

# MAKING A BAD SITUATION WORSE

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

A briefing note prepared by:  
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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.

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# TABLE OF CONTENTS

<b>Executive Summary</b> .....	2
Key Areas of the Agreement .....	3
<b>Introduction</b> .....	6
<b>Background to the Canada-Colombia Trade Agreement</b> .....	7
<b>Key Areas of the Agreement</b>	
Labour Rights in Colombia and the Canada-Colombia Labour Side Agreement .....	10
The Investment Chapter in the Canada-Colombia FTA .....	16
Market Access in Agriculture: Implications for Small-Holder Farmers and Human Rights ...	23
The Environmental Side Agreement in the Canada-Colombia FTA .....	28
<b>Authors' Biographies</b> .....	32
<b>Endnotes</b> .....	34

# EXECUTIVE SUMMARY

The text of the Canada-Colombia Free Trade Agreement (CCFTA) was released at the end of November 2008, a year and 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 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 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 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.

# INTRODUCTION

The text of the Canada-Colombia Free Trade Agreement (FTA) was released at the end of November 2008, a year and a half after negotiations were launched, and only after the terms of the deal were fully decided. The deal has generated significant concern in the public, in the House of Commons, and in the region. Marked by secrecy and a disregard for the deliberations of parliament, Canada's own process in moving towards this deepened trade relationship has not measured up to its own stated values.

This briefing note provides expert analysis and commentary on the text of agreement. It is not a comprehensive review, but considers key development and human rights concerns raised by the terms of the deal. The brief has been prepared by a team of analysts from a number of Canadian civil society organizations under the coordination of the Canadian Council for International Co-operation (CCIC), and has benefited from collaboration with counterparts in Colombia.

This briefing note is intended as a resource for parliamentarians, officials and civil society organizations. In particular, it is hoped the document contributes to informed debate during the 21 days provided to Canada's Parliament

to consider the trade agreement before the Government takes a decision to proceed to implementation legislation and 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. But neither the political conditions in Colombia nor the terms of the Canada-Colombia FTA (CCFTA) provide these reassurances.

While Canadians were assured 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. The terms of the deal raise serious human rights concerns for vulnerable populations in the context of Colombia's conflict economy. The agreement makes a bad situation worse.

"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. But neither the political conditions in Colombia nor the terms of the Canada-Colombia FTA (CCFTA) provide these reassurances. "

# BACKGROUND TO THE CANADA-COLOMBIA TRADE AGREEMENT

Colombia is not a significant trading partner for Canada.<sup>i</sup> In 2007, two-way merchandise trade between Canada and Colombia totaled \$1.14 billion, representing only 0.13% of Canada's total trade volume. Trade flows with Colombia are growing, though as part of a general growth trend for Canadian trade in the region. Major Canadian exports to Colombia include cereals, newsprint and heavy trucks. Canadian investment is more significant than trade flows, estimated at close to \$3 billion, mostly in the extractive sectors of mining, oil and gas.<sup>1</sup>

Canada is also not a major trading partner for Colombia, whose economy is dominated by imports from and exports to the US, as well as with China and regional trading partners such as Venezuela, Mexico and Brazil.

While the overall trading relationship is minor, Canada has a significant, or potentially significant, impact in a few key sectors in Colombia, notably through investment in the extractive sector and cereals exports. The deal also has important consequences for Colombians struggling to build democracy and for Canada's ambition for a principled role in the Americas.

## A Human Rights Crisis – Crimes Against Humanity

The opening of trade negotiations with Colombia were announced as part of Prime Minister Stephen Harper's new foreign policy focus on the Americas. Key objectives of Canada's new "Americas Strategy" include promoting "our fundamental values of freedom, democracy, human rights,

and the rule of law."<sup>2</sup> The choice of Colombia as a trade partner for Canada was particularly controversial in this context, given the human rights crisis in that country. A similar trade agreement in the United States (US), negotiated under former President George W. Bush, was put on ice by Congress in 2008 given the human rights concerns. President Barack Obama has reiterated US opposition to that deal given the violence against trade unionists and the impunity for these violations. The Canada-Colombia FTA is seen by many parliamentarians, congressional representatives, and citizens, in both Canada and Colombia, as a foreign policy initiative linked to the geo-strategic priorities of the former Bush administration.

The Canadian government has argued that Colombia has left behind its dark history. Colombian government representatives have repeatedly attempted to point to various statistical fluctuations in human rights violations to build evidence for this claim. Independent Colombian and international human rights organizations are unequivocal – human rights violations in Colombia remain rampant. In the last few years, some numbers have gone down (kidnappings for e.g.), while others have gone up (extrajudicial executions, forced displacement, and disappearances), including a sharp rise in killings of trade unionists in 2008. But overall the level of impunity and violations is egregiously high.<sup>ii</sup>

Through violations by its security forces, and through failure to prevent and prosecute violations, the Colombian state is at the centre of the crisis. The United Nations' High Commissioner for Human Rights Navi Pillay, reported in

i Colombia is only Canada's fifth largest export destination in Latin America, well after Mexico and Brazil, but also trailing Chile and Venezuela.

ii An October 2008 Amnesty International report found that about 330 extrajudicial executions by the security forces were reported in 2007, compared to 220 a year from 2004 to 2006; 130 in 2003; and 100 in 2002. *Colombia: 'Leave us in peace! : Targeting civilians in Colombia's internal armed conflict* (<http://www.amnesty.org/en/library/info/AMR23/023/2008/en>); According to the Consultancy for Human Rights and Displacement (CODHES), 270,675 people have been forced to flee from their homes in the first quarter of 2008 which is the highest rate of internal displacement since 1987. Colombia's Prosecutor's Office is currently investigating the disappearances of 1,015 people over the past year – more than four times the total for 2007 and a 1,300 percent increase over 2005. According to the Prosecutor's Office, members of the country's armed forces are suspects in more than 90 percent of the cases it is investigating. (<http://www.colombiajournal.org/colombia295.htm>)

November 2008 that Colombia's security forces are engaged in "widespread and systematic" killings of civilians that could constitute crimes against humanity.<sup>3</sup> Indeed on enforced disappearances alone, President Alvaro Uribe regime's can be compared with that of General Augusto Pinochet's over seventeen years of Chile's dirty war.<sup>4</sup>

Importantly, the Colombian government is mired in a growing political scandal for its close links to paramilitary death squads that have terrorized the countryside and even threatened Canada's embassy in Bogotá. Increasing numbers of President Uribe's close political allies, including the chief of security, personal advisors, and members of Congress have been tied to paramilitary activities.<sup>5</sup> The Colombian government is, thus, looking for international backing. The Canadian government has responded, closely tying political and economic objectives together in this agreement.<sup>iii</sup>

While Canadian officials have argued that the FTA will strengthen democracy and improve human rights in Colombia, Colombian civil society organizations are concerned the effect will be the reverse. They point to the deep connections between human rights violations and commerce in their country. These range from systematic attacks on the trade unionists that resist the liberalization and deregulation of local industry, to the dispossession and disappearance of peasants

"Colombia's security forces are engaged in "widespread and systematic" killings of civilians that could constitute crimes against humanity."

and Afro-Colombians as an expedient means to clear land for export plantations and mining investments. Amnesty International reports that "over 60% of the more than 3 million internally displaced people in Colombia have been forced from their homes and lands in areas of mineral, agricultural or other economic importance."<sup>6</sup>

In addition to backing a regime in a deep political and human rights crisis, the trade deal may serve to strengthen the hands of those undermining the struggle for democracy in Colombia – criminal networks and paramilitaries who are in a position to take advantage of export opportunities and inward flows of foreign investment.

### Who wants this trade deal?

While the Canada-Colombia FTA has been vigorously pursued by the Colombian government, the deal has been more than controversial with the Colombian people. Civil society networks in Colombia are opposed to a deal that reinforces rights for foreign investors and exporters, while failing to ensure local development concerns and human rights issues are respected. Protests against the similar and better known US and European Union deals have been widespread. In 2005, the Indigenous Council of North Cauca carried out a popular referendum in which 98% said "no" to the US Agreement. In October 2008, tens of thousands of indigenous people embarked on caravans and demonstrations protesting violation of their ancestral rights and the imposition of trade deals with Canada, the US and the EU. The marchers have met with violence and repression from the army.<sup>7</sup>

iii Prime Minister Harper explained Canada's decision to seek an FTA with Colombia at the Council on Foreign Relations in New York in September 2007: "This is in Canada's own strategic trade interests, but it will also assist that country to continue on its path of overcoming a long, dark history of terror and violence. In my view, Colombia needs its democratic friends to lean forward and give them a chance..." He also warned: "if the US turns its back on its friends in Colombia, this will set back our cause far more than any Latin American dictator could hope to achieve." ([http://www.cfr.org/publication/14315/conversation\\_with\\_stephen\\_harper\\_rush\\_transcript\\_federal\\_news\\_service.html?breadcrumb=%2Fregion%2F211%2Fcanada](http://www.cfr.org/publication/14315/conversation_with_stephen_harper_rush_transcript_federal_news_service.html?breadcrumb=%2Fregion%2F211%2Fcanada))

Debate on the merits of this North America Free Trade Agreement (NAFTA)-style trade deal is growing throughout the Americas. From Argentina to Central America and the Caribbean, citizens and governments are pursuing new trade arrangements and making proposals to ensure trade rules respect local development priorities and equip states with the policy tools required to regulate trade and investment in the public interest.

Propelled by recent elections in the United States, a new agenda is emerging even among NAFTA partners to re-think the 15-year-old agreement given its poor performance on key public issues from labour rights and employment goals to environmental concerns. The investor-state dispute settlement mechanism, which has cost governments dearly through dozens of corporate law-suits, is also widely criticized. Why is Canada replicating the kind of trade agreement that so many are re-thinking?

## Parliament and Process

In 2008, the Parliamentary Standing Committee on International Trade (CIIT) undertook a groundbreaking study, the *Human Rights and Environmental Considerations of the Canada-Colombia FTA*.<sup>8</sup> The Committee offered the first substantive fora for discussion of this high-priority, legally-binding treaty being negotiated by Canada.

The CIIT report was important for making issues of human rights and the environment – issues in which Canada has numerous binding obligations under international law – central to debates on the deal. The CIIT concluded that the FTA with Colombia should not proceed without further

“The Parliamentary Standing Committee 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.”

improvements in the human rights situation in Colombia (Recommendation 2) and without a comprehensive and independent human rights impact assessment (HRIA) being first undertaken (Recommendation 4).

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 (Recommendation 6). Unfortunately the government concluded negotiations before the Committee submitted its report.

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, and that 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. The following chapters provide analysis of key parts of the proposed Canada-Colombia FTA, highlighting important concerns that would warrant further investigation under a HRIA.

# KEY AREAS OF THE AGREEMENT

## LABOUR RIGHTS IN COLOMBIA AND THE CANADA-COLOMBIA LABOUR SIDE AGREEMENT

Mark Rowlinson, Canadian Association of Labour Lawyers, and Sheila Katz, Canadian Labour Congress

Violations of fundamental labour rights and violence committed against unionized workers are among Colombia's foremost human rights challenges. To this day, Colombia remains the most dangerous place in the world to be a trade unionist, accounting for the majority of murders of trade unionists world-wide. Given the scale and depth of the labour rights challenges, neither the Canada-Colombia FTA nor its labour side deal will be an instrument to guarantee labour rights and freedoms.

Trade agreements are not written to improve labour standards and there is little evidence that such agreements can become vehicles for the enforcement of labour rights. On the contrary, the market access and investor rights provisions of the text could serve to increase the rate of labour rights violations due to structural impediments to union freedoms in Colombian society and the gap between legislation and practice.

These structural impediments include labour legislation incompatible with international standards, labour relations devoid of labour rights, a precarious and unprotected labour force, low levels of social dialogue among employers, unions and the government, residual collective bargaining and systematic and deliberate violence meant to eliminate the trade union movement.

This chapter briefly reviews the context of labour rights violations in Colombia and provides an overview and analysis of the labour provisions of the supplementary Labour Cooperation Agreement or "labour side deal".

### A Culture of Fear and Impunity: Labour Rights Violations in Colombia<sup>9</sup>

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 to their control in the management and administration of enterprises and to their profits. The media also run anti-union smear campaigns, claiming workers have links with guerillas, or holding unions responsible for negative business outcomes.

According to DANE, the Colombian national bureau of statistics, in 2008 Colombia's labour force consisted of 18.2 million workers of which 60% were employed in the largely unregulated and undocumented informal sector. The official unemployment rate was 11.8%. 7.4 million workers (4%) were affiliated to a union, and of these, fewer than 50,000 (or 0.8% of the labor force) were working under a labour contract and covered by a collective agreement – the lowest rate of coverage in the hemisphere. This means that fewer than 1% of Colombian workers enjoy the right to collective bargaining, in spite of Colombia having ratified International Labour Organization (ILO) Conventions over the past several years.<sup>iv</sup> Since 1966, the unionization rate has declined from 13.5% to 4%.

Statistics on death threats and murders of trade unionists have fluctuated over the past 20 years. Since 1986, 2,690 trade unionists have been murdered. While there had been a decline in murders since 2001, this trend has ended with 46 deaths in 2008 as opposed to 39 the year before – an increase of 18%. This is especially concerning, given that in 2008, the Colombian government began showcasing improvements in the human rights situation to counter

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<sup>iv</sup> These include ILO Conventions 87, 98, 151, 154.

opposition to the US-Colombia FTA in the US Congress and to counter opposition to the Canada-Colombia FTA among Canadian parliamentarians and the Canadian public.

The number of death threats in 2008 was 157, a decline from 246 from the year before. There is no question that murder and threat of murder has a chilling effect on union activity. If workers fear their life is at risk if they exercise fundamental labour rights, how can they act to effectively share in any potential benefits of trade?

Other mechanisms for weakening trade unions in Colombia include the introduction of anti-union legislation that sets limits on the right to organize, bargain collectively and the right to strike; the forced dismantling of trade union structures under the guise of restructuring or privatization; and the practice of outsourcing personnel, social security and health coverage to “associated labour cooperatives”. These are employer-mandated union-substitution devices that are not covered by the labour code.

Perpetrators of the violence typically fall into three groups: paramilitaries, government security forces and military and guerrillas. In 2008, crimes committed by paramilitary groups rose to 41% of the total, from 14% the year before. The percentage of violations committed by Colombian security forces remained constant (9%), and, those committed by the guerrillas dropped from 1.5% to 0. From 2007 to 2008, human rights monitors have detected a disturbing rise in the number of regrouped, supposedly demobilized, paramilitary bands consolidating their actions on a regional level. Many of these groups use the generic name “Black Eagles” (Aguilas Negras).

President Alvaro Uribe argues that his administration has taken extraordinary steps to counter the violence against trade unionists, devoting new resources, including judges, to address labour cases, as well as additional funding to the attorney general’s office for investigation and prosecution. Such resources are, of course, appreciated, but the abuses and persecution against trade unionists and human rights defenders persist, including threats and attacks by telephone, e-mail, text messages, etc.

Importantly, the impunity rates for these violations remain unchanged with a 3% conviction rate. Those convicted have, in all cases, been the “hired gun” rather than the intellectual authors of the crimes. Furthermore, just over half are in custody, while the rest remain at large. This level of impunity creates very little incentive for perpetrators to cease their actions. The Uribe government continues to inaccurately denounce union members as guerrillas, statements considered by the unions to give carte blanche to paramilitaries act against unions, putting workers in extreme jeopardy.

## The Failure of Hemispheric Trade Agreements to Promote or Protect Labour Rights

The labour provisions in the Canada-Colombia FTA generally follow the model found in existing hemispheric trade agreements such as in NAFTA (NAALC – North American Agreement on Labour Cooperation), the Canada-Costa Rica FTA, the Canada-Chile FTA and, especially, the proposed Canada-Peru FTA. This model consists of a very brief provision in the text of the actual trade agreement and a more detailed labour “side agreement,” which sets out the specific rights and obligations of the Parties together with a mechanism to enforce those obligations.

The labour protections found in the trade agreements negotiated by the Canadian Government contain several common problems. First, they focus on the enforcement of existing domestic labour statutes rather than on raising labour standards.

Second, agreements that do require the Parties to maintain ILO Core Labour Standards dilute that requirement by requiring the signatories to respect ILO rights only in circumstances where trade or investment are affected.

Third, the enforcement mechanisms in the agreements are uniformly unsatisfactory. They are typically slow and cumbersome. In addition, the dispute resolution mechanisms are premised upon a model of political cooperation among the signatories rather than an independent and transparent complaint process. Complaints are investigated and evaluated by bureaucracies established for that purpose by the signatory governments

rather than by judicial or even quasi-judicial bodies. The complaints generally end with consultations between ministries of labour. In short, there is no meaningful supra-national authority with real power to enforce workers' rights. It should be noted that during 15 years of experience with the NAFTA labour side agreement, not one case has proceeded to an arbitration panel. All of the cases have ended following ministerial consultations.

Fourth, and perhaps most importantly, remedies available are generally not sufficient to address the issues or to deter the offending party from engaging in the impugned conduct. In general, trade agreements provide that offending countries are fined for violating labour rights. This is in stark contrast to the investment chapters of these same trade agreements where Parties are entitled to substantial, effective remedies imposed by independent quasi-judicial bodies.

## Labour Rights and Obligations under the Canada-Colombia FTA

The Canada-Colombia FTA labour provisions represent an evolution from earlier hemispheric trade agreements. Chapter 16 (labour) of the trade agreement itself contains very general provisions setting out the Parties' objectives and obligations with respect to labour issues. In particular, the Parties make the following affirmation:

### *Article 1601: Affirmations*

*The Parties reaffirm their obligations as members of the International Labour Organization (ILO) and their commitments to the ILO Declaration on Fundamental Principles and Rights at Work (1998) and its Follow-Up as well as their continuing respect for each other's Constitution and Laws.*

Further, Article 1603 of the proposed agreement states that the Parties, among other things, agree to "improve working conditions and living standards in each Party's territory."

However, chapter 16 only sets out general affirmations and objectives. These general statements do not provide the Parties with enforceable rights. Rather, as with all previous Canadian hemispheric trade agreements, the substance of the labour rights and obligations are set out in a separate Labour Cooperation Agreement, the so-called "labour side agreement".

The Labour Cooperation Agreement (LCA) in the Canada-Colombia FTA is, for the most part, similar to the recently concluded Canada-Peru agreement and contains similar language to the proposed US-Colombia agreement.

Part 1 of the LCA sets out the Parties' basic obligations. Article 1 affirms that:

*Each party shall ensure that its statutes and regulations and practices there under, embody and provide protection for the following internationally recognized labour principles and rights:*

- a) Freedom of association and the right to collective bargaining (including protection of the right to organize and the right to strike);*
- b) The elimination of all forms of forced or compulsory labour;*
- c) The effective abolition of child labour (including protections for children and young persons);*
- d) The elimination of discrimination in respect of employment and occupation*
- e) Acceptable condition of with respect to minimum wages, hours of work and occupational health and safety;*
- f) Providing migrant workers with the same legal protections as the party's nationals in respect of working conditions.*

By incorporating the rights contained in the 1998 ILO Declaration on Fundamental Principles and Rights at Work together with the ILO's Decent Work Agenda, Article 1 contains greater substantive labour rights than those found in any current hemispheric trade agreement to which Canada is a party. Unlike NAFTA, this agreement requires the signatories to ensure its statutes comply with ILO standards.

However, Article 2 of the LCA, the non-derogation clause, provides as follows:

*Article 2: Non-Derogation*

*Each Party shall ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour laws in a manner that weakens or reduces adherence to the internationally recognized labour rights referred to in Article 1 as an encouragement for trade with another Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.*

Hence, the agreement only prohibits the violation of ILO standards where it can be demonstrated (presumably by the other party) that the violation was done as an "encouragement to trade with another party or as an encouragement for the establishment, acquisition, expansion or retention of investment in its territory." This is a significant limitation on the substantive obligations of the Parties.

Articles 3, 4, 5 and 6 are very similar to provisions found in existing Canadian hemispheric trade agreements. Article 3 addresses issues concerning the enforcement of existing labour laws. Articles 4 and 5 set out certain procedural guarantees that must be provided to Parties who appear before those tribunals charged with the responsibility of enforcing labour laws. Article 6 requires the signatories to make the public aware of domestic labour laws and their enforcement.

The provisions found in Articles 3 through 6 are almost identical to those labour provisions found in all hemispheric trade agreements right back to the NAALC. While the issue of the effective enforcement of existing labour laws is important, these provisions do not require that labour standards be improved. They only provide procedural protections relating to current standards.

Part 2 of the Canada-Colombia LCA, entitled "Institutional Mechanisms", creates a number of institutions that perform a variety of roles under the agreement. Article 7 creates a ministerial council to review the operation and effectiveness of the agreement. Article 8 provides for the creation of national mechanisms for the review of public communications while Article 9 provides for a wide range of cooperative activities between the signatories.

## Enforcement of Labour Rights under the Canada-Colombia FTA

Article 10 of the LCA provides for the submission, acceptance and review of public communications. This is the primary complaint mechanism in the Canada-Colombia LCA. Article 10 provides that complaints may be filed on labour law matters that arise in the territory of a party and pertain to any matter in the agreement. Complaints may only be filed by a citizen of the party or an established entity in the territory of a party (for example, a trade union).

As with the current NAALC complaint process, a complaint, if accepted, may lead to ministerial consultations between the Parties (Article 12).

Following ministerial consultations, Article 13 provides that a national signatory (i.e. *not the individual or the organization that files the complain*) may request that a review panel be convened if it considers that:

- a) *the matter is trade-related; and*
- b) *the other Party has failed to comply with its obligations under this agreement through:*
  - i. *a persistent pattern of failure to effectively enforce its labour law or;*
  - ii. *failure to comply with its obligations under Articles 1 and 2 to the extent that they refer to the ILO Declaration.*

Articles 14 provides that the review panel must consist of experts in “labour matters or other appropriate disciplines” who are independent of either party. The Chair of the panel must not be a national of either party. Articles 15 and 16 provide for the review panel process while Article 17 provides that an initial report must be provided to the Parties for comments. The review panel may then reconsider its report or issue a final report (Article 18). If the final report finds there has been non-compliance by a party to the agreement, the Parties are then given every opportunity to implement an action plan aimed at compliance.

However, if a party refuses to comply with the report, Article 20 provides that the panel may then impose a monetary assessment, which is paid into a fund. The fund is to be expended on appropriate labour initiatives in the territory of the party that was the subject of the review. However, before monetary assessments are made, the offending country is given yet another opportunity to resolve the dispute. Annex 4 to the agreement provides that the amount of the monetary assessment shall not exceed US\$15 million annually. This is the only penalty for labour rights violations under the agreement.

The enforcement mechanism contains notable advances over the existing process under NAFTA. First, the process is less cumbersome. If accepted, a complaint goes to ministerial consultations after which the matter proceeds directly to a review panel. Second, the scope of the review process is substantially broader.

However, many of the flaws that have characterized the enforcement mechanisms in hemispheric trade agreements remain. First, and foremost the Canada-Colombia LCA is dependent upon the willingness of state signatories to pursue complaints. The complainants themselves cannot advance matters to a review panel. Given the experience under the NAALC, and given the diplomatic interest of both states to not conduct their disputes in public, it seems highly unlikely that any complaint will ever get beyond the level of ministerial consultations.

Second, the agreement provides every opportunity for the offending nation to negotiate a resolution to the complaint. Moreover, it is the states themselves that will decide whether a particular resolution to a complaint is satisfactory. The agreement does not provide the individual or group that launched the complaint with any mechanism to challenge the resolution.

Finally, the penalties are limited to relatively small fines. There are no possibilities for trade sanctions, trade tariffs or the revocation of the trade agreement as penalty for the repeated and systemic violation of the labour rights set out in the agreement.

## Will the labour provisions provide real protections for workers?

The labour protections found in hemispheric trade agreements negotiated by the Canadian Government have not provided enforceable rights for workers. While some improvements have been made in the Canada-Colombia agreement, the essential structure of the labour clauses found in previous trade agreements remains largely unchanged.

Substantive labour rights protections remain in a side agreement rather than in the body of the agreement. Enforcement of these rights remains entirely at the discretion of the signatory governments. There are no provisions that provide for independent legal actions by trade unions or other workers' organizations that could lead to real remedies for affected Parties. Finally, the agreement contains no provisions for real 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.

Given the magnitude of the labour rights violations in Colombia, and the failure of the current government to prosecute the offenders, simply issuing fines against the offending government is not an acceptable or effective sanction. Fines neither address the causes of the violence nor generate a substantive incentive or the political will in the Colombian administration to address the crisis and bring an end to violence against trade unionists.

In general, experience suggests that labour provisions in trade agreements, whether in side agreements or not, are unlikely to lead to concrete improvements for workers. The labour provisions in the Canada-Colombia FTA are not sufficiently robust to begin to address the serious labour and human rights violations that occur regularly in Colombia. The greater risk is that the FTA's provisions for market liberalization and investor rights, which are substantive, may in fact lead to further conflict and violations of worker rights.

## THE INVESTMENT CHAPTER IN THE CANADA-COLOMBIA FTA

Scott Sinclair, Canadian Centre for Policy Alternatives (CCPA)

There is a human rights crisis in Colombia. It is a nation gripped by internal armed conflict, where basic rights are routinely violated. Colombian ruling elites and governing institutions have been deeply implicated in the violence.<sup>v</sup>

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, primarily in the resource sector, are well established throughout Colombia, including in conflict zones. Regions rich in minerals and oil have been marked by violence, paramilitary control, and displacement. Nevertheless, Canadian investment is predicted to increase sharply in the near future.

While Canadian direct investment in Colombia was listed officially for 2007 at \$739 million, Canada's Embassy in Bogota estimates the stock of investment is significantly higher, closer to \$3 billion, because a majority of Canadian investments are made through offshore financial centers, particularly for oil, gas and mining. The Embassy's research also indicates there is an additional US\$2 billion in planned investment over the next two years, also focused on oil, gas and mining.<sup>10</sup> At the signing ceremony for the Canada-Colombia Free Trade Agreement (CCFTA) agreement in Peru, in November of 2008, President Alvaro Uribe indicated he hoped the accord would help spur oil, gas and mining exploration across half of Colombia's territory, up from just 13% of the country in 2002.<sup>11</sup>

The CCFTA will provide Canadian investors in Colombia with substantial new investment rights backed by a very powerful enforcement mechanism – the investor-state arbitral process. The agreement clearly provides increased security for the investments of Canadian companies. Unfortunately, human rights receive no such protection, as obligations on foreign investors to act responsibly are weak and generally unenforceable.

Rather than addressing Colombia's human rights crisis, inserting these 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 Canada-Colombia Investment Chapter: Key Provisions

The provisions of the investment chapter are generally based upon the template of the NAFTA investment chapter, as altered under Canada's subsequent bilateral FTAs and Foreign Investment Protection Agreements (FIPAs). There are certain new features and significant differences, which will be discussed below.

### Scope and Coverage

The investment chapter includes an extremely broad definition of investment (Article 838), covering nearly all forms of investments and property interests "acquired in the expectation or used for the purposes of economic benefit." Government "measures" covered by the agreement are also broadly defined to include "any law, regulation, procedure, requirement or practice" (Article 106). Consequently, the chapter's obligations cover almost any government action – at the federal, state, provincial or local levels – that affects foreign investment or investors.

<sup>v</sup> As Amnesty International reported in October 2008. "At the time of writing, more than 60 parliamentarians – most of whom are part of President Uribe's governing coalition in Congress... were under formal or preliminary investigation for their suspected links to paramilitary groups..., [and] several have either pleaded guilty or have been found guilty of association with paramilitary groups, electoral fraud, murder, and the organizing, arming and financing of paramilitary groups." (<http://www.amnesty.org/en/library/asset/AMR23/023/2008/en/65b11bee-a04b-11dd-81c4-792550e655ec/amr230232008eng.pdf>)

## Key Obligations

*Rules on non-discrimination.* As in other Canadian investment treaties, the chapter contains obligations for national treatment (Article 803) and most-favoured-nation treatment (Article 804), ensuring that governments treat foreign investors and investments “no less favourably” than local ones or those of other nationalities. Investor-state tribunals have interpreted NAFTA’s national treatment obligation in a manner that impinges on the ability of governments to treat investors differently for legitimate reasons.<sup>12</sup> The Canadian government has done nothing to correct these troubling interpretations.

*Restrictions on performance requirements.* The chapter prohibits most “performance requirements,” conditions set by governments for development purposes that oblige foreign investors, for example, to purchase local goods, transfer technology, or take local investment partners (Article 807). These restrictions empower international corporations but can be detrimental to local governments trying to secure longer-term benefits for their citizens. Exxon Mobil, for example, is currently challenging Canadian requirements that energy companies active in oil and gas fields off Newfoundland and Labrador must carry out some research and development within the province as a breach of NAFTA rules (Article 1106).

*Rules on “expropriation” and compensation.* Foreign service companies and other investors are protected against alleged “expropriation” without compensation (Article 811). Foreign investors have invoked similar provisions in NAFTA (Article 1110) to challenge a broad range of environmental protection, resource management and other regulatory measures as “indirect expropriations.” These include challenges to Ontario’s decision to block a controversial

waste disposal project, Nova Scotia’s decision not to approve a mega-quarry, and Quebec’s ban on the use of cosmetic pesticides, among others.

*Market access rules.* Under Articles 801 and 904, governments are prohibited from restricting investors’ access to domestic markets through the use of “quantitative restrictions” on investors or service suppliers. Examples of beneficial public policies that could conflict with these rules include measures limiting the growth of private health insurers; conservation measures limiting the number or types of investments in environmentally-sensitive areas; or bans (considered a limit of zero) on specific services, such as internet gambling or the application of cosmetic pesticides.<sup>vi</sup>

## Exceptions and Reservations

In the investment chapter, all sectors and measures are considered covered unless they are explicitly excluded. Both Canada and Colombia have taken reservations (country-specific exclusions) that exempt specific sectors or measures from certain obligations. Reservations are of two types: *bound reservations* (Annex I), which exempt specific existing, non-conforming measures, subject to a legal ratchet <sup>vii</sup> and *unbound reservations* (Annex II) that exempt broader sectors or policies from certain obligations, while providing for future policy flexibility.

If a measure is ruled inconsistent with the chapter, it can still be justified if the defending government can demonstrate that it falls within the chapter’s general exemption.<sup>viii</sup> This exemption (Article 2201.3) is narrower than those applying to other chapters (Articles 2201.1 and Article 2201.2). Governments have rarely been successful in justifying non-conforming measures even under broader general exceptions (such as GATT Article XX) in other treaties.

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vi Such measures are exposed to challenge even if they are non-discriminatory, applying equally to both domestic and foreign investors.

vii Measures reserved under Annex I can only be amended to become more consistent with the Chapter. If they are changed or eliminated by future governments their protection under the treaty expires.

viii Inconsistent measures that are necessary “to protect human, animal or plant life or health” or “for the conservation of living or non-living exhaustible natural resources” can be justified “subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between investors, or a disguised restriction on international trade or investment.” (Article 2201.3, emphasis added) These conditions are difficult to satisfy and governments have rarely been successful in justifying non-conforming measures under broader general exceptions in other treaties (such as GATT article XX or GATS article XIV).

*Investor-State Dispute Settlement.* Unlike other chapters of the treaty, which are enforced through government-to-government dispute settlement, the main obligations in the investment chapter are directly enforceable by foreign investors through investor-state arbitration. Arbitration can be invoked unilaterally by investors, without consent from their home governments. Cases are decided by tribunals of three members, one chosen by the investor, one by the challenged government, and a third selected by mutual agreement. Tribunal decisions are final, although they may be reviewed on narrow procedural grounds by domestic courts. While tribunals cannot compel governments to change inconsistent measures, they can award monetary damages to investors.

## Analysis of the Investment Chapter: Key Issues and Implications

### Corporate Social Responsibility

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 and they cannot evade responsibility (see box next page). The violent suppression of labour and community organizations greatly weakens the ability of Colombian citizens – especially workers and indigenous peoples – as well as governments at all levels to exert democratic control over investment in their communities.

The investment chapter pays mere lip service to corporate social responsibility. Article 816 observes that each party “should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies.” This is a “best-efforts” provision – purely voluntary and completely unenforceable. Similar ineffectual language on corporate social responsibility is also found in the agreement’s preamble.

In the same vein, under Article 815 “The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures.” But, once again, this obligation is merely “best-efforts.” The only recourse if a party acts inappropriately to encourage investment is to consult and exchange information between the two national governments (Article 815).

### Investor-State Arbitration

In sharp contrast to its treatment of corporate responsibilities, the chapter accords investors powerful substantive rights that are, in most instances, directly enforceable by investors through investor-state arbitration.

As experience under NAFTA chapter 11 demonstrates, making investment rights enforceable through investor-state arbitration greatly increases both the frequency and controversy of disputes. Governments tend to be cautious about bringing matters to formal dispute settlement. They must consider diplomatic relations and weigh the consequences for their own similar domestic policies if the challenge should succeed.

Private investors, on the other hand, have been quicker to invoke dispute settlement and are more aggressive in their interpretation of broadly worded investment rights.<sup>ix</sup> For example, there are currently at least 13 active NAFTA investment claims against Canada, involving challenges to a wide range of federal, provincial and local government measures. Canadian companies, including in the extractive sector, are adept at using such mechanisms in the Americas as well. In December of 2008, Pacific Rim Mining Corp, a Canadian mining company, filed a notice of intent to use its US subsidiary to launch claims under the US Central America Free Trade agreement for hundreds of millions of dollars against the Government of El Salvador for failure to grant mining permits.<sup>13</sup>

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ix There have been only three government-to-government disputes under Chapter 20 of the NAFTA. By contrast, there have been over 50 investor-state claims and the number continues to rise.

## COLOMBIA, CONFLICT ZONES AND CANADIAN CORPORATIONS

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There are over 20 Canadian oil and gas companies (oil producing, transportation and pipelines, and services) in Colombia.<sup>x</sup> The biggest Canadian companies in Colombia's oil and gas industry include Nexen, Enbridge, and Petrominerales.<sup>xi</sup> Enbridge owns approximately one quarter of the OCENSA oil pipeline, Colombia's longest pipeline, which spans over 800km. The OCENSA pipeline is guarded by over 1,400 members of various military units.<sup>xii</sup> Some of those military units have a history of support for paramilitary groups and systematic human rights violations.<sup>xiii</sup>

Canadian mining company Coalcorp carries out exploration and owns producing coal mines, railways and has stakes in two ocean ports in the departments of Cesar, Santander and La Guajira.<sup>xiv</sup> These areas are characterized by high incidences of paramilitary violence.

Vancouver's B2Gold is among more than 35 Canadian junior mining companies exploring for minerals in Colombia. B2Gold is the only Canadian company that was named in the Permanent People's Tribunal on Multinational Corporations in Colombia. This tribunal, which concluded in July 2008, undertook almost three years of hearings, listening to people's testimony about violations of human rights in connection with the actions of multinational corporations.<sup>xv</sup> Toronto's Colombia Goldfields has been accused by locals of displacing artisanal miners in Marmato. <sup>xvi</sup>

Other Canadian companies in Colombia include Bata Footwear, Kruger Paper, McCain Foods, Nortel Networks, President's Choice International, Quebecor World and Talisman Energy. <sup>xvii</sup>

– Dawn Paley

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x <http://www.international.alberta.ca/documents/Colombia-2007.pdf>

xi [http://www.edc.ca/english/publications\\_15570.htm](http://www.edc.ca/english/publications_15570.htm)

xii Note: Enbridge says that they are required by the Colombian government to enter into such contracts. <http://www.enbridge.com/csr2007/socialperformance/enbridge-csr-in-colombia/>

xiii <http://www.amnesty.org/en/library/info/AMR23/079/1998/en>

xiv <http://www.coalcorp.ca/properties/>

xv The Permanent Peoples' Tribunal is an international independent tribunal, founded in 1979, that examines and judges complaints regarding violations of human rights that have been submitted by the victims. The Tribunal's verdicts are carried out by high-level international judges. <http://www.dominionpaper.ca/articles/2002>

xvi <http://www.dominionpaper.ca/articles/1777>

xvii <http://www.infoexport.gc.ca/ie-en/Office.jsp?oid=62>

Colombians have little experience with investor-state arbitration. Because of concerns about their constitutional validity, only a handful of Colombian bilateral investment treaties are currently in force.<sup>xviii</sup> The recently negotiated US-Colombia FTA contains investment protection provisions, but the pact is in limbo due to US Congressional and now Presidential concerns about the human and labour rights situation in Colombia. Colombia has no FIPA with Canada, so the rights provided to Canadian investors by the FTA would be unprecedented. Given the projected growth of Canadian investment, particularly in oil, gas, and mining, the FTA strengthens the hand of investors in a context of frequently violent struggles over land and resources.

Even in a strong democracy such as Canada's, with a well-functioning judicial system, these extraordinary investor rights have been abused to contest democratically-decided policies and regulation. In the Colombian context where human rights, democratic institutions and the judicial system are fragile and under threat, for Canada to insert such powerful investment rules and rights into an already troubled situation can only be regarded as destabilizing and unconscionable.

## Constraining Regulatory Authority

As already noted, foreign investors have invoked similar rights under NAFTA to challenge governments' exercise of regulatory authority to protect the public good. Rules protecting against expropriation without compensation (NAFTA Article 1110 and CCFTA Article 811) are some of the most abused.

Under Canadian domestic law, expropriation generally means the transfer of real property for the government's own use and benefit. Other actions, such as laws or regulation, that may harm an investor are not considered expropriation.<sup>xix</sup>

Using NAFTA's investment protection rules, however, foreign investors have repeatedly alleged that government actions that diminish the value of investors' assets constitute "indirect expropriation" and require compensation. In certain cases (most notably *Metalclad vs. Mexico*) such arguments have succeeded and the tribunal has ordered that compensation be paid. The CCFTA investment chapter will expose Colombian government actions to similar claims (and further ingrains an interpretation of property rights that has been used aggressively against Canadian government measures).

The language in Article 811 differs only slightly from NAFTA Article 1110.<sup>xx</sup> One difference, however, is that a new annex to the chapter provides guidance to tribunals on the meaning of "indirect expropriation, which results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure (Annex 1)."<sup>xxi</sup>

It is difficult to predict if this guidance will restrain future tribunals in their interpretations of indirect expropriation. The annex sets out a number of criteria that the tribunal should consider in its case-by-case assessment such as the "character of the measures", "their economic impact" and whether they interfere with "reasonable, investment-backed expectations." It also stipulates that "Except in rare circumstances, ... non-discriminatory measures by a Party that are designed and applied to protect legitimate public

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xviii Colombia has a bilateral investment treaty with Peru and is part of a free trade agreement with Mexico and Venezuela. In 2005, Colombia signed a bilateral investment treaty with Spain. See Luke Eric Peterson, "Claim threatened by Peruvian slot machine manufacturer against Colombia," *Investment Treaty News*, May 31, 2006.

xix Moreover, property rights are not entrenched in the Canadian constitution.

xx The most noteworthy difference is that NAFTA's reference to measures "tantamount to expropriation" has been deleted.

xxi This language is drawn largely from letters accompanying the investment chapter of the US-Singapore Free Trade Agreement (2003). Similar language has been incorporated into subsequent US bilateral FTAs, as well as into the new template for Canada's FIPAs, which was updated in 2003.

welfare objectives, for example health, safety and the protection of the environment, do not constitute indirect expropriation.(Annex 1)”

Fundamentally, however, the annex still leaves it up to the judgement of arbitrators to draw the line between legitimate regulation and indirect expropriation and to determine those “rare instances” where non-discriminatory regulation might constitute expropriation.

This continuing uncertainty about the meaning of expropriation will cast a shadow over regulatory initiatives and policy-making in both countries. Moreover, formalizing this interpretation of indirect expropriation, which diverges from Canadian law and practice, could be argued to entrench a contentious conception of property rights through the back door of international trade and investment agreements.

As noted, *Market Access Rules* (Articles 801 and 904) prevent governments from restricting investors’ access to domestic markets by limiting the number of investors or service suppliers. This is the first time such market access prohibitions have been incorporated into the investment chapter of a Canadian FTA. <sup>xxii</sup>

Such rules are drawn from one of the most controversial articles (Article XVI) in the General Agreement on Trade in Services (GATS). The GATS, however, has a very different architecture. Unlike the Colombian agreement, GATS coverage for services liberalization is based on a positive list, where sectors are only covered if specifically included. Moreover, the GATS general exception is broader than the one in the investment chapter. <sup>xxiii</sup>

Canada has attempted to opt out of these controversial rules by reserving “the right to adopt or maintain any measure that is not inconsistent with Canada’s obligations under Article XVI of the GATS.” Colombia took a different approach, reserving a long list of sectors including security, research and development, energy distribution, education, health, libraries and more from Article 904. While this approach demonstrates Colombia’s awareness of the risks to public policy in certain areas, it may well expose regulatory measures in unlisted sectors to challenge.<sup>xxiv</sup> Especially in light of Canada’s effort to back out of these obligations through its reservation, it is highly inappropriate to have included them in the first place.<sup>xxv</sup>

## Conclusion

In Latin America, there is widespread and growing recognition that foreign investment liberalization and accompanying policies of deregulation have not stimulated broad-based economic growth or improved environmental protection in the region. To ensure development benefits flow from foreign direct investment, government policies must support economic linkages to local communities and firms, redistribute revenues from resource development, and protect the environment and the public good.<sup>xxvi</sup>

The Canada-Colombia investment chapter would restrict the ability of governments to put in place the types of public policies and regulations needed to ensure that foreign investment contributes to development and that development benefits are shared more equitably. In certain respects, it goes further than previous investment treaties in restricting governmental ability to set policies that will benefit their citizens.

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xxii The pending Canada-Peru FTA, which was negotiated concurrently, contains similar provisions.

xxiii For example, it does not safeguard measures for consumer protection or the protection of “public morals” which is the exception the US invoked in the GATS gambling case (cf. GATS Article XIV)

xxiv Article 904, although incorporated into the investment chapter, is not enforceable through investor-state arbitration (see Article 819a).

xxv For example, both parties could simply have affirmed that their services liberalization obligations are governed under the GATS.

xxvi Despite evidence to the contrary, arguments continue to be made that investment agreements increase foreign investment flows. In fact, foreign direct investment is attracted by traditional factors such as size of market, per capita incomes, well-developed infrastructure and natural resource endowments. See Working Group on development and Environment in the Americas, “Foreign Investment and Sustainable development: Lessons from the Americas,” 2008, Tufts’ Global Development and Environment Institute, 2008, <http://ase.tufts.edu/gdae/WGOoverview.htm>

This trade agreement ignores the fact that Latin America, and perhaps the world, is turning the page on an era where international constraints severely reduced government's role in the economy. Today, the ability to screen foreign investments for development purposes; to exclude foreign investment from certain strategic sectors; public ownership; requirements to source locally; negotiations with foreign investors to maximize development benefits; and establishing local employment, training, research and technology transfer targets, are, once again, part of the tool kit that democratic governments are turning to, to promote their development goals.

The outmoded approach embodied in the investment chapter looks especially inept in view of the current global crisis. Costs inflicted by past financial deregulation mount daily and citizens in both the North and South are demanding effective government intervention to create jobs and protect living standards – that is to ensure positive economic outcomes for the majority of citizens. The CCFTA investment chapter provides powerful rights to foreign investors, but does little to protect the rights of citizens.

Canada will pay a diplomatic price and may squander goodwill in the region by continuing to promote this discredited approach.

Given Colombia's very poor human rights record, it is strongly in Canada's interest to encourage a more balanced approach and to act as a good neighbour in the hemisphere. This requires a thorough rethinking of the investment chapter template in place since NAFTA and an overhaul of Canadian negotiating objectives. The first step in this necessary reorientation should be to reject the Canada–Colombia deal.

## MARKET ACCESS IN AGRICULTURE: IMPLICATIONS FOR SMALL-HOLDER FARMERS AND HUMAN RIGHTS

Gauri Sreenivasan and Dana Stefov, Canadian Council for International Co-operation (CCIC), with reports from Inter Pares

As in most developing countries, agriculture in Colombia is pivotal for addressing poverty and development. 12 million people live in Colombia's countryside. Agriculture provides 11.4 % of Gross Domestic Product and accounts for 22% of employment –nearly twice the level of employment in manufacturing.<sup>14</sup> Special consideration must be given to the impact the Canada-Colombia Free Trade Agreement will have on the human rights of Colombia's rural population.

Colombia's four decade internal conflict is fuelled by struggles for control over land and the resources under it. As a result, Colombia's rural citizens have borne the brunt of the violence unleashed by guerrilla groups, State security forces, and paramilitary groups linked to both State and business actors. Approximately 4 million Colombians are internally displaced, ranking the country second only to Sudan in humanitarian disasters on the planet. According to the *2008 World Development Report* 79% of Colombia's rural population lives below the national poverty line.

The women and men who make up the rural poor are small-scale farmers, landless workers on large farms and plantations (such as coffee, sugar cane or palm oil) or workers in other rural sectors such as artisanal mining. Lack of access to land and credit, poor infrastructure in marginal areas, competition from imports, and poor and low-paying working conditions mean rural Colombians have been struggling for decades to build sustainable livelihoods. Indigenous and Afro-Colombian populations are among the hardest hit. Many rural households, even if food producers, are net food consumers. The reality is that one of the most

lucrative sectors for the rural poor is illicit coca production, where finance and inputs are readily available from narco-trafficking networks.

Despite Article 65 of the Colombian Constitution, which guarantees collective rights for protection of food production, the focus of government support and resources has been to plantation and export agriculture. Small-holder agriculture and hence food crop production has lagged behind. Colombia's dependence on food imports such as wheat and other cereals has grown over the last 15 years due to market liberalization. Colombia now imports over 50% of the food required by its citizens.<sup>xxvii</sup> Food imports have not addressed hunger however, given wide-ranging poverty. In a country of 44 million people, 5 million go to bed hungry each night and the Food and Agriculture Organization reports that 2.5 million children live in chronic hunger, in violation of the fundamental right to food.<sup>15</sup>

### Trade in Agriculture with Colombia

Agricultural goods are a significant part of two-way trade between Canada and Colombia. Major Canadian agricultural exports to Colombia include wheat, barley, and pulses. Canadian wheat sales totalled about \$1.2 million in 2007. While wheat is Canada's top export to Colombia, this represents only 2.5% of global sales of Canadian wheat.<sup>16</sup> Almost 60% of Colombian exports to Canada are agricultural, particularly coffee, bananas and cut flowers.

Most Colombian goods enter Canada duty-free already, though minor tariffs remain on certain sugar products and cut flowers.<sup>xxviii</sup> Canadian cereal exports to Colombia face a 15% tariff, while higher tariffs apply for pork (20%) and beef (up to 80%).<sup>17</sup>

xxvii In 1990, Colombia imported 700,000 tonnes of food products. Today Colombia imports 8 million tonnes of food. (Mario Alejandro Valencia, RECAL CA. Personal communication with CCIC. November 11, 2008.)

xxviii Tariffs on sugar are currently at 7% for refined sugar and 5% for sugar candy ; tariffs on cut flowers are 6-10.5% ([http://www.international.gc.ca/right\\_column/Content/agr-acc/andean-andin/FTA-annex-annexe-ALE-and\\_tab1\\_en.aspx](http://www.international.gc.ca/right_column/Content/agr-acc/andean-andin/FTA-annex-annexe-ALE-and_tab1_en.aspx))

## Key Market Access Results of the FTA for Canadian Exports

The Colombia-Canada FTA is a comprehensive agreement that aggressively opens the Colombian agricultural sector to Canadian exports, including immediate elimination of duties on wheat, peas, lentils and barley and on specified quantities (quotas) of beef and beans. Other key exports have rapid tariff phase-outs (5 years) such as on french fries and specified quotas of pork (double current annual export volumes). Where tariff phase-outs with quotas have longer implementation periods (12 years for beans and beef e.g.), the gains to Canada are frontloaded, i.e. most of the market access gain is in the first year, with only moderate growth before duty free treatment kicks in. The shock on local producers in sectors important for food security such as beans, therefore, is largely immediate, rather than attenuated.

Table 1 provides an overview of pre-FTA tariff rates and market share for select Canadian products compared to their new treatment under the agreement.

### What Impacts Will This Have on Small-Holder Livelihoods in Colombia?

While an exhaustive analysis is not offered here, a review of the profiles of these sectors reveal important concerns about the likely negative impacts of the FTA with Canada, particularly, for local grain farmers (wheat and barley) and informal pork producers. As border protections are ratcheted down through the deal, Colombian farmers in these areas will lose access to local markets with new inflows of Canadian products. At the same time, the Colombian government has effectively negotiated away its access to safeguard measures to protect livelihoods and farmer incomes. The trade agreement may thus propel additional displacement of the rural poor.

## Pork

The Canadian FTA will likely have a major negative impact on production and jobs in the pork sector. 50% of the pork industry is informal in Colombia and employs 90,000 people per year. Colombian analysis of the US-Colombia FTA (commissioned by Oxfam UK) predicted this sector would be decimated by increases in US imports likely losing 39,000 of those jobs.<sup>18</sup> The impact of Canada's exports would be comparable given Canada's similar industrial profile and competitive price position with the US on pork exports. Although tariff reductions are phased in over 13 years, the organization representing pork producers, Asoporcultores, has noted the informal pork farm sector will not become competitive in such a timeframe and is likely to slowly dismantle.<sup>19</sup>

## Grains: Wheat and Barley

Despite official government attempts to modernize and restructure Colombian wheat and barley production, there are still a significant number of subsistence Colombian wheat and barley farmers (approximately 12,000).<sup>xxix</sup> Despite challenges in these sectors, production in Colombia has been fairly steady annually at 58,000 tonnes of wheat and 6,000 tonnes of barley. Based on the conclusions of the Oxfam study on the US-Colombia FTA, it is anticipated that these small-scale, cold-climate crop producers will be the hardest hit by an FTA with Canada – 12,000 livelihoods easily undermined by the competitive edge of Canada's world class industrially-produced wheat and barley exports.<sup>xxx</sup> In the case of barley, given recent decreases in local production and the inclusion of tariff-free barley in the FTA, it is likely that Colombia will cease to produce barley at all.<sup>20</sup>

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xxix The Colombian government has attempted to restructure wheat and barley farmers' production due to an assessed inadequacy of conditions for profitability. (Mario Alejandro Valencia, RECALCA. Personal communication with CCIC. November 11, 2008). From 1990 to 2005, the total area dedicated to wheat production was reduced by 50% and by 94% for barley production. Garay (2006) *op. cit.*, p. 79.

xxx Parallel impacts can be inferred given the competitive position of Canadian to US wheat, and the parity of the concessions that were negotiated in the two deals.

## TABLE 1

Product	Share of Canadian Exports to Colombia	Current Colombia Tariffs	Canadian Export Volumes (Annual Average 2005-2007)	Canada Treatment in Canada-Colombia FTA
Wheat	22%	15%	410,861 Tonnes (Wheat and Barley)	Free and Immediate
Barley	3%	15%		Free and Immediate
Pulses	10%	Lentils/Peas 15% Beans 60%	96,179 Tonnes 654 Tonnes	Free and Immediate Immediate within an annual quota of 4,000 tonnes. Complete tariff elimination within 12 years.
Pork	1%	20% In Quota 108% Over Quota	2,561 Tonnes	5 years phase out on an annual quota of 5,000 Tonnes. Complete tariff elimination within 13 years.
Beef	1%	70-80%	0 (due to BSE ban)	Free and Immediate on 1,750 Tonnes for each of high quality, standard quality and offal. Complete tariff elimination within 12 years.

**Adapted from source:** [http://www.international.gc.ca/right\\_column/Content/agr-acc/andean-andin/FTA-annex-annexe-ALE-and\\_tab3\\_en.aspx](http://www.international.gc.ca/right_column/Content/agr-acc/andean-andin/FTA-annex-annexe-ALE-and_tab3_en.aspx) and AAFC Agriculture Backgrounder to Canada-Colombia FTA.

While it is theoretically possible that these farmers could turn to another crop, concerns have been raised that there will not be any viable (legal) conversions, especially in the short term, as previous attempts to promote such transitions in Colombia did not work (as was the case for wheat producers in Nariño and Boyacá departments).<sup>21</sup>

## Gutting Trade Protections for Colombian Farmers

Colombia currently employs the Andean Price Band, which provides the government leeway to adjust tariffs if import prices for a given product exceed or drop below specified levels. The Price Band is a key mechanism to moderate the volatility of imports and prices, which can be so damaging for the poor, as witnessed in the last two years of the global food crisis. Under the CCFTA, Colombia must eliminate the Price Band Mechanism altogether on a range of goods of export interest to Canada including wheat, barley, lentils and peas.

*Special safeguard mechanisms and special products* are easy-to-use border measures that enable developing countries to protect small-scale farmers and their livelihoods through the application of tariffs.<sup>xxx1</sup> These policy tools are currently under negotiation in the World Trade Organization Doha Round trade talks. The Canada-Colombia FTA allows for none of these special developmental measures. Bilateral trade agreements are characterized by an asymmetrical negotiating dynamic between Northern and Southern countries. Important tools that developing countries may be able to achieve in a multilateral process by forming negotiating blocs, are easily dismissed in bilateral discussions.

On a few products of special sensitivity to Colombia (such as beef and beans) Colombia has access under the terms of the CCFTA to a safeguard trigger that allows the government to apply additional duties during the tariff phase-out period. But the trigger is both temporary and very weak, requiring in the case of high quality beef for one and a half times the

quota volume to have been exceeded before the safeguard can be employed.

Given the concessions made by Colombia in the FTA with Canada, including loss of the Andean Price Band and lack of provisions for a permanent *special safeguard mechanism* or *special product designation*, small and medium agriculturalists that dominate rural Colombia have been left with few options or protections. As Oxfam writes, “small farmers in Andean countries have very limited resources and fewer options for preserving their income if the products they grow are displaced. The lack of alternative employment, limited access to markets and credit, and lack of basic services in adverse climatic conditions and geographic isolation further compound poverty levels.”<sup>22</sup>

## Key Market Access Results of the FTA for Colombian Exports

Colombia’s markets access gains to Canada are modest, given the few barriers that were facing Colombian exports before the CCFTA. Even here, however, the gains display asymmetrical advantages to Canada. Remaining Canadian duties on sugar – of export interest to Colombia and of minor economic significance to Canada – will be phased out over 17 years. In contrast, Colombia, the developing nation, won only 12 or 13 year phase-outs for tariffs on sensitive sectors, including beans or pork, supporting livelihoods and food security for vulnerable populations. Moreover, while the CCFTA saves Colombia \$5.3 million in tariff duties on its annual exports to Canada, Canada saves \$25 million, growing to \$32 million. Importantly, these larger amounts represent lost revenues for the Colombian government.

Colombia did secure immediate tariff elimination on cut flowers and a range of other goods including palm oil products. But what are the developmental and human rights implications of more export growth in Colombia? To gauge the human impacts of an FTA, it is necessary to look at how specific economic sectors are linked to vulnerable groups in the economy and assess who gains and who loses from

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xxx1 A “special safeguard mechanism” allows developing countries to apply tariffs temporarily to address surges in imports. “Special products” is a tool that designates certain products as crucial to a nation’s food security and rural livelihoods, justifying lighter treatment under tariff reduction formulae.

growth in an area. This is particularly important in a conflict zone. Boosted exports generate profit and economic growth – but whose? In 2004, Colombia's Comptroller General indicated that about half of the country's arable land was in the direct hands of paramilitaries and narco-traffickers. Palm oil, a growing export to Canada, is a case in point, and is the subject of an in-depth upcoming research report by Inter Pares.

## Who gains from export growth in Colombia? The Case of Palm Oil<sup>23</sup>

*"What are the children going to eat, because we do not have other crops? We see no way out. What we need is our government or the government of other countries to help us because we have had enough of this crisis. But the government is only focused on biodiesel...it does not help us grow food, only to grow more oil palm..."*

– Yaneth Sosa, small grower in Nariño

African palm is the fastest growing agricultural sector in Colombia, currently covering more than 300,000 hectares of prime agricultural land. 75% of this production is undertaken by large palm oil companies. Palm oil is used as cooking oil, processed food, cosmetics and industrial products. Increasingly it is processed into biodiesel.

Because of growing international demand for palm oil as food and fuel, the value of Colombia's palm oil exports have increased at a staggering 300% over the past few years – from US\$25.7 million in 2002, to US\$78 million in 2006. While Europe is Colombia's largest buyer of palm oil, Canada has recently begun importing crude palm oil from Colombia. In 2007, Canada's imports of processed palm oil (from a variety of countries) were 150% greater than in 2005.

Colombia's President Alvaro Uribe has sought to take advantage of the growing global demand for palm oil and biodiesel by promoting growth of the industry. In 2007, he argued there was room for 6 million more hectares of land to be dedicated to African palm. Colombia is not currently

able to export biodiesel, but is in the process of constructing five refineries, with plans for another four to supply both domestic and international markets.

While the Colombian government paints a bright future for Colombia's palm sector, the industry has a dark side. In all four palm growing zones of the country, palm companies have been repeatedly linked to right wing paramilitaries and human rights violations, including massacres and forced displacement. Afro-Colombian communities have been particularly affected. In some cases, the victims of forced displacements are now, cruelly, having to work as low-paid employees on farms that were once their own property. Human rights groups have documented 113 murders in one river basin in the west by paramilitaries working with palm companies to take over Afro-Colombian owned lands.

Inter Pares' case study in the Western Nariño region demonstrates that in addition to the violence and loss of land, local farmers remain mired in poverty and food insecurity. Small-scale farmers were provided with supports only to grow palm oil. The mono-cropping style of palm oil left fields vulnerable to blight, which devastated the region, leaving farmers indebted and without food crops as fall back. The region now imports food stuffs from other Andean countries where before they had grown rice, bananas and other crops. Those who ended up as farm workers on palm oil plantations testified to threats and violence in the face of attempts to organize and to other less direct means to undermine union organizing.

In this already difficult agricultural context, coca growers have also increased their presence. Civilian communities have been caught between the violent struggles of army, paramilitaries and guerrillas in the area vying for control of both palm oil and coca production. Afro-Colombian communities have been organizing to reject coca and palm oil, both of which are mono-cropped exports that destroy local ecosystems and bring violence and conflict to their lives. They are seeking support from their government and the international community to grow their own local food crops to reclaim culture, territory and safeguard the environment.

## THE ENVIRONMENTAL SIDE AGREEMENT IN THE CANADA-COLOMBIA FTA

Steven Shrybman, Sack Goldblatt Mitchell LLP

The Agreement on the Environment (Environmental Side Agreement), negotiated as an adjunct to the Canada-Colombia Free Trade Agreement (CCFTA), not only fails to provide a credible vehicle for achieving its stated purpose of enhancing and enforcing environmental laws and regulations, but it will also fail to mitigate the corrosive pressures the CCFTA will exert on existing environmental and conservation measures and on efforts to strengthen this policy and regulatory framework.

It is now generally acknowledged that the de-regulatory objectives of trade liberalization policies may often conflict with those of environmental protection and sustainable development – hence the need for agreements such as the Environmental Side Agreement (ESA).<sup>xxxii</sup> The ESA, however, will do little, if anything, to moderate the adverse impacts the CCFTA will have on environmental law and policy that arise from the new tools the Agreement provides for assailing existing and proposed environmental measures. Particularly problematic in this regard is the right of foreign investors to claim damages where environmental measures negatively affect existing or proposed investments.

Moreover, by focusing on the question of enforcement, while establishing no minimum threshold for environmental protection or conservation, the ESA is likely to discourage environmental and conservation initiatives that would otherwise occur, particularly in Colombia. Because the effects of CCFTA on the environment will be particularly felt in Colombia, the focus of this assessment is, accordingly, on those impacts.

Colombia is the second most biologically diverse country on Earth, but is losing nearly 200,000 hectares of natural forest every year according to figures released by the United Nations in 2003. This deforestation results primarily from agricultural activities, logging, mining, energy development, and infrastructure construction.

The extensive investment interests of Canadian mining, energy and engineering companies in various development projects and operations in Colombia underscores the importance of ensuring that these investments not undercut efforts to protect the environment and biodiversity in that country. Unfortunately, the failure of the ESA to effectively counter the pressures of the CCFTA on environmental law and policy will significantly exacerbate the already serious environmental problems that Colombia now faces.

### The Status and Essential Elements of the ESA

The ESA is referred to, but not incorporated into the provisions of the CCFTA. It is not, therefore, amenable to the enforcement provisions of the trade agreement. Article 1704 declares the ESA and the CCFTA to be mutually supportive. But by isolating the ESA from, rather than incorporating it into, the CCFTA, the side deal is relegated to the status of an interpretive note to the provisions of the trade agreement itself. If the first principle of sustainable development requires the integration of environmental and economic policy, the relationship between the CCFTA and ESA fails the test.

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<sup>xxxii</sup> There is now extensive literature assessing the implications and impacts of trade liberalization on the environment, and the United Nations Environmental Program has called for meaningful measures to ameliorate the impacts of such policies on environmental protection and resource conservation efforts, see *UNEP Warns of Trade Liberalisation Failure if Environment Forgotten*, (<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=452&ArticleID=4953&l=en>)

The purpose of the ESA is described by its preamble, which commits the Parties to implementing their Free Trade Agreement in a:

*manner that is consistent with environmental protection and conservation, and the sustainable use of their resources, and within that area to:*

- a) enhance and enforce environmental laws and regulations;*
- b) strengthen cooperation on environmental matters; and*
- c) promote sustainable development . . .*

Under Article 2 of the ESA:

*1. Recognizing the sovereign right of each Party to establish its own levels of domestic environmental protection and its environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and policies, each Party shall ensure that its environmental laws and policies provide for high levels of environmental protection and shall strive to continue to develop and improve those laws and policies.*

*2. Accordingly, and with the aim of achieving high levels of environmental protection, each Party shall effectively enforce, through government action, its environmental laws.*

In other words, the ESA establishes no minimum standards for environmental protection and the parties are free, under the side deal, to maintain the status quo, or even eschew environmental policy or law reform. This is the singular and most fundamental failure of the ESA to engender any meaningful commitment to its putative environmental goals.

Rather the focus of the ESA regime is on the enforcement of environmental laws, should any be established. In this regard, each Party is obliged to enforce their respective environmental laws subject to certain qualifications.<sup>24</sup> In addition, the need to maintain environmental measures once adopted is reinforced by Article 2:4 pursuant to which the Parties agree not to waive or otherwise derogate from environmental laws for the purpose of encouraging trade or investment.

Under Article 2, the Parties also agree to:

- maintain appropriate environmental assessment procedures;*
- encourage trade and investment in environmental goods and services; and*
- advance the objectives of the Convention on Biological Diversity.*

Under Article 3, the Parties further agree to ensure that domestic enforcement proceedings<sup>xxxiii</sup> are available to provide sanctions or remedies for violations of their environmental laws, and under Article 6, to encourage voluntary best practices of corporate social responsibility by enterprises within their jurisdictions.

Article 5 of the ESA refers to and reiterates the Parties commitment to the *Convention on Biological Diversity*.

Noticeably absent from the ESA is any credible enforcement procedure to encourage adherence by the Parties to the requirements of the regime, however modest these obligations may be.

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xxxiii These are to be distinguished from enforcement procedures relating to the ESA itself.

The “enforcement” mechanisms of the ESA regime are set out in Articles 4 and 12. Under the former, any person may submit a “written question” to either Party to which that Party must respond in writing. But a person submitting a question has no recourse if the Party fails to provide an adequate, or even any response.

Article 12 sets out procedures for resolving disagreements if these arise among the Parties concerning the meaning and application of the ESA. But dispute resolution under ESA is consensual, and no sanctions are provided for non-compliance. Moreover, Article 12:6 provides:

*Neither Party may provide for a right of action under its law against the other Party on the ground that the other Party has acted in a manner inconsistent with this Agreement.*

Thus even the modest enforcement regime of the side agreement to the North American Free Trade Agreement (NAFTA)<sup>xxxiv</sup> is absent from the ESA.

## Analysis of the ESA as a Tool for Environmental Protection

The potential effectiveness of the ESA can only be assessed when account is taken of the likely impacts of the CCFTA on environmental law and policy. As described elsewhere in this brief, 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 and conservation measures, or to discourage progressive reforms.<sup>xxxv</sup>

One need look no further than Canada’s experience under NAFTA investment rules for evidence of the corrosive influence these dispute procedures can exert on environmental and conservation measures.<sup>25</sup> Moreover, the frequency of investor claims targeting environmental and

conservation measures seems to be increasing, with recent claims being made against Canada for measures concerning pesticide standards, environmental assessment procedures, and forest conservation measures.<sup>26</sup>

Given the limited presence of Colombian investors in the Canadian market, the concern here arises from the investments of Canadian mining, energy and engineering companies in Colombia. As we know, efforts to establish ecologically protected areas or to regulate resource extraction activities, whether in Colombia or elsewhere, are often opposed by the mining and energy companies affected by such initiatives.

In fact, the Canadian International Development Agency (CIDA) was instrumental in promoting revisions to Colombia’s mining code in 2001. In a study by the North-South Institute, the code is described as having “weakened – rather than strengthened – democratic procedures and Indigenous rights in favour of creating an investment environment conducive to large-scale mining development.”<sup>27</sup>

Under the CCFTA, the considerable influence resource industries may exert either directly, or indirectly to discourage environmental initiatives is strengthened by providing them the right to claim damages for any business losses occasioned by environmental or conservation reforms. Canadian mining companies are not shy about using investor-state dispute settlement. Canadian mining company Glamis Gold is currently suing the US government for \$US 50 million under NAFTA rules because of California’s regulations on open pit mining that are designed to protect the environment and indigenous rights.<sup>28</sup>

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xxxiv Under Part 5 of the NAFTA side agreement, third party arbitration may be invoked, and failure to implement an arbitral panel report can result in the suspension of benefits.

xxxv These procedures are set out in Chapter 8 of the CCFTA on Investment and may be invoked by private investors to enforce the broad rights they are accorded under that Chapter. See Chapter 3.2 of this briefing note.

As noted, references are made to the Convention on Biological Diversity (CBD) in Article 5 of the ESA, but this important international environmental agreement is noticeably absent from those listed under Annex 103 to the text of the CCFTA. The omission is telling of the relative priority the Parties have assigned to commercial vs. ecological goals. Under CCFTA Article 103, Multilateral Environmental Agreements, such as the Montreal Protocol on ozone depletion, are given priority if inconsistent with the CCFTA. The CBD is arguably the most important safeguard against the environmental damage typically caused by mining and other resource development activity. Yet this multilateral environmental agreement is not listed to Annex 103. By failing to do so, the Parties have clearly indicated that the interests of foreign investors under the CCFTA are to have priority in situations where these conflict with the requirements of the CBD.

The question to ask, then, is whether the ESA provides an effective buffer to counter the pressure enforceable investor rights will exert on environmental measures; the answer is clearly no, for two principal reasons. First, there is a stark asymmetry between the enforcement mechanisms of the CCFTA and the ESA. The former provides what is arguably the most effective enforcement regime ever incorporated into trade agreements because it can be invoked by countless third party private investors who may recover substantial damages for their efforts. The latter provides no sanction whatsoever for non-compliance with even the modest requirements of the ESA.

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.

There have now been over 14 years of experience under the environmental side agreement to NAFTA, and the emerging consensus is that the agreement has failed to provide a meaningful vehicle for achieving environmental goals, or for abating the significant erosion of environmental and conservation objectives that has occurred during this period.<sup>29</sup>

However, quite apart from failing to provide a credible vehicle for progressive environmental regulation or sustainable development, the ESA may actually provide an incentive for the Parties, and in particular Colombia, to eschew new environmental or conservation measures.

The reason for such a perverse result arises from the focus of the ESA on the question of enforcement while providing no requirement for any threshold of environmental regulation. Thus, neither Party may complain about the other failing to establish even minimum standards of environmental protection, yet they may challenge their trade partner's failure to enforce standards if adopted. Thus for a developing country like Colombia, which will have only modest monitoring and enforcement resources, the safest course may be to reject environmental and conservation initiatives in order to avoid the potential embarrassment of a complaint that it is not doing what is required to enforce such measures. Even if the current government in Colombia may not be inclined to strengthen environmental policy, the legally binding nature of the CCFTA means the disincentive remains for successive Colombian governments as well, limiting policy space even for future action in favour of the environment.

In sum, CCFTA will provide new tools for those who would discourage government measures proposed for the purpose of protecting the environment or conserving natural resources. Of particular concern is the private enforcement regime incorporated to the trade deal's investment chapter. The ESA does nothing to mitigate this negative pressure, and may in fact provide a further disincentive for environmental law reform.

# AUTHORS' BIOGRAPHIES

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# ENDNOTES

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## Background to the Canada-Colombia Trade Agreement

- 1 DFAIT (2007). *An FTA with the Andean Community countries of Colombia and Peru: Qualitative Economic Analysis – June*. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/andean-andin/FTA-ALE-and.aspx>
- 2 *Canada's re-engagement in the Americas*. DFAIT website: <http://geo.international.gc.ca/cip-pic/geo/objectives-en.aspx>
- 3 UN High Commissioner for Human Rights – statement to the press following visit to Colombia October 27-November 1, 2008. <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/935E73F72F4E47A1C12574F6003607FC?opendocument>; "UN accuses Colombian forces of killing civilians", *Financial Times*, November 2, 2008  
[http://us.ft.com/ftgateway/superpage.ft?news\\_id=fto110220081827099777&page=1](http://us.ft.com/ftgateway/superpage.ft?news_id=fto110220081827099777&page=1)
- 4 <http://www.colombiajournal.org/colombia295.htm>
- 5 Amnesty (2008). *op. cit.*
- 6 Amnesty International (2007). *Colombia: Killings, arbitrary detentions, and death threats – the reality of trade unionism in Colombia*, July <http://www.amnesty.org/en/library/asset/AMR23/001/2007/en/dom-AMR230012007en.html>
- 7 See FIDH report <http://www.unhcr.org/refworld/topic,4565c22535,459bb2cb21,494a1278c,0.html> and <http://www.iadllaw.org/en/node/325>
- 8 <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3580301&Language=E&Mode=1&Parl=39&Ses=2>

## Key Areas of the Agreement

- 9 Sources for this section:  
AFL-CIO, Colombia: Continued Violence, Impunity and Non-Enforcement of Labor Law Overshadow the Government's Minor Accomplishments, July 2008 Update  
Brief prepared for the European Union: Report on the Changes Needed if the Government of Colombia is to Fully Respect Fundamental Labour Standards, in Particular ILO Conventions 87 & 98, [www.justiceforcolombia.org/downloads/Report\\_from\\_ITUC\\_with\\_Colombian\\_tus.pdf](http://www.justiceforcolombia.org/downloads/Report_from_ITUC_with_Colombian_tus.pdf)  
CSR Report for Congress: Order Code RL34759, Proposed Colombia Free Trade Agreement: Labor Issues, November 24, 2008, Mary Jane Bolle, Specialist in International Trade and Finance, Foreign Affairs, Defense, and Trade  
Escuela Nacional Sindical (ENS), Informe de Violaciones a la Vida, Libertad e Integridad de Sindicalistas en Colombia, Periodo de Enero a Diciembre de 2008
- 10 DFAIT (2007). *op. cit.*
- 11 [http://www.bloomberg.com/apps/news?pid=20601082&sid=a5pix\\_PvfTsk&refer=canada](http://www.bloomberg.com/apps/news?pid=20601082&sid=a5pix_PvfTsk&refer=canada)
- 12 Jon Johnson (2001). "Essential Disciplines of the National Treatment Obligation under NAFTA Chapter Eleven," December 2 <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/treatment.aspx?lang=en>
- 13 <http://www.marketwire.com/press-release/Pacific-Rim-Mining-Corp-TSX-PMU-928202.html> Canada does not yet have its own investment agreement with El Salvador. Other examples include Canada's Glamis Gold, which is currently suing the US government under NAFTA's investment rules, claiming \$US 50 million in damages allegedly arising from California's environmental regulations on open pit mining and protections for indigenous rights.
- 14 Oxfam America (2006). *Song of the Sirens*, Oxfam Briefing Paper, June, p. 6.
- 15 Witness for Peace. (2006) *Faces of Colombia: who are the Victims of Free Trade?* <http://www.witnessforpeace.org/downloads/FacesofColombiaFTAfinal.pdf>
- 16 [http://www.international.gc.ca/right\\_column/Content/agr-acc/andean-andin/FTA-annex-annexe-ALE-and\\_tab3\\_en.aspx](http://www.international.gc.ca/right_column/Content/agr-acc/andean-andin/FTA-annex-annexe-ALE-and_tab3_en.aspx)
- 17 DFAIT (2007). *op. cit.*

- 18 Garay, Luis Jorge, *et al.* (2006) *La Negociación Agropecuaria en el TLC: Alcances y Consecuencias*. Study undertaken by Planeta Paz with the support of Oxfam UK. September. Bogotá, Colombia. p.100.
- 19 *Ibid.* p. 101
- 20 Garay (2006) *op. cit.*
- 21 Garay (2006) *op. cit.*, pp. 101-102.
- 22 Oxfam America (2006). *op. cit.* p. 9.
- 23 The following section is drawn entirely from Gary Leech (2009). *Fuelling Underdevelopment in Colombia: Poverty Human Rights and Canada's Role in the African Palm Oil Sector*. An Inter Pares publication. Forthcoming, April.
- 24 Article 2.2.
- 25 International Institute for Sustainable Development and the World Wildlife Fund, *Private Rights, Public Problems*  
[http://www.iisd.org/pdf/trade\\_citizensguide.pdf](http://www.iisd.org/pdf/trade_citizensguide.pdf)
- 26 "Dow challenges Quebec pesticide ban", *Globe and Mail*, October 22, 2008, and see the case materials available on the website of the Department of International Trade concerning *Dow AgroSciences LLC v. Government of Canada*; *Clayton/Bilcon v. Government of Canada*; and *Merrill and Ring v. Canada* .<http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/gov.aspx?lang=en>
- 27 Viviane Weitzner (2002). *Through Indigenous Eyes: Towards Appropriate Decision-Making Processes Regarding Mining on or Near Ancestral Lands*, North-South Institute, September, pp.72-73.
- 28 Sinclair, S. (2008). NAFTA Chapter 11 Investor-State Disputes to January 1, 2008, CCPA  
[http://www.policyalternatives.ca/documents/National\\_Office\\_Pubs/2008/NAFTA\\_Dispute\\_Table.pdf](http://www.policyalternatives.ca/documents/National_Office_Pubs/2008/NAFTA_Dispute_Table.pdf)
- 29 Notes for Geoffrey Garver – Appearance before the Standing Committee on International Trade, June 2008. Mr. Garver was senior official the North American Commission on Environmental Cooperation.





