



Five Years of Human Rights Impacts

The Canada-Colombia Free Trade Agreement and the Future of Peace and Prosperity in Colombia

Submission by the United Steelworkers Concerning the
Annual Reports on Human Rights and Free Trade
Between Canada and Colombia



A. INTRODUCTION

The United Steelworkers (USW) has been working closely with workers and communities in Colombia for many years, through relief, development and mutual aid. Our union continues to observe the conditions and challenges in Colombia through regular exchanges and delegations.

As a labour organization, the killing of trade unionists and human rights defenders in any part of the world mobilizes us. For years, we have heard about assassinations and disappearances in Colombia. For that reason, our union got involved in the opposition to a free trade agreement with Colombia as far back as 2007.

The USW has sent delegations to Colombia, which have included Ken Neumann, USW National Director for Canada, and representatives of our global union partners. Steelworkers Global Affairs Department staff Jorge Garcia-Orgales has also met with the Colombian government and FARC representatives in Cuba to discuss their progress and, more importantly, to support their efforts to end the war in Colombia.

The USW is engaged in the Canadian Network on Corporate Accountability (CNCA) which brings together environmental and human rights NGOs, faith groups, labour unions, and researchers from across Canada, who are advocating for federal legislation to establish mandatory corporate accountability standards for Canadian extractive companies operating abroad, especially in developing countries.

The lack of respect for the environment and culture, shocking working conditions, and the connection between Canadian companies and human rights violations in Colombia, were reasons that the USW became a member of the CNCA. The USW is the mining union in Canada and we know that responsible mining is possible. That is not what we have observed in Colombia.

The USW is also an active participant in Common Frontiers, a multi-sectoral working group, which confronts and proposes an alternative to the social, environmental and economic effects of economic integration in the Americas. As a member of Common Frontiers, USW was involved in the request for an independent Human Rights Impact Assessment (HRIA) long before the Canada-Colombia agreement was signed.

Today, the USW is part of the Colombia Working Group, a coalition dedicated to educating Canadians about Colombian issues. We have helped to sponsor visits to Canada by Colombian human rights defenders, who continue to be subjected to death threats, illegal surveillance by the state and are forced to live in a de facto state of displacement because they have been targeted.

We understand that, as part of the current process, the Colombia Working Group will be tabling its extensive and well-researched report “*Colombia in the Shadow of Human Right Abuses*”, which confirms that human rights violations have not abated in Colombia over the five years since the implementation of the Canada-Colombia Free Trade Agreement (CCOFTA).

CCOFTA was presented as the ideal tool to improve human rights in Colombia based on two assumptions: first, that trade would bring prosperity; second, that the government of Colombia is committed to improving human rights.

Our presentation will not repeat information provided by other sources, which demonstrate that these assumptions have proven to be largely false. This submission focuses on the opportunity the Canadian government has to improve the HRIA, and to review the CCOFTA with a view to facilitating the peace process in Colombia.

B. INTENSIFIED CONCERN

Our concern for Colombia intensified in the period leading up to the 2010 passage of the Canada-Colombia Free Trade Implementation Act. We joined with many parliamentarians and concerned Canadians in the call for an independent human rights assessment prior to any vote in the House of Commons. This call originated with the Parliamentary Committee on International Trade as far back as 2008, supported by all opposition parties at the time: the Liberals, the NDP and the Bloc Quebecois.

Scott Brison, now President of the Treasury Board in the current Cabinet of Prime Minister Justin Trudeau, was a vocal supporter of that position, declaring in the House in 2009:

“We believe that a full, independent human rights assessment, as recommended by the committee, should be provided by the government in Parliament before we vote again . . .”

However, by September of that year, Mr. Brison had changed his position with respect to the need for an independent assessment. Mr Brison endorsed the Canada-Colombia Free Trade Agreement, adding now that it was not only good economic policy but also the only way that Canada can forcefully intervene to end violence against unionists and human rights activists.

Human rights remained a concern among Liberals, and Mr. Brison developed a compromise position that he believed would respect those concerns while allowing Liberal MPs to vote with the government in favour of the Free Trade Agreement. And so the

Implementation Act passed, with the addition of a paragraph calling for an annual report on how the CCOFTA itself was impacting human rights in Colombia.

Mr. Brison stated with confidence that:

“if the reports are tabled in Parliament, the Human Rights Impact Assessment will be available to the public and will be debated at the trade committee. We can hear from witnesses, both from Colombia and Canada, on an annual basis.”

Obscured by this Liberal compromise, the original call for an independent, impartial and comprehensive human rights impact assessment was never about how a free trade agreement would impact Colombia in the future following the Implementation Act. It was about whether Canada should reward a regime that was known for its continued and murderous violations of human rights. Free trade agreements are commercial documents, essentially devoid of any moral obligation to uphold human rights. Instead, such agreements enshrine investor rights as the guiding imperative.

The Conservative government, supported by the opposition Liberals, said that the lives of ordinary Colombians would vastly improve under a ‘rules-based’ trade and investment environment. Those who opposed rewarding the Colombian government and business interests were characterized as being ideologically driven and simply ‘unwilling’ to recognize that free trade equals security and economic prosperity, as well as labour and human rights.

As the Colombia Working Group and others will report, in the years that followed human rights have not improved in Colombia. It is still identified as one of the most dangerous countries on earth to be a trade unionist and people continue to have their land either taken or degraded so that multinational corporations (some of them Canadian) can extract Colombia’s resources. Violence continues to be the byproduct tensions that have existed in that country for decades.

Despite the on-going rights violations, the HRIAs tabled annually to both the Canadian and Colombian parliaments uphold the status quo and are viewed by both Governments as confirmation of a job well done.

C. HARASSMENT AND INTIMIDATION

The Colombia Working Group will report that improvements in human rights have not yet happened. Indeed, there are some very recent reports of harassment and intimidation of human rights leaders and threats against local communities in various parts of Colombia since January of this year (2016), including:

- A pamphlet from the Black Eagles Northern Bloc Atlantic Coast (Bloque Norte Costa Atlántica Águilas Negras) was circulated in Atlántico Department. The death threat named about 40 individuals, including human rights defenders, trade unionists, land claimants, and a state official working on land restitution. Those named in the death threat had been involved in the land restitution process and issues relating to the peace process;
- In Chocó, on Colombia's Pacific Coast, the National Movement of Victims of State Crimes (MOVICE) has reported threats against the community of Peñaloza by paramilitary groups, which have been ongoing since November, 2015. One person has been killed and many families have started to flee the region;
- In Cauca, in Southwest Colombia, leaflets in the name of the paramilitary group "Los Urabeños" have threatened the local community in Bordo Patía with social cleansing;
- In other areas of Cauca, the forced eradication of illicit crops by the Colombian anti-narcotics police and military has created a situation of fear for local farmers, who have been threatened and had their lands and schools occupied by the armed forces;
- Also in Cauca, a witness for the Attorney General's Office and member of a network of informants for the army has threatened and followed two trade union activists and human rights defenders. Gerardo and James Barona Avirama have had their home spied upon by Nilson Hernando Mina Barrientos, a well-known army informant who, in exchange for payment, has accused local members of the community of being FARC insurgents;
- In Catatumbo, in northeast Colombia, one of the leaders of the agricultural workers' association, ASCAMCAT, has also been harassed by the military. Jhonny Feldeth Abril

- Salcedo has been the victim of discriminatory stop and searches, and local activists are fearful of further criminalization of human rights defenders in the region;
- On 5 February, a death threat by the Black Eagles paramilitary group (Águilas Negras) announced that it was “time for social cleansing in northern Cauca” and circulated this in the area and neighbouring municipalities¹.
 - On 6 February, Gerardo Velasco Escue and Emiliano Silva Oteca of the Toéz Indigenous *resguardo* (reservation) were forcibly abducted after being stopped by unidentified armed men near the hamlet of La Selva in Caloto Municipality, Cauca Department. Two days later, the community found their bodies bearing signs of torture in the municipality of Guachené.²
 - On the evening of February 24th, Emilio Torres Vega was violently detained by the police after attending activities organized in the center of Bogotá to campaign against police violence. Torres Vega was arrested while dining with friends after the protest. After what seems to have been a misunderstanding, he was insulted by the police and then taken into detention. The police refused to allow his lawyer to have contact with him and his family had no idea where he was. It is understood that he was released the next day;
 - Deivin Hurtado, a leading human rights activist and Head of the South-West Colombia Human Rights Network, has been arbitrarily stopped by the army and intimidated at gunpoint. As he was driving his motorbike through a village in Cauca, his path was obstructed by a man pointing his gun at Deivin. After he stopped his vehicle, members of the army emerged from the undergrowth and said that he was passing through a military checkpoint. However, there were no signs on the road identifying a checkpoint. They interrogated Deivin, and refused to allow him to make a call to identify his whereabouts, before then letting him go.

¹ Amnesty International Report 2015-2016 Annual Report on Human Rights, section Colombia

² Amnesty International Report 2015-2016 Annual Report on Human Rights, section Colombia

D. MAKE THE PROCESS WORK

It is clear that the CCOFTA has not improved the human rights record in Colombia, and the HRIA process has contributed very little to creating change and building a legal and social framework in Colombia that fully respects human rights. The current question is what is the strongest contribution the Government of Canada can make to improving human rights in Colombia today and over the next crucial years?

The USW believes that an annual, open debate, including witnesses from both countries, to measure and monitor the improvement of human rights in Colombia, would reflect the spirit expressed by parliamentarians and others, who believe that business should not be conducted at the expense of, or without regard to, basic human rights.

The narrow parameters of the HRIA, as the Conservative government understood the Implementation Act, are likely an impediment to an improved and open process of monitoring and reporting on human rights impacts over time. This process must be given the respect it deserves, with a full discussion in Parliament and appropriate committees, complete with witness testimony and debate.

The Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia has a mechanism to amend the current parameters of the reporting requirements. Specifically, Article 4 of the Agreements states:

Amendments.

The Parties may agree in writing to amend this Agreement. Each Party shall notify the other Party in writing of the completion of its domestic procedures required for the entry into force of the Amendment. The Amendment shall enter into force 60 days from the date of the second of these notifications.

This is no different than the environmental side agreement to the CCOFTA. Article 10 of that agreement calls for a review every five years to measure progress.

It was understood and accepted that conditions can change and that a regular review can make the agreements effective and relevant.

Since the signing of the CCOFTA, both Canada and Colombia have elected new governments. Both governments appear to be more open to ideas that will bring real improvement. In Colombia, for example, an unprecedented process has been established to end the armed conflict.

The first HRIA was presented in 2012. The upcoming report will be the fifth. Since the original compromise amendment seems to be too narrow to fully reflect the reality of Colombia, the USW proposes that the parameters be reviewed to allow more full and open reporting and evaluation. The new parameters should be renegotiated with Colombia in the understanding that a more full and open reporting process will not only satisfy the Canadian public, but also contribute to improving the image of Colombia in the world, as well as facilitate international support for the peace process there.

E. CCOFTA AND THE PEACE PROCESS

The government of Colombia and the FARC conducted peace negotiations in Cuba, considered to be a 'safe' location. Both parties agreed that those discussions were only aimed at putting an end to the armed conflict.

As the weapons are silenced, the real peace process will start in Colombia. But until the root causes anchoring the war (poverty, inequality and discrimination) are eliminated, peace will be difficult to achieve.

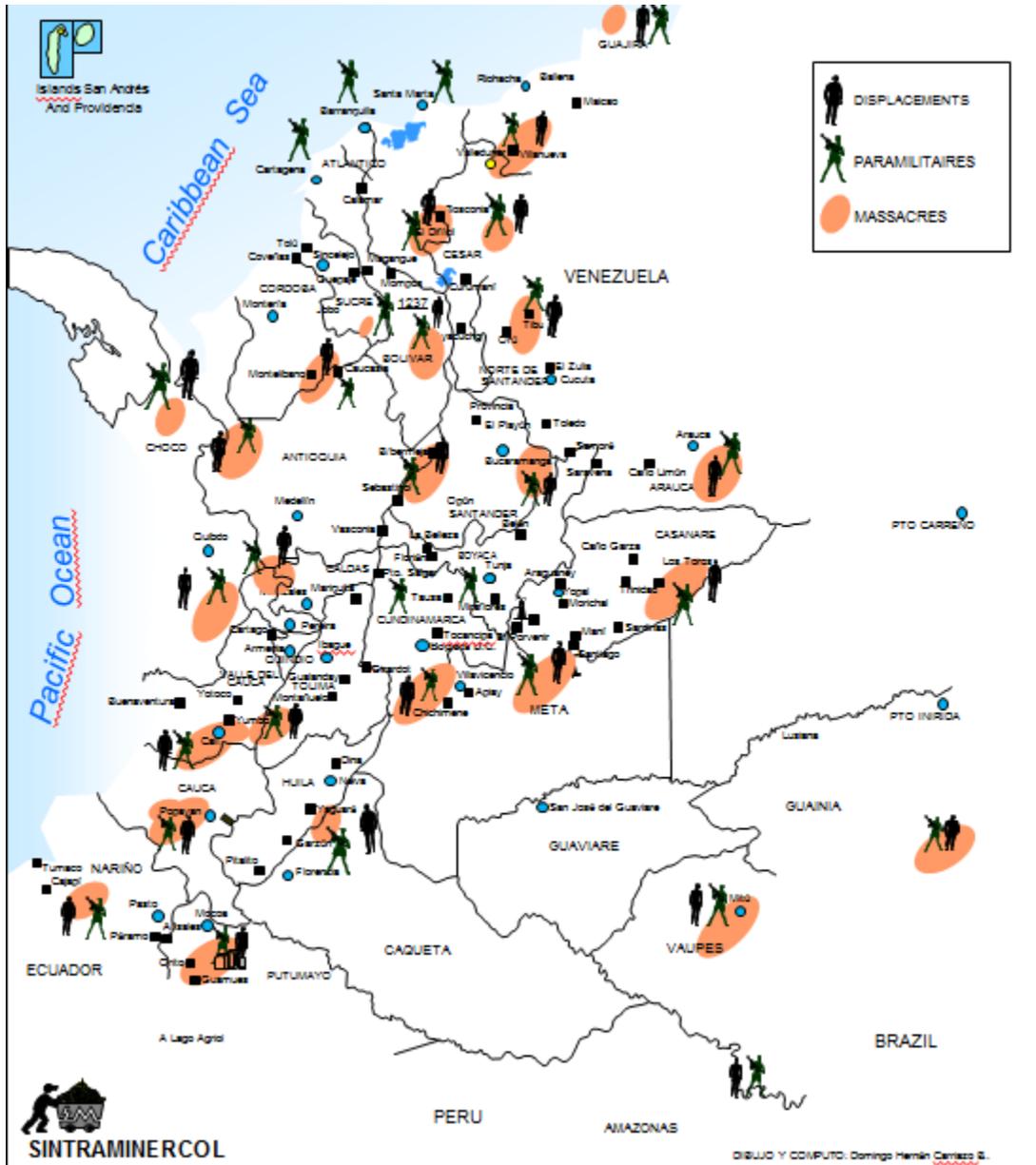
The issue of "land" was recognized by both parties as fundamental to creating a fairer and more equal society in Colombia. During the course of the five-decade-old conflict, some 8 million hectares of land have been illegally taken or abandoned under duress by mostly Indigenous, Afro-descendant and peasant farmer communities. Since 1985, about 6 million people have been forced from their homes and lands, largely as a consequence of the armed conflict. Much of this land has been used for the development of agro-industrial, mining, oil or infrastructure projects. In many cases, civilian communities living in areas of economic interest were forcibly displaced to make way for the development of these projects, mostly by paramilitary groups and the security forces, either acting alone or in collusion with each other, and on occasions with the active support of companies and other economic interests, such as landowners and investors.

Even if many of these economic interests played no part in forced displacement, they often benefited from the forced removal of whole communities from areas earmarked for economic development.³

³ Amnesty International. Colombia: National Development Plan threatens to deny the right to land restitution to victims of the armed conflict and allow mining firms to operate on illegally acquired lands

To illustrate this point we will present 3 maps.

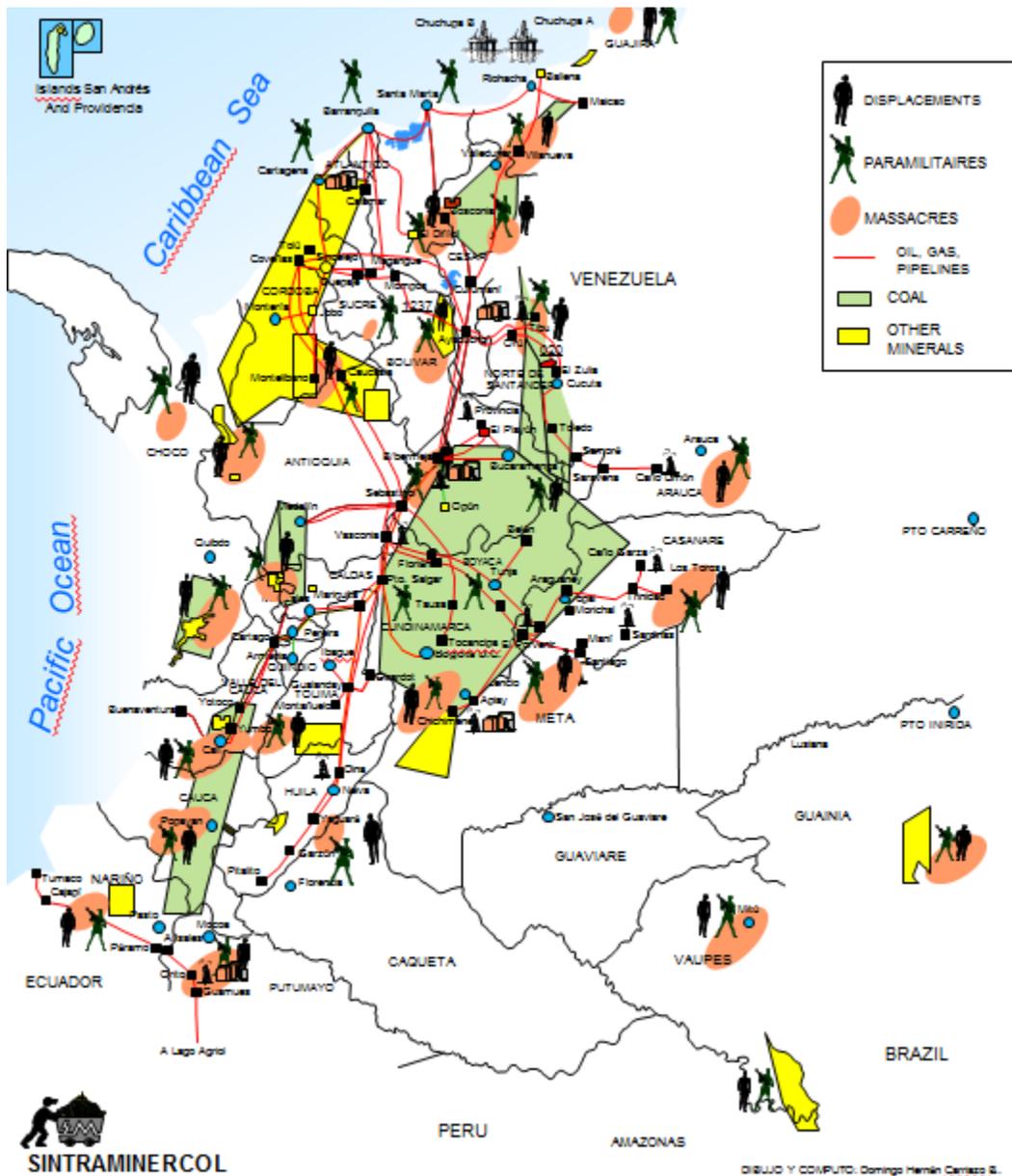
First is the map showing all areas in Colombia impacted by paramilitaries' activities ending in massacres and displacements:



Second we will add the pipelines and oil and gas facilities.



Finally, we will add mining facilities.



The maps confirm the position affirmed by Amnesty International. There is a clear correlation between the location of massacres and displacements as a result of paramilitary activities the location of the extractive industry in Colombia. In the same way, as reported by the Canadian Peace Brigades' paper *"Mining in Colombia – At what cost"*, 80 per cent of the human rights violations that have occurred in Colombia in the last 10 years were committed in mining and energy-producing regions, and 87 per cent of Colombia's displaced population originate from these places.

This is an essential consideration for the Canadian government, since Canadian foreign direct investment in Colombia has grown consistently since the 1990s, particularly in telecommunications, mining, and fossil fuel extraction. Canadian mining and oil companies are major players in Colombia, and there is clear evidence they are benefiting from the violence and displacement showed in the maps.

The effect shown by the maps has not escaped the attention of the government of Colombia and the FARC in Cuba. The parties in the peace process have reached points of agreement in trying to deal with the land issue. The second point in the agenda for peace agreed by the parties is about the need for rural land reform. This agreement, in point 1.7 – Restitution, specifically states that:

“The national government and the FARC share the intention to reverse the effects of the conflict, to return to the victims of dispossession and forced displacement and the communities their land rights, and that the voluntary return of the displaced occur.”

The agreement about land reform, considering the economic and social development of rural areas, also calls for the creation of a land bank as a way to reallocate land. The land bank would include areas seized illegally during the fighting. It would define future policies to adequately maintain proper information about land property, and recognize the historical rights of campesinos, afro-Colombians and native communities. The agreement would also ensure social programs such as health care, housing, education and others.

The parties are still discussing a very important agreement on how the extractive industry will be impacted.

The fifth point of the agenda for peace agreed by the parties is about the victims of the conflict. Point 5.1.3.6 of the victims’ agreement specifically refers to land restitution to the victims as a mechanism to repair historical and psychological damages, and also the reintegration of the victims in society.

The values of “truth, justice, reparation and not repetition” guide the agreement between the parties. The value of “reparation” includes land restitution. In discussions, the FARC called for international support to achieve these goals.

In this context, perhaps the most troubling Canadian impediment to peace in Colombia is in the CCOFTA Chapter 8, which protects Canadian capital investment and may interfere with land claims rights and fairness. Specifically, Chapter 8 states as follows:

Article 811: Expropriation

1. Neither Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation"), except:

(a) for a public purpose;⁷

(b) in a non-discriminatory manner;

(c) on prompt, adequate, and effective compensation in accordance with paragraphs 2 to 4; and

(d) in accordance with due process of law.

2. Such compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. To determine fair market value a Tribunal shall use appropriate valuation criteria, which may include going concern value, asset value including the declared tax value of tangible property, and other criteria.

7. The term "public purpose" is a concept of public international law and shall be interpreted in accordance with international law. Domestic law may express this or similar concepts using different terms, such as "social interest", "public necessity" or "public use".

Annex 811

Indirect Expropriation

The Parties confirm their shared understanding that:

1. Paragraph 1 of Article 811 addresses two situations. The first situation is direct expropriation, where an investment is nationalized or otherwise directly expropriated as provided for under international law.

2. The second situation is 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.

(a) The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

- (i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,*
- (ii) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations, and*
- (iii) the character of the measure or series of measures;*

(b) Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith, 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.

Also, in our submission, the complete Investor State Dispute Settlement mechanism (**Section B – “Settlement of Disputes between an Investor and the Host Party”**) is also likely to interfere with land claims, human rights and fairness in Colombia.

The Canadian government is well informed of negative impacts produced by investor-state dispute settlement clauses. The Canadian Centre for Policy Alternatives in its paper, “*NAFTA Chapter 11 – Investor-State Disputes to January 1, 2015*”, states that prior to January 2015, there had been 35 claims filed against Canada and, as a result, Canada has paid out damages totaling over \$172-million.

Scott Miller, Greg Hicks, and Paul Nadeau, in their paper for the Centre for Strategic and International Studies, said, “The vast majority of investor claims do not challenge the government’s power to legislate or regulate, but rather challenge the administration of law and regulation, such as the government’s treatment of an individual investor.”

It is our submission that in the Colombian case, any legislation or regulation to implement the peace agreements that could be seen by Canadian investors as impacting their investment. As a result, Canadian investors could, and probably would, challenge the peace agreement using the ISDS provisions of the CCOFTA.

As noted, the maps attached to this submission show the strong geographic overlap between paramilitary activities, massacres and displacements, and oil, gas and mining activities. These realities work against the possibility of land restoration and any compensation for Colombians whose lives have been impacted by the activities of Canadian companies. As it protects investors, the CCOFTA clearly works against any serious attempt to reach peace - with social justice - in Colombia.

The USW submits that Canada does not have to sit idle and see the peace process fail. The CCOFTA can be renegotiated with as little as 6 months' notice. If both governments are serious about human rights and peace in Colombia, this renegotiation should take place before further land displacements take place.

F. CREATING MEANINGFUL ACCOUNTABILITY FOR CANADIAN EXTRACTIVE COMPANIES

The connection between the extractive sector and human rights violations, as illustrated by the maps above, also requires Canada to take stronger action to ensure that Canadian companies are held accountable for their actions overseas.

The USW urges the Government of Canada to create an independent extractive sector ombudsman, who has the authority to review complaints from workers and communities when Canadian companies are not living up to Canada's expectations for corporate behaviour and international human rights standards.

At the same time, the Government of Canada should take the lead in facilitating access to Canadian civil courts for non-citizen workers and communities, who believe that they have been harmed by the actions of Canadian companies overseas, and are seeking redress that is not available in Colombia.

Both of these mechanisms are triggered only after there is a negative outcome, such as the death of a community member at the hands of private security, or the contamination of water as a result of mining practices. The USW submit that Canada has the capacity to take

initiatives that would help create a framework which would promote proactive best practice on human rights by Canadian companies operating in Colombia.

G. CONCLUSION

The United Steelworkers submits that the first five years of the Canada-Colombia Free Trade Agreement have not respected the expressed commitment by parliamentarians to see human rights in Colombia improve, while boosting economic prospects and the relationship between the two countries. It is time for Canada and Colombia to live up to the human rights commitments that were expressed at the time the CCOFTA was signed.

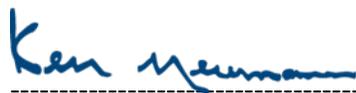
As an involved partner with labour and human rights defenders in Colombia, the USW submits that the HRIA process must be altered so that the monitoring of human rights in Colombia is not directly tied to the CCOFTA.

With many civil society organizations already involved in monitoring human rights violations (and progress) in Colombia, the USW recommends that the presentation of HRIAs to Parliament be given a full hearing, including the calling of witnesses to give testimony at appropriate committees.

Because little real progress can be made without a strategy for peace and stability, the USW recommends that elements of the CCOFTA be renegotiated to put rules in place that will allow the implementation of a peace-with-social-justice process in Colombia.

Respectfully submitted,

March 4, 2016



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