MAKING A BAD SITUATION WORSE

AN ANALYSIS OF THE TEXT OF THE CANADA-COLOMBIA FREE TRADE AGREEMENT

A briefing note prepared by:
Canadian Council for International Co-operation
Canadian Association of Labour Lawyers
Canadian Labour Congress
Canadian Centre for Policy Alternatives
The Canadian Council for International Co-operation (CCIC) is a coalition of Canadian voluntary sector organizations working globally to achieve sustainable human development. CCIC seeks to end global poverty and to promote social justice and human dignity for all.

CCIC gratefully acknowledges the financial and in-kind support provided by collaborating institutions for this publication, as well as on-going financial support from the Canadian International Development Agency (CIDA) and the International Development Research Centre (IDRC). The views expressed in this document are those of the authors and do not necessarily reflect the views of funders.

The authors and collaborating organizations would like to thank the following for comments received on this brief: Rick Arnold, Mark Fried, Kenton Lobe, Dawn Paley, William Payne, and Jean Symes. In Colombia, Mario Valencia, Red Colombiana de Acción frente al Libre Comercio y el ALCA, Apecides Alvis Fernández, President, Confederación de Trabajadores de Colombia (CTC), Julio Roberto Gomez Esquerra, President, Confederación General de Trabajadores (CGT), Tarcisio Mora Godoy, President, Confederación Unitaria de Trabajadores (CUT), and Luciano Sanín Vásquez, Director, Escuela Nacional Sindical, (ENS).

All or part of this document may be reproduced and used for nonprofit purposes, provided that CCIC is credited as the source. Use of any part of this document for commercial purposes is forbidden without prior written permission from CCIC.

For additional information:
Tel.: 613-241-7007
Fax: 613-241-5302
Email: info@ccic.ca
Web Site: www.ccic.ca


Making a Bad Situation Worse: An Analysis of the Text of the Canada-Colombia Free Trade Agreement is also available in French as Aggraver une situation problématique : analyse du texte de l’Accord de libre-échange Canada-Colombie, and in Spanish as Empeorando una Situación que ya Estaba Mal: Un análisis del Texto del Acuerdo de Libre Comercio Canadá-Colombia.

All rights reserved.
© Canadian Council for International Co-operation 2009
The text of the Canada-Colombia Free Trade Agreement (CCFTA) was released at the end of November 2008, a year and a half after negotiations were launched, and only now that the terms of the deal are fully decided. The deal has generated significant concern in the public, in the House of Commons, and in the region.

This briefing note provides expert analysis of key development and human rights issues raised by the terms of the agreement. The brief has been prepared by a team of Canadian civil society analysts under the coordination of the Canadian Council for International Co-operation (CCIC), and has benefited from collaboration with counterparts in Colombia. The brief is intended as a resource for parliamentarians, officials and civil society organizations, to contribute to debate on the agreement before a decision is taken on ratification.

Trade can support development and the realization of human rights, if it brings benefits to vulnerable populations and allows states, who are willing, to promote developmental outcomes and protect the environment. But neither the political conditions in Colombia nor the terms of the Canada-Colombia FTA provide these reassurances. Indeed, while Canadians were promised that this agreement had been tailored to take account of human rights concerns, in fact the agreement turns out to be a standard “market-access” oriented trade deal, with ineffectual side agreements on labour and the environment.

Colombian civil society and human rights organizations have been clear: they do not want this agreement. President Barack Obama has indicated the United States will not proceed with their FTA with Colombia given continued and escalating violence against workers and the impunity with which these crimes are committed. What is Canada doing?

Ratification of this deal provides Canadian political support to a regime in Colombia that is deeply implicated in gross violations of human rights and immersed in a spiralling political scandal for links to paramilitary death squads. Canada’s own process is marked by secrecy and a disregard for the deliberations of parliament.

The terms of the trade agreement also raise serious human rights concerns for vulnerable populations in the context of Colombia’s conflict economy. The FTA will hit small-scale farmers with low-price competition, and may further expose indigenous people, Afro-Colombians and rural dwellers to land grabs by Canadian mining companies equipped with powerful new investor rights, but no binding responsibilities. Introducing such provisions into this troubled context will chill democratic dissent and tilt the scales further against already disadvantaged and victimized groups. The side agreements on Labour and the Environment do not address these threats; to the contrary the latter creates perverse incentives for weak regulation. The agreement makes a bad situation worse.

Conclusion

In 2008, the Standing Committee on International Trade (CIIT) concluded that the FTA with Colombia should not proceed without further improvements in the human rights situation in Colombia and without a comprehensive and independent human rights impact assessment (HRIA). It also called for legislated provisions on corporate social responsibility to address the implementation of universal human rights standards by Canadian entities investing in Colombia.

Canadian civil society organizations affirm that the preconditions are not in place for an FTA with Colombia given the human rights crisis in that country. Any eventual deal should only proceed on the basis of a HRIA to ensure the agreement will generate positive social and economic benefits for vulnerable populations.
Key Areas of the Agreement

Labour Rights and the Labour Side Agreement
Mark Rowlinson, Canadian Association of Labour Lawyers, and Sheila Katz, Canadian Labour Congress

- Violations of labour rights and violence committed against unionized workers are among Colombia’s foremost human rights challenges. Colombia is the most dangerous place in the world to be a trade unionist. A deep-seated anti-trade union culture exists in Colombia, both within Government and among entrepreneurs, who see the autonomous organization of workers as a threat.

- 2,690 trade unionists have been murdered in Colombia since 1986. While there has been a decline in murders since 2001, this trend has now ended with 46 deaths in 2008 as opposed to 39 the year before – an 18% increase. Impunity rates for these violations is unchanged with a 3% conviction rate.

- The Uribe government continues to inaccurately denounce union members as guerrillas, statements considered by the unions to give carte blanche to paramilitaries to act, putting workers in extreme jeopardy.

- Substantive labour rights protections remain in a side agreement rather than in the body of the agreement. Enforcement of these rights is entirely at the discretion of the signatory governments.

- The complaint process is not investigated and evaluated by independent judicial or quasi-judicial bodies that could lead to real remedies for affected parties.

- Unlike the provisions for investors’ rights, the agreement offers no trade sanctions, such as the imposition of countervailing duties or the abrogation of preferential trade status, in the event that a Party fails to adhere to the labour rights provisions.

- Simply issuing fines against the offending government is not an acceptable or effective sanction. Fines neither address the causes of the violence nor generate substantive incentive or political will in the Colombian administration to address the crisis and bring an end to violence against trade unionists.

- Given the scale and depth of the labour rights challenges in Colombia, neither the Canada-Colombia FTA nor its labour side deal will be an instrument to guarantee labour rights and freedoms. The greater risk is that the agreement’s provisions for market liberalization and investor rights, which are substantive, may in fact exacerbate conflict and violations of worker rights.

The Investment Chapter
Scott Sinclair, Canadian Centre for Policy Alternatives

- Canadian oil and mining companies are well-established throughout Colombia, including in conflict zones. Canada’s Embassy in Bogota estimates the current stock of Canadian investment at $3 billion and predicts it will grow to $5 billion over the next two years, with a focus on the oil, gas and mining sectors. Regions rich in minerals and oil have been marked by violence, paramilitary control, and displacement.

- The ongoing human rights crisis undermines the role of citizens and communities in deciding which foreign investment projects proceed in their region. It also hampers their ability to advocate for greater community benefits, decent wages and working conditions, and improved environmental protection.

- Canadian companies operating in conflict zones are not neutral actors. Even when investors are not directly connected to the violence, their interests are often intertwined with the perpetrators. Canadian companies cannot evade responsibility.

- The CCFTA investment chapter pays mere lip service to corporate social responsibility, with “best-efforts” provisions, which are purely voluntary and completely unenforceable.
• In sharp contrast, the chapter accords investors powerful, substantive rights that are directly enforceable through investor-state arbitration. Unlike governments, private investors have been quick to invoke dispute settlement and are more aggressive in their interpretation of broadly worded investment rights.

• Colombia has no FIPA with Canada, so the rights provided to Canadian investors by the FTA would be unprecedented. The Investment chapter strengthens the hand of investors’ in a context of, frequently violent, struggles over land and resources.

• Rather than addressing Colombia’s human rights crisis, inserting new investment rights into this deeply troubled context will effectively chill democratic dissent and tilt the scales further against already disadvantaged, excluded and victimised groups.

• The CCFTA ignores the fact that Latin America, and perhaps the world, is turning the page on an era where international constraints reduced government’s role in the economy. The investment chapter restricts the ability of governments to put in place public policies and regulations needed to ensure that foreign investment contributes to development and that development benefits are shared equitably. The Investment chapter goes further than previous investment treaties in restricting governmental ability to set policies that would benefit their citizens.

• Canada will pay a diplomatic price and may squander goodwill in the region by continuing to promote this discredited approach. Given Colombia’s poor human rights record, it is strongly in Canada’s interest to encourage a balanced approach and to act as a good neighbour in the hemisphere.

Agriculture
Gauri Sreenivasan and Dana Stefov, CCIC, with Inter Pares

• Agriculture in Colombia is pivotal for addressing poverty and human rights. 12 million people live in Colombia’s countryside. Agriculture provides 11.4% of GDP and accounts for 22% of employment – nearly twice the level for manufacturing.

• Colombia’s four-decade conflict is fuelled by struggles for control over land and the resources under it. Colombia’s rural citizens have borne the brunt of the violence. Over 60% of the almost 4 million internally displaced people have been forced from their homes and lands in areas of mineral, agricultural or other economic importance.

• The CCFTA aggressively opens the Colombian agricultural sector to Canadian exports, including immediate elimination of duties on wheat, peas, lentils, barley and on specified quantities of beef and beans.

• 50% of Colombia’s pork industry is informal and employs 90,000 people per year. Colombian analysis of the U.S.-Colombia FTA predicted the sector would be decimated by increases in U.S. imports likely losing 39,000 jobs. The impact of Canada’s exports would be comparable.

• Small-scale wheat and barley producers will be the hardest hit by an FTA with Canada. 12,000 livelihoods will be undermined by Canada’s industrially-produced wheat and barley exports. The value of domestic wheat production in Colombia is expected to drop by 32%, leading to losses of 44% in employment levels and wages.

• The Colombian government has effectively negotiated away its access to safeguard measures to protect livelihoods and farmer incomes. The trade agreement may propel additional displacement of the rural poor.
• Markets access gains are asymmetrically advantageous to Canada. While Colombia won 12 or 13 year phase-outs for tariffs on sensitive sectors (such as beans), Canada’s tariff phase-outs on imports of Colombian sugar will stretch over 17 years.

• The developmental and human rights implications of export growth in Colombia are questionable. Boosted exports may generate profit and economic growth – but for whom? In 2004, Colombia’s Comptroller General indicated that half of the country’s arable land was in the direct hands of paramilitaries and narco-traffickers.

• African palm is the fastest growing agricultural sector in Colombia. Colombia’s President Uribe wants to take advantage of the growing global demand for palm oil and biodiesel by promoting the industry. But the palm sector has a dark side. In all four palm growing zones, palm companies have been linked to paramilitaries and human rights violations, including massacres and forced displacement. Human rights groups have documented 113 murders in one river basin by paramilitaries working with palm companies to take over Afro-Colombian owned lands.

The Environmental Side Agreement
Steven Shrybman, Sack Goldblatt Mitchell LLP

• Colombia is the second most biologically diverse country on Earth, but is losing nearly 200,000 hectares of natural forest every year. This deforestation results from agriculture, logging, mining, energy development, and infrastructure construction.

• The extensive investment interests of Canadian mining, energy and engineering companies in Colombia underscores the importance of ensuring these investments do not undercut efforts to protect the environment and biodiversity in Colombia.

• The dispute procedures of the CCFTA, and in particular the investor-State dispute procedures, provide potent new mechanisms that may be invoked either to challenge existing environmental measures, or to discourage progressive reforms.

• The Environment Side Agreement (ESA) is unable to provide an effective buffer to counter the pressure that enforceable investor rights will exert on environmental measures for two reasons:

  – First, there is a stark asymmetry between the enforcement mechanisms of the CCFTA and the ESA. The CCFTA provides, arguably, the most effective enforcement regime ever incorporated into trade agreements because it can be invoked to win damages by countless third party private investors. The ESA provides no sanction whatsoever for non-compliance with even the modest requirements of the ESA. Dispute resolution under the ESA is consensual. Even the modest enforcement regime of the side agreement to the North American Free Trade Agreement (NAFTA) is absent from the CCFTA.

  – Second, the CCFTA establishes objective and minimum standards of investor protection and trade regulation. The ESA imposes no analogous requirements, and instead leaves the level of environmental regulation entirely to the Parties.

• The ESA may actually provide an incentive for the Parties, and in particular Colombia, to eschew new environmental or conservation measures. This perverse result stems from the focus of the ESA on the enforcement of environmental laws while providing no requirement for any threshold of environmental regulation. Neither Party may complain about the other failing to establish minimum standards of environmental protection, yet they may challenge the other’s failure to enforce standards if adopted. For a developing country like Colombia, the safest course may be to reject environmental initiatives in order to avoid the potential embarrassment of a complaint that it is not doing what is required to enforce such measures.

• The ESA not only fails to provide a credible vehicle for enhancing and enforcing environmental laws and regulations, but it also fails to mitigate the corrosive pressures the CCFTA will exert on existing environmental and conservation measures and may in fact provide a further disincentive for environmental law reform.