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Investor Rights Trump Human Rights
The Investment Chapter of the Canada-Colombia FTA

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Editors Note: *This brief was first published as part of a longer document entitled* ***Making a Bad Situation Worse: An analysis of the text of the Canada-Colombia Free Trade Agreement*** *(CCFTA). That document, coordinated by the Canadian Council for International Co-operation, includes expert analysis of the human rights situation in Colombia, the labour side agreement, the investment chapter, agricultural provisions, and the environmental side agreement of the CCFTA. The Executive Summary of* ***Making a Bad Situation Worse*** *can be found at http://www.ccic.ca/e/docs/making_a_bad_situation_worse.pdf, while the full text of the analysis can be found at http://www.ccic.ca/e/docs/making_a_bad_situation_worse_long_version.pdf.*

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.[1]

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.[2] 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.[3]

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.

3.2.1 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.

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.[4] 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.[5]

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[6] 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.[7] 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.

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.

3.2.2 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. 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 though 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.[8] 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. Canada does not yet have a trade deal with Central America.[9]

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.[10] 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. Government actions, such as laws or regulation, that may harm an investor are not considered expropriation.[11]

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.[12] 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)."[13]

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 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.[14]

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 and rules are only covered if specifically included. Moreover, the GATS general exception is broader than the one in the investment chapter.[15]

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.[16] 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.[17]

3.2.3 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.[18]

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.

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.

Notes

1 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

2 DFAIT (2007). op. cit.

3 http://www.bloomberg.com/apps/news?pid=20601082&sid=a5pix_PvfTsk&refer=canada

4 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

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

6 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.

7 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).

8 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.

9 http://www.marketwire.com/press-release/Pacific-Rim-Mining-Corp-TSX-PMU-928202.html 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.

10 Colombia has a bilateral investment treaty with Peru and is part of a free trade agreement with Colombia, 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. As previously noted, the recently negotiated Colombia-US Free Trade Agreement is unlikely to be ratified because of US concerns over the human rights situation in Colombia.

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

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

13 This language is drawn 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.

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

15 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).

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

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

18 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/WGOverview.htm

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