the impact of the FTA. On the basis of the evidence presented at each review (the equivalent of a – scoping assessment ), a decision would be taken over whether there was a need to undertake more detailed investigations of any particular human rights issues that appeared to have arisen in relation to specific provisions of the FTA.

Should the Canada-Colombia FTA come into force, civil society organisations should advocate for both periodic review of the implementation of the agreement and a more formal assessment of the impact of the agreement after a set time period (e.g. five years). In the absence of government or parliamentary support for such a process, civil society organisations should consider setting up an independent form of *ex post* human rights impact assessment.

## APPENDIX 1 KEY RESOURCES

### Human Rights Impact Assessments

Garbers and Hirsch, Trade Policies and Hunger: The Impact of Trade Liberalisation on the Right to Food of Rice Farming Communities in Ghana, Honduras and Indonesia (Ecumenical Advocacy Alliance, 2007) [http://www.e-alliance.ch/trade\\_policiesandhunger.jsp](http://www.e-alliance.ch/trade_policiesandhunger.jsp).

Thailand National Human Rights Commission (Subcommittees), Draft Report on Results of Examination of Human Rights Violations (2006), electronic copy on file with this author.

### Useful Websites

Human Rights Impact Resource Centre – <http://www.humanrightsimpact.org/> – containing HRIAs in a range of different fields and extensive methodological guidance.

The University of Nottingham Human Rights Law Centre Trade Impact Assessment database – [http://www.nottingham.ac.uk/law/hrlc/business-trade/Final\\_Database.xls](http://www.nottingham.ac.uk/law/hrlc/business-trade/Final_Database.xls) – containing a wide range of social impact assessments of trade agreements.

### Academic Articles Exploring HRIA Methodological Issues

James Harrison, Alessa Goller. Trade and Human Rights: What Does Impact Assessment Have to Offer? (2008) Human Rights Law Review 8 (4).

Simon Walker, Human Rights Impact Assessments of Trade-related Policies in Gehring and Segger (eds.) Sustainable Development in World Trade Law (Kluwer, The Hague, 2005).

### On the Development of Indicators

Office of the High Commissioner for Human Rights, OHCHR, *Report on Indicators for Promoting and Monitoring Implementation of Human Rights* (6 June 2008) HRMI/MC/2008/3.