

## LABOUR RIGHTS AND THE CANADA/COLOMBIA FTA: A FUNDAMENTALLY FLAWED CULTURE

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### Résumé de l'article

Des négociations entourant la question du Système des préférences généralisées et de discussions plus récentes pour la conclusion d'accords de libre-échange bilatéraux et multilatéraux, la question du lien causal entre la promotion d'un droit du travail universel et le commerce est demeurée d'actualité. Dans le récent cas du *Traité de libre-échange Canada-Colombie (TLÉCC)*, les autorités canadiennes ont lié au document un accord parallèle pour la coopération dans le domaine du travail (APCDT) dans le but d'accroître les liens entre les deux États et d'ainsi supporter les travailleurs colombiens, oeuvrant dans un contexte de répression constante par les forces gouvernementales et paramilitaires. Toutefois, le présent essai optera pour une approche critique qui proposera et développera les oppositions de la société civile au TLÉCC en avançant que les garanties légales accordées par le traité et l'APCDT sont fondamentalement biaisées, et ce en regardant les structures de significations langagières sous-jacentes au texte. En prenant un point de vue structuraliste, il sera proposé que la culture générale et l'*habitus* qui se sont développés par les interactions structurelles des acteurs en cause et l'usage de leur capital symbolique ont eu un effet central sur le sens du TLÉCC et de son APCDT en altérant complètement le sens de leur langage. Une telle perspective est d'actualité dans le contexte présent des négociations sur le Partenariat Trans-Pacifique, et de la croissance de l'intégration économique mondiale à travers les traités de libre-échange.

# LABOUR RIGHTS AND THE CANADA/COLOMBIA FTA: A FUNDAMENTALLY FLAWED CULTURE

*Pierre-Alexandre Cardinal\**

From talks around the issue of the Generalized System of Preferences and more recent talks on bilateral and multilateral FTAs, the linkage between the promotion of universal labour rights and trade has been on the agenda of policy makers, and integrated into most FTAs. In the case of the recent *Canada-Colombia Free Trade Agreement (CCFTA)*, Canadian officials negotiated the inclusion of a side agreement on labour cooperation (ALC) in order to deepen ties between the two countries, and support Colombian workers, who face severe repression by government and paramilitary forces. The current essay will bring forward and deepen the critiques formulated by civil society actors against *CCFTA*, and argue that the guarantees given by the agreement and the ALC are fundamentally flawed using an examination of the underlying meaning of the words of the agreement. By taking a structural approach, it will be argued that the general culture and *habitus* developed through the interests and usage of symbolic capital of structural actors have a central effect on the FTA and its ALC by completely altering the meaning of their language. Such a critique offers a relevant standpoint in the context of the on-going discussions revolving around the Trans-Pacific Partnership, and the general expansion of global integration through FTAs.

Des négociations entourant la question du Système des préférences généralisées et de discussions plus récentes pour la conclusion d'accords de libre-échange bilatéraux et multilatéraux, la question du lien causal entre la promotion d'un droit du travail universel et le commerce est demeurée d'actualité. Dans le récent cas du *Traité de libre-échange Canada-Colombie (TLÉCC)*, les autorités canadiennes ont lié au document un accord parallèle pour la coopération dans le domaine du travail (APCDT) dans le but d'accroître les liens entre les deux États et d'ainsi supporter les travailleurs colombiens, œuvrant dans un contexte de répression constante par les forces gouvernementales et paramilitaires. Toutefois, le présent essai opéra pour une approche critique qui proposera et développera les oppositions de la société civile au *TLÉCC* en avançant que les garanties légales accordées par le traité et l'APCDT sont fondamentalement biaisées, et ce en regardant les structures de significations langagières sous-jacentes au texte. En prenant un point de vue structuraliste, il sera proposé que la culture générale et l'*habitus* qui se sont développés par les interactions structurelles des acteurs en cause et l'usage de leur capital symbolique ont eu un effet central sur le sens du *TLÉCC* et de son APCDT en altérant complètement le sens de leur langage. Une telle perspective est d'actualité dans le contexte présent des négociations sur le Partenariat Trans-Pacifique, et de la croissance de l'intégration économique mondiale à travers les traités de libre-échange.

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Justice without force is contradictory [...]; force without justice is accused of wrong. And so it is necessary to put justice and force together; and, for this, to make sure that what is just be strong, or what is strong be just.

-Blaise Pascal<sup>1</sup>

For some time already, the struggle for the promotion of universal labour rights has been on the global agenda and has, from the talks surrounding the Generalized System of Preferences and other trade policies, to bilateral FTAs and multilateral conventions, been the subject of much discussion. One of the issues relating to labour rights that has monopolized most of these talks is the implementation of some form of “core labour standards” in developing countries, which has been taking an increasingly important role in trade policy. Where developing nations see a comparative advantage in offering cheap and efficient labour, developed nations see an outrageous violation of human rights, referring to universally recognized documents, such as the International Labour Organization’s (ILO) *Declaration on Fundamental Principles and Rights at Work*<sup>2</sup> of 1998 or the *Universal Declaration of Human Rights (Declaration)*. At this time, there still remained an important obstacle; as it was written in the *Singapore Ministerial Declaration* of 1996, member States of the WTO were not able to reach a consensus on the issue of trade/labour linkage.<sup>3</sup> The ideal of core labour rights found its way in the field of bilateral and regional trade and investment law, starting with *NAFTA*. The main provisions and standards pertaining to labour rights are now almost omnipresent in bilateral and regional trade and investment agreements, accompanied by various measures to insure their implementation by the parties. However, such measures usually only consist of complaints review and cooperation systems, without any long-term mechanisms ensuring compliance of evolving circumstances with norms of international human rights law, an omission that questions whether or not current discussions on labour rights are leading somewhere.

In August of 2011, a new free trade agreement (FTA) between Canada and Colombia came into force, opening their borders to one another in terms of trade, but also investment. For years, negotiations leading to the FTA have been met with intense criticism and opposition in both Canada and Colombia by diverse sectors of civil society. Critics of the FTA highlight that the agreement has been concluded in a context of severe human rights violations that have not been taken into account during the negotiations. Colombia has a record of being the theater for some of the worst human rights violations in the Americas, as well as being the most dangerous country

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<sup>1</sup> Jacques Derrida, “Force of Law” (1989-1990) 11 *Cardozo L Rev* 937 [Derrida].

<sup>2</sup> ILO, *Declaration on the Fundamental Principles and Rights at Work*, 37 ILM 1237 (1998) (Annex revised 15 June 2010), online: International Labour Organization <<http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>>.

<sup>3</sup> Clodilde Granger & Jean-Marc Siroen “Core Labour Standards in Trade Agreements. From Multilateralism to Bilateralism” (2006) 40 *J World Trade* 813.

in the world for trade unionists.<sup>4</sup> That being said, even critics recognize that the new *Canada-Colombia FTA (CCFTA)* is one of the most progressive trade and investment agreements in terms of labour standards, with an extensive side agreement providing various labour rights and standards.<sup>5</sup> The Canadian government's rationale for the signing of the FTA is that "deepening both economic and political engagement between our countries is the best way Canadians can support the citizens of Colombia"<sup>6</sup>, while objections from civil society highlight that over 20 trade-unionists have been killed since the coming into force of the document in August 2011.<sup>7</sup>

The current essay aims to critically analyze the text of the *CCFTA*, in light of the circumstances of its conclusion, in order to highlight the lack of causality between the factual situation, and the legal language of the document itself. A structural framework, based on binary relationships of "*parole*" and "*langue*", "word" and "language", will be used to show that cultural and circumstantial elements (the "*langue*") surrounding the conclusion of the document are inherently and fundamentally affecting the effectiveness of the formal legal language, thus rendering the treaty's labour provisions completely ineffectual. In other words, the essay aims to show, following authors like Foucault, that a "text" (here that of *CCFTA*) is a "symptom" that allows us to understand and diagnose cultural problems afflicting its "word" (here, the circumstances surrounding the negotiation and conclusion of the agreement).<sup>8</sup> In general, such a perspective is bound to highlight what David Kennedy framed as the two histories of international law; first, that of the reproduction of its language perpetuated by the second, that of the personal projects and agendas of jurists (whether they be legal or political).<sup>9</sup> Such a perspective does not aim to provide "solutions" per se, but to point at injustices that are legitimized or unaccounted for by the system of international law. The essay will be divided over three main sections. First, there will be a brief discussion of the theoretical structuralist framework that will be used in the analysis, followed by a closer look at the labour provisions provided for in the *CCFTA*. This will then grow into a broader argument, contained in the third section, framing the cultural elements and circumstances that are the source of the agreement's fundamental flaws, especially with regards to the right to

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<sup>4</sup> On the subject of Human Rights violations, see Amnesty International, *Amnesty International Report 2012; The State of the World's Human Rights* (London: Peter Benenson House, 2012) at 111 or online: Amnesty International <<http://www.amnesty.org/en/region/colombia/report-2012#section-29-2>>.

<sup>5</sup> Mark Rowlinson et al, "Making a Bad Situation Worse; An Analysis of the Text of the Canada-Colombia Free Trade Agreement" Briefing note (2009) Canadian Council for International Co-operation, online: CCIC <[http://www.ccic.ca/what\\_we\\_do/trade\\_misellaneous\\_e.php](http://www.ccic.ca/what_we_do/trade_misellaneous_e.php)> at 8, 13 [Rowlinson et al].

<sup>6</sup> Canadian Labour Congress, *Free Trade with Colombia*, (Ottawa: Canadian Labour Congress, 2012), online: Canadian Labour Congress <<http://www.canadianlabour.ca/issues/free-trade-colombia>> [Canadian Labour Congress].

<sup>7</sup> *Ibid.*

<sup>8</sup> Hayden V White, "Foucault Decoded: Notes from the Underground" (1973) 12:23, *History & Theory* 27; Mark Poster, *Foucault, Marxism and History: Mode of Production versus Mode of Information* (Oxford: Polity Press, 1984) at 70.

<sup>9</sup> David Kennedy, "La discipline du droit international au XXème siècle aux États-Unis", in David Kennedy, *Nouvelles approches de droit international* (Paris: Éditions A Pedone, 2009) at 29.

association and collective bargaining. These rights are under constant pressures by the Colombian anti-union culture and the Canadian/international capitalistic culture.

## I. Theoretical Framework

As previously said, the current analysis of the *CCFTA* will follow a structural analysis of the document itself, and of its relationship to the culture and circumstances surrounding its conclusion. The present section will define the “structural” framework that will be used for the following analysis.

Generally speaking, a “structure” can be understood as a “set of internal dependencies” that apprehends social reality as an ensemble of relations. Going further, this means that each and every element in a structure is relational; that it takes its meaning from its relation or opposition towards other elements in the structure. As such, elements of the structure find their meaning in relation to that structure as a whole. Thus, structuralism, broadly speaking, seeks to find the meaning of a phenomenon by analyzing its relational positions in the structure, and then to find the underlying cultural constant that affects the whole framework.<sup>10</sup> A structure will first determine the relational positions of its various elements and second, comprehend that it is structured by laws insuring the “co-existence” of its elements and third, that the structure represents an all-encompassing “culture” that lies beneath the surface of the appearance of meanings of the singular elements and their binary relations.<sup>11</sup>

However, opting for a systemic analysis of a structure has the risk of accounting only for a deterministic study of inanimate objects, which is the reason why critiques of structuralism highlight the importance of placing the analysis in conjunction with the study of the object itself. Such a process lessens the risk of an ahistorical and inflexible analysis of structural principles that risk being placed in a fundamentally deterministic position, and thus highlights positions of power of some structural actors.<sup>12</sup> This is why the current essay aims to analyze the text of the agreement, not only its general context. By studying the agreement as an object, as well as its inter-relation to other legal documents and actors, the study will highlight deeper power relationships that have, on a parallel with the structure, an explicatory meaning of the workings of the structure. A joint study of the object and the structure, as a whole, is fundamental to understanding the situation surrounding labour rights in the context of the *CCFTA*.

Moving from the strict “philosophical” background, structuralism has had some variations in the field of legal study, which will be of use in the current essay. To put it in the terms used by David Kennedy, the goal of a structural analysis of the

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<sup>10</sup> Simon Blackburn, *The Oxford Dictionary of Philosophy*, 2nd ed (Oxford: Oxford University Press, 2008) *sub verbo* “structuralism”.

<sup>11</sup> Alison Assiter, “Althusser and structuralism” (1984) 35:2 *The British Journal of Sociology* 272.

<sup>12</sup> James D Marshall, ed, *Poststructuralism, Philosophy, Pedagogy*, 1st ed (Dordrecht, Netherlands: Kluwer Academic Publishers, 2004) at xviii.

law is to “uncover the *langue* which produces legal culture”.<sup>13</sup> In one of his essays, Pierre Bourdieu highlighted that various “codes” of the legal field, which he defines as shaping influences from social, economic, psychological and linguistic practices, while never being completely and explicitly accounted for, have a determining power on the law. These codes would then have to be considered if the full meaning of the function of law is to be understood; we have to take into account their relation towards the object.<sup>14</sup> Such “codes” would help understand the legal field as they are rooted in the deep structures of behaviour of this legal field; they are what is termed “*habitus*” by the author.<sup>15</sup> This *habitus* forms a legal culture that Bourdieu refers to as a vehicle of meanings inherent to the legal sphere, but that also have underlying roots in other “spheres”, meaning the economic and the political, for example. As the legal structure is permeated by external influences, it is linked in a way or another to State power, or other power sources, but not in a mere instrumentalist sense, as shown by authors who have highlighted the failures of the law.<sup>16</sup> Bourdieu thinks that the relationship between the legal field and external influence is one of resistance, and that this structuring relationship occurs mostly in linguistics, on the issue of interpretation of norms and legal texts, which would be why legal texts might give a meaning that would be completely different than their real translation when paired with interpretations of its *langue*.<sup>17</sup> As some have argued, this linguistic factor of the law stems from the fact that the words and concepts in use in the legal field limit what can be said, and thus, what can be thought and meant by the law, as its meaning originates from conventions, a *habitus*, defined by jurists and other structurally relevant actors.<sup>18</sup>

As highlighted by Bourdieu and Jacques Derrida, the law, in order to have some kind of legitimacy, has to be structurally legitimized; it has to either be recognized by the social field as constraining,<sup>19</sup> or it has to be enforced in a way or another by “political” power.<sup>20</sup> Thus, the legitimization (and as seen previously, the meaning) of legal norms arises through its interactions within the structure; if other structural elements recognize the law as law, it is then considered as intrinsically correct and thus binding and enforceable.

An interesting concept that Bourdieu illustrates that is significantly relevant for the current analysis is that of “symbolic capital”. This can be generally defined as some form of wealth acquired by actors of the structure, found in various forms (whether it be authority, knowledge, prestige, reputation, etc.), that is then converted

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<sup>13</sup> David Kennedy, “Critical Theory, Structuralism and Contemporary Legal Scholarship” (1985-1986) 21:2 *New Eng L Rev* 268 [Kennedy].

<sup>14</sup> Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field” (1987) 38 *Hastings LJ* 807 [Bourdieu].

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid* at 807-809.

<sup>18</sup> William F Fisher, “Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History” (1997) 49:5 *Stan L Rev* 1080.

<sup>19</sup> Bourdieu, *supra* note 14 at 809-10.

<sup>20</sup> Derrida, *supra* note 1 at 941.

into other forms of capital, giving significant power to actors possessing it.<sup>21</sup> Such a power, when taken in the context of legitimization of legal norms is pertinent in that symbolic capital can be used to validate a law by being translated into some form of “social capital” (or symbolic violence), thus creating a linguistic convention around the norm, making it acceptable as a rule of law that will be used to effect structural relations and other *habitus* (cultures). An example given by Bourdieu is that of the educational function of the state, as a form of symbolic violence stemming from symbolic capital; the pedagogical authority obliges students to view reality and their structural position in the sense of the meaning that is being inculcated to them by their schooling, thus creating the said linguistic convention around the words taught.<sup>22</sup> As such, for Bourdieu, this structural machinery leads to what he calls “miscognition”; the misunderstanding of power relations not for what they really are, but rather for what is said to render them legitimate in the eyes of the subjects of power, as a convention on the meaning of positions and words legitimizing the state apparatus and, necessarily, the legal field itself.<sup>23</sup>

To sum up what has been said in the last few pages in other words, using David Kennedy’s concepts, the form of the law, the *parole* (the word of the law) is fundamentally affected by the legal *langue*, or language, the underlying culture of the legal structure, which is itself affected by its interrelations with other spheres of influence, such as the political or the social.<sup>24</sup> In the text of the law, both the text’s own meaning and the pervading influence of the underlying culture would be compressed together, making it a single synchronic sphere of meaning having relations with other parts of the structure. In such a framework, the fundamental element of the law would not be the text, as it is only a “façade”; the underlying culture, the *langue* of the law, is what gives its word a meaning, as it represents the linguistic convention structurally imposed on the law.<sup>25</sup> The object of this analysis will be to go over the façade given by the words of the *CCFTA* in order to highlight the real culture behind it.

## II. The Labour and Investment Rights Regime Under the *CCFTA*

As shown in the previous section, a structural study of a particular construct has to account for the object of the analysis as well as for the result of the study in order not to propose a “deterministic” interpretation of the structure. The current section will serve that purpose in, first, briefly looking at the “words” of the *CCFTA* itself in order to understand its effects, and secondly, by analyzing its relation with another part of the agreement, the investment regime.

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<sup>21</sup> Bourdieu, *supra* note 14 at 812.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.* at 813.

<sup>24</sup> Kennedy, *supra* note 13.

<sup>25</sup> *Ibid.*

Various civil society actors have been clear about their views on the *CCFTA*. Whether they are from Colombia or Canada, most have expressed serious doubts about the agreement itself, and its labour rights regime<sup>26</sup>. For multiple reasons, human rights and labour activists are highly dubious of the regime that has been negotiated to protect labour rights. A notable point to start with is that the text of the FTA itself is relatively silent on the issue of labour rights, as were all Canadian FTAs, starting with *NAFTA*. Indeed, most of the substantive law is contained in the side *Agreement on Labour Cooperation between Canada and the Republic of Colombia (ALC)*.<sup>27</sup> Again, following previous Canadian experiences, labour rights are stated not in the body of the main agreement itself, but in a side agreement, as the main document only contains principles with references to the substantive provisions included in the side agreement, a practice initiated only a few years ago with the Canada/Peru<sup>28</sup> and Canada/Jordan<sup>29</sup> FTAs of 2009 and the Canada/Panama<sup>30</sup> FTA that came into force last April.

The only labour provisions contained in the text of the FTA itself are in Chapter sixteen of the document.<sup>31</sup> The said chapter primarily states that parties to the agreement will focus on compliance with their own national and constitutional laws, to which there shall be no derogation to encourage trade and investment, as well as compliance with internationally recognized standards set in ILO conventions that the parties have ratified.<sup>32</sup> Such a wording in the *CCFTA* paraphrases that of other Canadian FTAs, namely those signed with Peru (Chapter XVI), Jordan (Chapter XI) and Panama (Chapter XVIII), and thus represents a clear improvement from prior FTAs that did not include any reference to labour rights in the body of their main

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<sup>26</sup> Rowlinson et al, *supra* note 5; Canadian Labour Congress, *supra* note 6; Guillermo Correa Montoya, "The Need for Human Rights Accountability in Asymmetrical Free Trade Deals: The Case of the Canada-Colombia FTA" (Speech delivered at the CRDP-HRC University of Ottawa, 21 November 2012).

<sup>27</sup> *Agreement on Labour Cooperation between Canada and the Republic of Colombia*, 21 November 2008, Can TS 2011 No 13 (entered into force 15 August 2011), online: Canadian Government Labour Program <[http://www.labour.gc.ca/eng/relations/international/agreements/lca\\_colombia.shtml](http://www.labour.gc.ca/eng/relations/international/agreements/lca_colombia.shtml)> [*Canada-Colombia Labour Cooperation Agreement*].

<sup>28</sup> *Free Trade Agreement between Canada and the Republic of Peru*, 29 May 2008, Can TS 2009 No 15 (entered into force 1 August 2009), online: Foreign Affairs, Trade and Development Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/index.aspx?lang=eng&view=d>> [*Canada-Peru Free Trade Agreement*].

<sup>29</sup> *Free Trade Agreement between Canada and the Hashemite Kingdom of Jordan*, 28 June 2009, CAN TS 2012 No 22 (entered into force 1 October 2012), online: Foreign Affairs, Trade and Development Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/jordan-jordanie/index.aspx?lang=eng&view=d>>.

<sup>30</sup> *Free Trade Agreement between Canada and the Republic of Panama*, 14 May 2010, CAN TS 2013 No 9 (entered into force 1 April 2013), online: Foreign Affairs, Trade and Development Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/index.aspx>> [*Canada-Panama Free Trade Agreement*].

<sup>31</sup> *Free Trade Agreement between Canada and the Republic of Colombia*, 21 November 2008, CAN TS 2011 No 11 (entered into force 15 August 2011), online: Foreign Affairs, Trade and Development Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/can-colombia-toc-tdm-can-colombie.aspx?view=d>>, chapter sixteen [*Canada-Colombia Free Trade Agreement*].

<sup>32</sup> *Ibid* at art 1601-1604.



document, namely *NAFTA*, and those signed with Israel<sup>33</sup>, Chile<sup>34</sup> and Costa Rica<sup>35</sup>. Nevertheless, what stands out the most in the text of the agreement with Colombia is the lack of threshold and willingness to raise labour standards; everything is set in the side agreement, while the body of the main document only provides for compliance with national laws, the non-derogation principle, and refers to the parties' commitments to the ILO Declaration of 1998. There is no setting of any substantive standards. Again, it would seem that the language used in the agreement is only a reproduction of what was in prior FTAs, thus, following the conceptual framework set previously, creating a linguistic *habitus*.

As stated previously, the core labour standards of the document are inserted in the side *ALC*. The first article of the document states the parties' obligations pertaining to labour rights; it refers to the principles of the ILO's core labour standards, set in the 1998 Declaration (right to freedom of association and collective bargaining, elimination of forced labour, effective abolition of child labour and elimination of discrimination with respect to work)<sup>36</sup> and some elements of the organization's *Decent Work Agenda*<sup>37</sup> (acceptable conditions of work with respect to minimum wages, hours of work and occupational health and safety, and providing same legal protection to migrant workers with respect to working conditions)<sup>38</sup> as a minimum labour standard that has to be embodied in the parties' national laws and regulations. The standards in the *ALC* offer greater substantive labour rights than what is found in other trade agreements, which do not refer to ILO standards. These standards still offer the guarantees that Canadian FTAs with Peru, Jordan and Panama were providing in their first article.<sup>39</sup> The obligations contained in the *ALC* do not seem to compel governments to implement any improvement in their national legislations, but rather follow basic commitments of good intentions, without giving any clear substantial requirements. That these provisions do not require any further commitment seems rather weak, as it is known that the two parties to the agreement are already subjected to international regulations; Colombia has already ratified all eight of the fundamental conventions of the ILO, which has not really changed its human rights record. Canada is a signatory to only six of the core ILO conventions

<sup>33</sup> *Free Trade Agreement between the Government of Canada and the Government of the State of Israel*, 31 July 1996, CAN TS 1997 No 49 (Entered into force 1 January 1997), online: Foreign Affairs, Trade and Development Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/israel/>>.

<sup>34</sup> *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 5 December 1996, CAN TS 1997 No 50 (entered into force July 1997), online: Foreign Affairs, Trade and Development Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/index.aspx>> [*Canada-Chile Free Trade Agreement*].

<sup>35</sup> *Free Trade Agreement between the Government of Canada and the Government of the Republic of Costa Rica*, 23 April 2001, (entered into force 1 November 2002), online: Foreign Affairs, Trade and Development Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/costarica/index.aspx?lang=eng>>.

<sup>36</sup> *Canada-Colombia Labour Cooperation Agreement*, *supra* note 27 at art 1(1) (a)-(d).

<sup>37</sup> ILO, *Decent Work Agenda*, online: International Labour Organization <<http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm>>.

<sup>38</sup> *Canada-Colombia Labour Cooperation Agreement*, *supra* note 27 at art 1(1) (e), (f).

<sup>39</sup> Rowlinson et al, *supra* note 5 at 13.

(no 98 (1949) and 138 (1973), respectively about the right to organize and collective bargaining, and about the minimum age for work, being both under technical review). It would not appear that the mere declaration in the *ALC* suggests any change to the situation.<sup>40</sup>

Article 2 of the side agreement restates the non-derogation clause contained in the *CCFTA* but adds that violations of ILO standards are prohibited when it comes to “encouragement to trade between the Parties, or as an encouragement for [investment]”<sup>41</sup>. This article seems to be substantially limiting the obligations of States, affirming that obligations are only relevant when it comes to trade or investment matters, thus reducing the scope of article 1 of the *ALC*. The meaning of the article is formed when read in conjunction with article 26 of the *ALC*, which describes the cases in which a review panel can be convened in order to rule on a labour dispute. According to the paragraphs of article 13, such cases arise only when the matter is “trade-related” and when a party failed to comply with its obligations under the agreement through a “persistent pattern of failure to effectively enforce its labour law” or “failure to comply with its obligations under Articles 1 and 2 to the extent that they refer to the ILO 1998 Declaration”. This use of words in Canadian FTAs dates back to the wording of the *North American Agreement on Labour Cooperation (NAALC)*, the labour side agreement to *NAFTA*, and has been employed through either a direct reproduction of the language, for example at article 21 of the labour side agreement of the Chile FTA (the first FTA concluded by Canada after *NAFTA*), or paraphrased here in the text of the *CCFTA ALC*, or in previous trade agreements such as that with Costa Rica (Article 15 of its *ALC*), Peru (Article 13 of its *ALC*), Jordan (Article 12 of its *ALC*) and Panama (Article 13 of its *ALC*). The pattern in Canadian free trade policy with regards to labour rights is to only render such rights binding when sustained violations can be shown to be in direct relation to a trade deal, a serious limitation of the commitments discussed in the previous paragraph.

The rest of the *ALC* provides for enforcement mechanisms. Article 3(2) provides that

Each Party shall ensure that its competent authorities give due consideration, in accordance with its law, to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labour law.<sup>42</sup>

This element shows that the interested nationals of a party will not benefit from the investigation of an independent authority into the violation of labour laws; it is, once again, completely within the party's discretion and capacities as the

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<sup>40</sup> Kenneth V Georgetti, “Submission by the Canadian Labour Congress to the House of Commons Standing Committee on International Trade Concerning the Free Trade Agreement Between Canada and the Republic of Colombia” (14 September 2009), online: Canadian Labour Congress <<http://www.canadianlabour.ca/sites/default/files/pdfs/Canada-Colombia-FTA-2009-09-14-EN.pdf>> at 2.

<sup>41</sup> *Canada-Colombia Labour Cooperation Agreement*, *supra* note 27 at art 2.

<sup>42</sup> *Ibid* at art 3(2).

complaint system is based on national bureaucracies. Article 3(2) has been reproduced in every FTA concluded by Canada since the signing of *NAFTA*. No grievance by private parties has ever made it to evaluation by a review panel, or sanctioned in any possible way.<sup>43</sup>

On a similar note, it is also important to take into account that the major institutional mechanisms provided in the side agreement, as some scholars have exposed,<sup>44</sup> are not overviewed and investigated by an independent judicial or quasi-judicial body. Most of the institutional mechanisms provided by the *CCFTA ALC* are based on the establishment of national competent authorities, such as a labour committee, that will serve as a contact for consultations and reviews,<sup>45</sup> a practice common to all Canadian FTAs<sup>46</sup>.

The third part of the *CCFTA ALC* offers a “procedure for review of obligations”, which means some sort of complaint review panel by which a party can request consultations with the other regarding its labour obligations. Such a consultation first goes through communication of written statements (through which independent experts can be asked to prepare reports), followed by a ministerial consultation process to discuss an agreement to solve the issue at hand.<sup>47</sup> Following that consultation, the requesting party may ask for the establishment of a review panel, but interestingly, only “if it considers that the matter is trade related”.<sup>48</sup> The parties are required to implement the findings of the panel in their legislation, which, if not complied with, can lead the panel to impose a monetary assessment determined under Annex 4 of the document, the maximum being 15 million US dollars.<sup>49</sup> Thus, the review mechanism offers an easy way out for the parties; the matter, to be investigated by a review panel, has to be “trade-related”, meaning that a party would only have to show that the matter at hand is not “trade-related” to escape its obligations. As explained previously, when this part of the agreement is read in relation to the non-derogation clause of article 2, we see a pattern that shows a lack of

<sup>43</sup> Rowlinson et al, *supra* note 5 at 12; Georgetti, *supra* note 40 at 15-16.

<sup>44</sup> Rowlinson et al, *supra* note 5 at 3.

<sup>45</sup> *Canada-Colombia Labour Cooperation Agreement*, *supra* note 27 at art 8.

<sup>46</sup> On this note, see the *North American Agreement on Labour Cooperation*, 14 September 1993, CAN TS 1994 No 4 (entered into force 1 January 1994), online: Canada Treaty Information <<http://www.treaty-accord.gc.ca/result-resultat.aspx?type=2>> at art 8, 13; *Agreement on Labour Cooperation between the Government of Canada and the Government of the Republic of Chile*, 6 February 1997, CAN TS 1997 No 52 (entered into force 5 July 1997), online: Canada Treaty Information <<http://www.treaty-accord.gc.ca/details.aspx?id=101547>> at art 8, 13; *Agreement on Labour Cooperation between Canada and the Republic of Peru*, 29 May 2008, CAN TS 2009 No 17 (entered into force 1 August 2009), online: Canada Treaty Information <<http://www.treaty-accord.gc.ca/details.aspx?id=105126>> at art 8 [*Canada-Peru Labour Cooperation Agreement*]; *Agreement on Labour Cooperation between Canada and Hashemite Kingdom of Jordan*, 28 June 2009, CAN TS 2012 No 24 (entered into force 1 October 2012), online: Canada Treaty Information <<http://www.treaty-accord.gc.ca/details.aspx?id=105180>> at art 9; *Agreement on Labour Cooperation between Canada and the Republic of Panama*, 13 May 2010, CAN TS 2013 No 11 (entered into force 1 April 2013), online: Canada Treaty Information <<http://www.treaty-accord.gc.ca/details.aspx?id=105262>> at art 8 [*Canada-Panama Labour Cooperation Agreement*].

<sup>47</sup> *Canada-Colombia Labour Cooperation Agreement*, *supra* note 27 at art 12.

<sup>48</sup> *Ibid* at art 13.

<sup>49</sup> *Ibid* at art 18-20.

willingness to make the *CCFTA* and its *ALC* binding for serious violations that are not “trade-related”. This process of complaints review exists, under very similar terms, in all other FTAs to which Canada is a party and, interestingly, is subjected to the same compliance mechanism of fines. In only two cases,<sup>50</sup> the fines are capped at 15 million US dollars, paid to a fund that is to be used for the establishment of action plans to develop mechanisms for safeguarding labour rights.

It has to be taken into account that labour organizations, employers and civil society do not have standing for review under this process; the complaint has to be brought forward by a member party, and only member parties can ask for compliance to obligations under the document. Complainants themselves (workers) do not dispose of any mechanisms to challenge the resolution of a complaint, or even to file one before a panel or take part in a ministerial consultation.<sup>51</sup> Also, as a brief comment, it should be noted that throughout the almost 20 years of experience of *NAFTA*, which proposed a similar but slightly lengthier complaint review process, no grievance has ever proceeded to review by a panel, and thus none has been sanctioned or remedied through fines.<sup>52</sup>

Compared to the main document, the labour cooperation agreement does not, in the eventuality that a state party would not comply with the labour rights provisions, offer trade sanctions like abrogation of preferential trade status,<sup>53</sup> but only offers remedies in the form of fines.<sup>54</sup> This last point highlights the fundamental double standard applied in the *CCFTA*'s labour regime, as other trade/investment rights are at odds with labour rights, with a clear supremacy of the first regime; it is as if labour rights were a secondary concern in the document.<sup>55</sup> The imposition of this hierarchy in trade agreements is reproduced in all previous Canadian FTAs that are linked to an *ALC*; Chapter G, Section II of the *Canada-Chile FTA*, Chapter XIV of the *Canada-Jordan FTA*, Chapter VIII, Section B and XXI of the *Canada-Peru FTA* and Chapter IX, Section C and XXII of the *Canada-Panama FTA* all provide for dispute resolution systems for investment and commercial disagreements. Such mechanisms allow for particular procedures and sanctions like suspensions of trade and investment benefits to make states comply with the outcome of the dispute resolution system. Again, there is a clear pattern of the reproduction of the language of the law in Canadian FTAs, the effect of which is to give a different status to labour rights, compared to that of commercial and investors' rights.

As stated, this last point is in explicit contrast to the investment chapter, chapter eight of the agreement, which clearly elaborates the powerful substantive

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<sup>50</sup> See *Canada-Peru Labour Cooperation Agreement*, *supra* note 46 at Annex 4; *Canada-Panama Labour Cooperation Agreement*, *supra* note 46 at Appendix 3.

<sup>51</sup> *Canada-Colombia Labour Cooperation Agreement*, *supra* note 27 at art 12-13; Rowlinson et al, *supra* note 5 at 4.

<sup>52</sup> *Canada-Colombia Labour Cooperation Agreement*, *supra* note 27 at 12; Georgetti, *supra* note 40 at 15-16.

<sup>53</sup> *Canada-Colombia Free Trade Agreement*, *supra* note 31 at art 2114.

<sup>54</sup> *Canada-Colombia Labour Cooperation Agreement*, *supra* note 27 at art 20 (3)(b) and (4).

<sup>55</sup> Rowlinson et al, *supra* note 5 at 3, 14-15.

rights of investors<sup>56</sup>. These are directly enforceable through investor-state arbitration that can be brought forward by an investor.<sup>57</sup> The definition of “investment” inscribed at article 838 is very broad, covering every stages of an investment listed in the article, from mere contracts to enterprises, and anything else “acquired in the expectation or used for the purpose of economic benefit”.<sup>58</sup> The investment chapter confers rights to investors against governmental “measures”, which are considered very broadly in the opening definitions of the agreement, encompassing laws, regulations, procedures, requirements and practices.<sup>59</sup> Chapter eight covers almost any action by the government of a party against an investor or an investment. Thus, government measures pertaining to labour rights that would render an investment ineffective would be subject to arbitration under chapter eight. As said in the previous paragraph, Chapter G of the *Canada-Chile FTA*, Chapter VIII of the *Canada-Peru FTA*, Chapter IX of the *Canada-Panama FTA*, provide for dispute resolution systems that are similar to that of *CCFTA*, but also show very similar definitions to those included in that last agreement.<sup>60</sup>

On another note, an interesting element provided in the *CCFTA* is the guidelines on what constitutes an “indirect expropriation”. Annex 811 to article 811 on expropriation states that “[indirect expropriation] 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”.<sup>61</sup> The definition gives various criteria establishing the occurrence of indirect expropriation: inference with reasonable expectations of investment, character of the measures and their economic impacts. Even though this regime is slightly different from what *NAFTA* proposed, it is not different enough to infer that arbitration panels would rule differently, for what was integrated in the document is very close to previous panel interpretations, and could not prevent the existence of cases like *Metalclad Corporation v United Mexican States*. The risk however, as stated by Jennifer Moore of Mining Watch Canada and other scholars, is that such an uncertainty regarding the meaning of expropriation might call for a regulatory and policy-making chill for fear of retaliation by investors.<sup>62</sup>

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<sup>56</sup> *Canada-Colombia Free Trade Agreement*, *supra* note 31 at art 803-811.

<sup>57</sup> *Ibid* at art 818-819.

<sup>58</sup> *Ibid* at art 838.

<sup>59</sup> *Ibid* at art 106.

<sup>60</sup> On that issue see *Canada-Chile Free Trade Agreement*, *supra* note 34 at Chapter B, art B-01 “measure” and Chapter G, Section III, art G-40, “investment”; *Canada-Peru Free Trade Agreement*, *supra* note 28 at Chapter I, Section B, Art 105 “measure” and Chapter VIII, Section C, Art 847 “investment”; *Canada-Panama Free Trade Agreement*, *supra* note 30 at Chapter I, Section A, Art 1.01, “measure” and Chapter IX, Section A, Art 9.01 “investment”.

<sup>61</sup> *Ibid* at Annex 811(2).

<sup>62</sup> Rowlinson et al, *supra* note 5 at 20-21; Jennifer Moore, “Commerce et Impacts sur les droits humains: le cas de l’Accord bilatéral de commerce entre le Canada et la Colombie” (Conference delivered by the Canadian Council for International Cooperation at the University of Ottawa, 14 May 2012), online: Human Rights Research and Education Center <<http://www.cdp-hrc.uottawa.ca/?p=4040>>.

Another provision worth notice is section 807 of the investment chapter which rules on performance requirements and states that “neither Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment [of an investment]”<sup>63</sup>, which is followed by a list of things on which the parties cannot impose performance. This article from the investment chapter of *CCFTA* restricts the ability of governments to put in place public policies and regulations that could be fundamental in ensuring that investments really contribute to the equitable development of the other party. For example, paragraph (f) prevents a party from passing regulations on technology transfers. Such a provision is a common feature of most Canadian FTAs comprising an investment chapter, such as the *Canada-Chile FTA* (Section G-06), the *Canada-Peru FTA* (Section 807) and the *Canada-Panama FTA* (Section 9.07), which reproduce provisions very similar to that of Section 807 of *CCFTA*.

A fundamental aspect of labour rights is the idea of corporate social responsibility (CSR). The *CCFTA* provides for some kind of promotion of corporate social responsibility in a declaration of principles in its preamble. The investment chapter also points to the promotion of CSR by way of article 817, as a function of the investment committee, but even more so in article 816, which provides 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”.<sup>64</sup> However, the CSR regime provided in the *CCFTA* is very weak and is based on a purely voluntary and unenforceable system; it is more of a “do your best” principle than a legally enforceable norm, as is the case of Section 9.17 of the *Canada-Panama FTA*, and Section 810 of the *Canada-Peru FTA*. That being said, it must be noted that this statement of principles remains an improvement with regards to previous FTAs that did not even mention CSR, such as *NAFTA* or the *Canada-Chile FTA*.

As has been demonstrated, the provisions of the *CCFTA* seem to offer a labour rights regime that is very similar to the Canadian practice of previous FTAs, namely those that were signed with South and Central American nations like Panama, Peru and Chile. However, the question of whether the labour rights regime as codified in the agreement will be sufficient to safeguard the rights of workers in Colombia still remains, especially in light of chapter eight and its focus on the issue of investment principles and the double standard that seems to be applied on the topic of dispute resolution. The following section aims to apply the theoretical framework described above to the *parole* of the FTA as described in this section. An attempt will be made to highlight the main cultural influences underpinning the provisions and various regimes of the FTA that have encouraged reproduction of the language of international law in a way that might not be sufficient to ensure the safeguards given to workers in the *CCFTA ALC*.

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<sup>63</sup> *Canada-Colombia Free Trade Agreement*, *supra* note 31 at art 807(1).

<sup>64</sup> *Ibid* at art 816.

### III. The *Langue* of the *CCFTA*, Part 1: The Anti-Union Culture

As we have seen, even though the *CCFTA*'s provisions are not "revolutionary", as the parties already have obligations under international law, the text of *CCFTA* offers an interesting corpus of labour standards that the parties need to comply with. However, it remains to be seen if the situation in Colombia will really change due to the effect of the *ALC*. The current section will analyze elements of the Colombian context in order to appreciate whether or not there is a possibility, or a willingness, in the context of *CCFTA* to actually comply with the declarations on labour standards. We will look at what has been termed by most the "anti-union culture of Colombia" through a look at the Colombian labour rights system's provisions pertaining to unionization, the field of labour law in which most violations happen in Colombia. This will be paired with a look at more in-depth factual situations describing structural relationships between actors in order to understand the underlying culture affecting the language of the *CCFTA*. There will also be a short discussion on the situation of labour rights in the Canadian context, which is, as hinted to previously, far from being absent of criticism.

A fundamental element to understand is that trade unionists in Colombia, whether they are leaders or simple members, are the victims of severe selective and persistent violence, which is directed at them in total impunity. The violence against trade unionist is in direct correlation with the internal war raging in Colombia. This will sometimes translate into a systemic form of violence directed at workers, but it must be kept in mind that they are not the only victims.<sup>65</sup> Anti-union policies are quite clear when, looking at the internal guerrilla warfare that ravages the country, the government, using the media as its tool,<sup>66</sup> antagonizes trade unions by aligning them ideologically and factually to the left-wing guerrilla forces,<sup>67</sup> while the government itself is affiliated with right-wing paramilitary forces, links which are established by growing evidence.<sup>68</sup> Such evidence is followed by proof of human rights violations caused by either the paramilitary, armed forces or other government bodies like the Colombian civilian intelligence service, which is under direct authority of the president and has been involved in illegal espionage. There is also cooperation with paramilitary death squads, recognized as used to silence political opposition.<sup>69</sup> In

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<sup>65</sup> International Confederation of Free Trade Unions, *Reports on Core Labour Standards Applying for the GSP-Plus* (October 2005), online: <<http://www.icftu.org/www/PDF/GSP.pdf>>.

<sup>66</sup> Rowlinson et al, *supra* note 5 at 10.

<sup>67</sup> US Office on Colombia, *Labor Rights*, (2008), online: US Office on Colombia <<http://www.usofficeoncolombia.org/Labor%20Rights/>> [US Office on Colombia].

<sup>68</sup> Canadian Labour Congress, Statement, "Canadian Labour Congress Statement on Passage of Canada-Colombia Free Trade Agreement" (12 July 2010), online: Canadian Labour Congress <<http://www.canadianlabour.ca/news-room/statements/canadian-labour-congress-statement-passage-canada-colombia-free-trade-agreement>>.

<sup>69</sup> Beth Berton-Hunter et al, "Joint Statement –Canada-Colombia Human Rights Deal 'Empty': Civil Society Leaders" (14 June 14 2010), online: Canadian Council for International Cooperation <[http://www.ccic.ca/\\_files/en/media/news\\_2010-06-15\\_canada-colombia\\_human\\_rights.pdf](http://www.ccic.ca/_files/en/media/news_2010-06-15_canada-colombia_human_rights.pdf)>; Mary Jane Bolle, *Proposed Colombia Free Trade Agreement: Labor Issues*, (RL34759) (Washington, DC: Congressional Research Service report for congress, November 24, 2008) at 8 [Bolle]; Georgetti, *supra* note 40 at 7-8.

Colombia, labelling someone as aligned with the guerrilla amounts to giving *carte blanche* to the paramilitaries to threaten or murder a targeted victim. Such violence is thus inherently linked to the governmental “anti-union” culture. Even though some might claim the contrary, evidence of this culture is strong, and the ILO’s Committee on Freedom of Association has recognized it in case 1787.<sup>70</sup> The main rights that will be discussed here are the possibility to unionize and the associated risks of physical retaliation, the right to strike and the impunity that covers all violations.

The *Colombian Constitution* enshrines many universally recognized human rights and labour standards. Article 93 translates every human rights treaty or convention that Colombia has ratified into its national law.<sup>71</sup> As such, international labour standards that are included in international documents to which Colombia is a member would impose legally binding obligations in the national order of the country. This would mean that the fundamental rights like that of association and collective bargaining enshrined in the ILO’s 1998 Declaration, and the ILO Convention 87,<sup>72</sup> are binding on the Colombian State. In article 107, the *Constitution* aims to protect freedom of association of Colombian citizens in the “political” context.<sup>73</sup> As for freedom of association in relation to the strict labour context, article 12 of the *Colombian Labour Code*<sup>74</sup> ensures the right to association and to strike and then prohibits employers from limiting the right of workers to unionize.<sup>75</sup> There are also extensive rights provided for collective bargaining and for unions in general.<sup>76</sup> Specifically, these rights include the possibility to decide on their own functioning and rules and to not be disbanded without the verdict of a judicial authority or by explicit will of the 2/3 of its members.<sup>77</sup>

However, the situation on the ground is fundamentally different from what the word of the law tells us. We shall now look at a few factual examples. First, on the subject of the registration process of a union, whereas the *Labour Code* considers the

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<sup>70</sup> *Complaints against the Government of Colombia presented by the International Confederation of Free Trade Unions, the Latin American Central of Workers and the World Federation of Trade Unions on allegations of murders and others acts of violence against trade union officials and members, acts of anti-union discrimination and refusal to reorganize the representativity of a trade union organization*, (2008) ILO case no 1787, online: <[http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_124972.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_124972.pdf)>.

<sup>71</sup> *Constitución política de la República de Colombia de 1991 con reformas hasta 2005*, (2005 Rev Ed), art 93, online: Political Database of the Americas <<http://pdba.georgetown.edu/Constitutions/Colombia/col91.html>> [*Constitución política de la República de Colombia* or *Colombian Constitution*].

<sup>72</sup> *Convention concerning Freedom of Association and Protection of the Right to Organise*, 9 July 1948 66 UNTS 17, online: International Labour Organization <[http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312323](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312323)>.

<sup>73</sup> *Constitución política de la República de Colombia*, *supra* note 71 at art 107.

<sup>74</sup> *Código sustantivo del trabajo de Colombia*, 1951 (with subsequent modifications), online: Secretaría General del Senado <[http://www.secretariasenado.gov.co/senado/basedoc/codigo/codigo\\_sustantivo\\_trabajo.html](http://www.secretariasenado.gov.co/senado/basedoc/codigo/codigo_sustantivo_trabajo.html)> [*Código sustantivo del trabajo de Colombia*, *Colombian Labour Code*, *Labour Code*].

<sup>75</sup> *Ibid* at art 59(4).

<sup>76</sup> *Ibid* at art 353-484.

<sup>77</sup> *Ibid*; US Office on Colombia, *supra* note 67 at 5; *Código sustantivo del trabajo de Colombia*, *supra* note 74 at art 362, 401.



registration as only a formality which, under due completion of a series of forms,<sup>78</sup> should give legal status and publicity to the Union, some actors have shown that the Ministry of Social Protection, in fact, uses the registration process to arbitrarily deny or delay union registration.<sup>79</sup> The ENS (National Trade Union School) states that between 2003 and 2008, 253 unions were completely denied registration,<sup>80</sup> meaning that they were not given the legal delay to correct vices in their application, provided by article 362 of the labour code. Another interesting fact is that before the arrival of president Uribe, from 2000 to 2002, the ENS noted only four union registration denials.<sup>81</sup> In alignment with the anti-trade union behaviour displayed by President Uribe, under his rule, it was more difficult for workers to establish trade unions. It would then appear that the meaning of such a violation of the *Colombian Labour Code* arises when it is compared with other elements of the structure –the arrival of President Alvaro Uribe, and the institution of the clear anti-union culture within the Colombian government. We then notice state actors using symbolic capital to influence the outcome of the union registration process, thus having an impact on the anti-union culture in Colombia, propagated further by the symbolic capital of various structural actors and their enforcement of power relations in their favour. President Uribe's general disregard for the political opposition, and for left-leaning movements are examples of one of the structural relationships that fundamentally affects the creation of the new *habitus*. This has an underlying effect on national laws as well as, in this case, the application of the *ALC* of *CCFTA*.

Also, it should also be noted that outside the legal realm, workers in the process of unionization also face severe risks of retaliation. Even though the government claims the contrary, major Colombian confederations of trade unions (CUT, CGT and CTC) as well as human rights NGOs point out that most of the human rights violations occurring in Colombia are associated with industrial disputes and take place in the general context of the decades-long war in the country.<sup>82</sup> As a matter of fact, kidnappings, murders, threats and forced displacements have taken place in the context of intensified union activity and labour demands.<sup>83</sup> Therefore, trade unionists would not be mere accidental or collateral victims of an armed conflict. The SINTRAEMCALI union case speaks for itself; one of their leaders protesting against privatization of public works in the municipality of Cali, Ricardo Barragan Ortega, was murdered soon after the protests. There are multiple examples like this one. This takes on even more significance when we look at the declarations of government officials, linking the actions of trade unionists with the actions of the left-wing guerrilla forces, a major actor in the decades-long guerrilla war the country has been facing. These forces are the primary antagonists of the Uribe and Santos

<sup>78</sup> *Código sustantivo del trabajo de Colombia*, *supra* note 74 at art 365-366.

<sup>79</sup> Trade Union Congress, Irish Congress of Trade Unions, Justice for Colombia, Unite, Workers Uniting, *Trading Away Human Rights: Why the EU-Colombia Free Trade Agreement is a Step in the Wrong Direction* (2009), online: Irish Congress of Trade Union <[http://www.ictu.ie/download/pdf/eucolombia\\_fta\\_report.pdf](http://www.ictu.ie/download/pdf/eucolombia_fta_report.pdf)> at Appendix I, 11 [Trade Union Congress].

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> US Office on Colombia, *supra* note 67 at 8; Georgetti, *supra* note 40 at 13-14.

<sup>83</sup> *Ibid.*

governments, aligned to the right wing paramilitaries still in action in the country.<sup>84</sup> Navi Pillay, UN Human Rights High Commissioner, compared the Uribe regime record to that of Augusto Pinochet during the war in Chile.<sup>85</sup>

Corporate opposition of trade unions and their registration emphasizes a factual retaliation towards trade unionists.<sup>86</sup> This process will sometimes be done through restructurization of the company, which forces trade unions to disband or to be ineligible for registration. Three major state-owned companies, Ecopetrol (oil sector), Telecom (telecommunications sector) and the Instituto de Seguros Sociales (health sector), have in the past been restructured in what seemed to be a manoeuvre to disband their trade unions.<sup>87</sup> One of them, Telecom, faced severe militarization and was liquidated without following the required legal procedures. Its 6000 members-strong union was dispersed, ending its capacity to collectively bargain.<sup>88</sup> At the same time, the government used the assets of the company to set up a new, non-unionized telecommunications company that only employed, under temporary employment contracts, a fraction of the workers of the old company.<sup>89</sup> A similar case happened in Puerto Gaitan where Pacific Rubiales operates oil deposits. The striking workers were able to withstand assault by the army and security forces. Following this, representatives of the union of administrative workers that were close to the government negotiated an agreement.<sup>90</sup> The agreement reached covered only part of the striking workers and instituted a new union, composed of 700 administrative employees hired by the company itself; none of the 12000 striking workers were included and they are still prohibited to form a trade union.<sup>91</sup> Such an action clearly shows the power of the government in using the military to disband unionized companies and its disregard for national laws, its anti-union culture and policy, acting towards the maintaining of the status quo in terms of power relations between various structural actors, from government agencies, to foreign corporations.

Another clear violation of the law relates to temporary contracts in which employers have the right, under article 46 of the *Labour Code*, to hire workers and renew their contracts indefinitely. Even though the workers can officially join a union, in practice, workers face the real possibility of non-renewal of their contract. This constitutes a factual limitation of the protected right to freedom of association.<sup>92</sup>

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<sup>84</sup> Bolle, *supra* note 69.

<sup>85</sup> Rowlinson et al, *supra* note 5 at 7-8.

<sup>86</sup> *Ibid* at 5.

<sup>87</sup> *Ibid* at 7. Comision Colombiana de Juristas, *Colombia: una politica de inseguridad laboral* (May 2004), online: <[http://www.coljuristas.org/documentos/libros\\_e\\_informes/una\\_politica\\_de\\_inseguridad\\_laboral.pdf](http://www.coljuristas.org/documentos/libros_e_informes/una_politica_de_inseguridad_laboral.pdf)>.

<sup>88</sup> *Ibid*, at 4-5.

<sup>89</sup> *Ibid*. International Trade Union Confederation, *Internationally-Recognised Core Labour Standards in Colombia*, Report for the WTO General Review of the Trade Policies of Colombia (22-24 November 2006), online: [http://www.ituc-csi.org/IMG/pdf/Colombia\\_20-11-06\\_final-2.pdf](http://www.ituc-csi.org/IMG/pdf/Colombia_20-11-06_final-2.pdf), at p 8.

<sup>90</sup> Montoya, *supra* note 26.

<sup>91</sup> PASC, *Updates: Conflict with the Canadian Oil Company Pacific Rubiales* (17 October 2011), online: *Projet Accompagnement Solidarité Colombie* <<http://www.pasc.ca/en/action/updates-conflict-canadian-oil-company-pacific-rubiales>>.

<sup>92</sup> *Supra* note 89 at 8.

On this subject, the case of afro-Colombian dockworkers in the municipality of Buenaventura is quite explicit. Through various market openings with other countries, Colombia was forced to develop its maritime infrastructures, and the privatization of the docks at Buenaventura were part of such changes. This led to the deterioration of labour conditions and prospects of unionization for the workers. The Port Society was established, and it soon started dismantling union structures of previous companies without proper judicial approval. Port operators then started to hire workers through contractors, temporary agencies and associative labour cooperatives (CTAs), which all allowed companies to subcontract workers through intermediaries without providing them with decent contracts or benefits.<sup>93</sup> CTA workers did not have collective bargaining rights, and thus, the company had absolutely no incentive to uphold a basic standard of work. The use of CTAs in Buenaventura demonstrates that companies themselves render the operation of legal norms pertaining to collective bargaining and other workers rights completely ineffective, showing a general disregard for trade unions. Again, it is quite clear that the systemic violence by various structural actors has an impact on the meaning of “the law” in Colombia, thus altering the meaning of legal norms themselves. This structural factor, if not countered with a different variant of the word of the law will not offer sufficient protection for the workers that suffer from grave violations of their rights to collective bargaining and to decent working standards. As we have previously seen, even though such standards are guaranteed in the first few articles of the *ALC* of *CCFTA*, the provisions of the agreement cannot ensure the parties’ compliance with internationally recognized labour rights that have been integrated in the Colombian national legal order.

A third severe violation of the right to assemble is the ever present factual illegality of the right to strike and the number of difficulties associated to that right. Even though the right to strike is under constitutional protection<sup>94</sup> and is provided for in the *Labour Code* in some instances, federations or confederations of unions cannot call a strike under article 417 of the *Labour Code* because of political interference with the process. This interference arises through legal or other means, in violation of Columbia’s international obligations under ILO Convention 87. On that note, workers, officials or unions can be suspended from their activities if, under article 450 of the *Labour Code*, they are found to be participating in what Colombian authorities consider an “illegal” strike, a notion that has been easily altered.<sup>95</sup> The recent law 1210 of 2008 gave the President the legal capacity to order the end of any strike that he would deem as “affecting the economy”.<sup>96</sup> This new law obviously goes farther than the ILO’s definition of what is considered an illegal strike regarding an “essential service”, an activity that, if stopped, would affect the “life, security or health” of the

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<sup>93</sup> Kelly Nicholls & Gimena Sanchez-Garzoli, *Buenaventura, Colombia: Where Free Trade Meets Mass Graves*, (July/August 2011), online: North American Congress on Latin America <<https://www.nacla.org/article/buenaventura-colombia-where-free-trade-meets-mass-graves>>.

<sup>94</sup> *Constitución política de la República de Colombia*, *supra* note 71 at art 107.

<sup>95</sup> Trade Union Congress, *supra* note 79 at 12.

<sup>96</sup> *Ibid.*

population.<sup>97</sup> Legally speaking, only public sector workers were subject to the limitation of the right to strike under the “essential service” criteria. However, the government tailored the definition of “official workers” or “civil servants” to their own meaning; such uses were employed in the Ecopetrol and Instituto de Seguros Sociales cases referred to above. Both companies were separated, and integrated in the “public sector”, forcing restrictions on the rights of association of their employees, especially on the right to strike.<sup>98</sup> The action of companies, impeding on the rights of workers to strike, and of the government in altering the meaning of essential services once again shows the deep relationship between structural actors, affecting the meaning of the law, creating the *habitus* of anti-unionism, and then greatly affecting the dispositions of *CCFTA*.

The major issue that combines all the previous questions together is the rampant impunity in Colombia. On the question of murders, Luciano Vasquez of the ENS declared that since 1986, in 97 % of the cases of murders of trade unionists, the perpetrators have either never been identified or have not been brought to justice.<sup>99</sup> Columbia’s enforcement of national laws is a very contentious issue, whether concerning labour rights or criminal convictions or threats against trade unionists. There are some government programs that help the advancement of labour rights like the program for the protection of registered labour unionists, an organization that has undeniably served its role. As well, an increase in the funding regarding the prosecution of crimes against trade unionists,<sup>100</sup> has led to the establishment of a special unit of prosecutors (the special unit did not go through a single prosecution between 2007 and 2011).<sup>101</sup> However, we have to remember that the underlying causes of the whole system of impunity and violation of labour rights is tied to an underlying *habitus*. The “anti-union culture” leads, through the use of intense symbolic capital and symbolic violence by various actors, to the changing of the general “meaning” of the *langue* of the law. The underlying changes to the *langue* will thus have a major impact on its structural relation with the meaning of the law itself. In the case of positive measures this might not have a significant effect if, for example, prosecutors are structural actors tied to the heads of state or where the executive interferes with the judiciary,<sup>102</sup> or if trade-unionists do not have the possibility to register under the program. Death threats do have a very chilling effect on the will of people to declare themselves as trade unionists.

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<sup>97</sup> Bernard Gernigon, Alberto Otero & Horacio Guido, *Les principes de l’OIT sur le droit de grève* (Geneva: International Labour Office, 2000) at 27; *supra* note 79 at 11.

<sup>98</sup> *Supra* note 89 at 8-9.

<sup>99</sup> Luciano Vasquez, “Assassinations of Trade Unionists in Colombia and the Proposed Free Trade Agreement” (Speech delivered at the Economic Policy Institute of Washington, DC, 27 February 2008), online: Economic Policy Institute <<http://www.epi.org/event/rising-economic-insecurity/>>.

<sup>100</sup> Angeles Villarreal, *The Proposed US-Colombia Free Trade Agreement*, (RL34470) (Washington, DC: Congressional Research Service report for congress, 26 January 2011) at 24-25.

<sup>101</sup> “Americas Policy Group Briefing Note: The Canada-Colombia Free Trade Agreement Human Rights Impact Report”, Briefing Note, (14 May 2012) CCIC, online: Canadian Council for International Cooperation <[http://www.ccic.ca/\\_files/en/working\\_groups/apg\\_2012-05-14\\_brief\\_CCOFTA\\_Human\\_Rights\\_Impact\\_Report.pdf](http://www.ccic.ca/_files/en/working_groups/apg_2012-05-14_brief_CCOFTA_Human_Rights_Impact_Report.pdf)>.

<sup>102</sup> *Supra* note 40 at 6.

Here, the creation of a “code” of meaning stemming from the political field by way of the influence of the president, and the intensification of the civil war against the guerrilla creates some form of *habitus* in Colombian institutions, which then permeates into the legal field. This influence gives some underlying meaning to the law that is here translated into a denial of the right of association. If recognized, this could lead to pressure by structural actors on the status quo held together by the *habitus*. Because the new culture does not recognize the original meaning of the *parole* of the law, this last element will be changed by the use of symbolic political capital that affects the underlying *langue* of the law. Thus, we would here have, in Bourdieu’s terms, a “miscognition” of power relations translated by a false understanding of the role of the political, a sphere that places its agenda above the “rule of law”, a fundamental prerequisite for the institution of a legal system, thus of labour rights norms that are constitutionally recognized in Colombia. In that sense, the changing of the meaning of legal norms contained in the *Colombian Labour Code*, or even in the *Constitution*, clearly shows that the symbolic capital of the Colombian state, caught in a stalemate with various other actors, such as the guerrilla, is affecting the definition of the law. There would seem to be, in the Colombian context, a redefinition of the *habitus* of the law; it can now be used for other reasons like the elimination of trade unions, which is, as previously said, a “miscognition”.

Although the Colombian context demonstrates the most severe of violations of labour rights, Canada is not cleared from criticism when it comes to labour rights. As a matter of fact, Canada is not yet a member to two of the eight core conventions of the ILO, namely conventions no 98 (1949) regarding the right to organize and collective bargaining and 138 (1973) regarding the minimum age for work. In terms of disputes, 83 complaints have been filed to the ILO against Canadian federal and provincial legislation since 1982, and of those 83 complaints, the ILO has ruled that there has been violation of freedom of association in 71 cases.<sup>103</sup> Since 1982, Canadian legislatures have passed over 200 pieces of legislation that are, according to the Canadian Foundation for Labour Rights, in serious violation of the bargaining rights of its citizens.<sup>104</sup> Even very recently, the anti-union culture present in Canada has shown its effects on the *habitus* of the law as the Québec legislature adopted, on the 1<sup>st</sup> of July, a back-to-work legislation to end a strike in the construction sector that lasted for two weeks. It imposed an arbitrary settlement on the striking workers, extending the 2010-2013 collective agreements to 2017.<sup>105</sup> As such, it can be argued that the anti-union culture that surrounds the Colombian situation is also present in Canada, even if to a lesser extent. Bargaining rights of workers have been infringed upon by legislatures on numerous occasions, creating a *habitus* in the Canadian context as well. This served the purpose of keeping the structural positions of various

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<sup>103</sup> Canadian Foundation for Labour Rights, *Canada’s record at the ILO* (April 2013), online: Canadian Foundation for Labour Rights <<http://www.labourrights.ca/research-publications/canadas-record-international-labour-organization-ilo>> [Canadian Foudantion for Labour Rights].

<sup>104</sup> On that note, see the databank compiled by the Canadian Foundation for Labour Rights, online: Canadian Foundation for Labour Rights <<http://www.labourrights.ca/restrictive-labour-laws>>.

<sup>105</sup> Bill 54, *An Act respecting the resumption of work in the construction industry*, 1st sess, 40th Leg, Québec, 2013, online: Assemblée nationale du Québec <<http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-54-40-1.html>>.

actors in place, whether they be employers unwilling to negotiate, or public officials seeking popularity. Because of the numerous Canadian laws that infringed upon workers' rights, the meaning of the words of the legal guarantees given to workers has been altered to allow for exceptions, defined by those in a structural position of power.

Placed in context with the *CCFTA*, such structural factors show the permeation of a new *habitus*, highlighting that the provisions of the *ALC* are rather useless, because of its power through symbolic capital to alter the underlying meaning of legal provisions included in the agreement. As some NGOs and scholars have stated, there is nothing that shows that mere declarations of principle like those found in the *CCFTA* lead to a change in the Colombian situation. This is especially true when looking at the level of intrusion of the *habitus* of anti-unionism in the legal context of Colombia, where even constitutionally recognized rights suffer from alteration through the effects of the *habitus*. The culture that trade unions are facing has filtered into most spheres of Colombian society, reaching an almost hegemonic state in the institutions of the country even though a few vanguards such as the ENS still remain. Thus, we can see that the *langue*, the national culture, underpinning the *parole* of the agreement and the international legal text requiring national implementation are clearly undermining its object. Such a process is also present through a similar standpoint stemming from the Canadian legal context, where legal safeguards are discredited through various pieces of legislation that seriously impact the rights of workers, especially their right to unionize and to bargain collectively. It can be said that the provisions of the *CCFTA* that protect labour rights are completely ineffectual, and obviously insufficient to help with the situation in Colombia. The following section will analyze another cultural aspect that has a fundamental effect on the labour rights provisions of the *CCFTA*; the capitalistic culture that encompasses the agreement, clearly present in its investment and labour chapters, as well as in the actions of Canadian companies in Colombia.

#### **IV. The *Langue* of the *CCFTA*, Part 2: The Capitalistic Culture**

As it was emphasized previously, the investment chapter of the *CCFTA* constitutes, in contrast to the labour chapter, a major element of the agreement. The agreement itself opens the borders of Colombia to protected Canadian investments by providing all the basic necessary standards of treatments provided for an investment promotion agreement, as well as by imposing major limitations on the capacity of each party member to adopt regulations and legislations in order to make sure that the effects of investments benefit the whole of Colombian society. Some proponents of FTAs have declared that Colombia is but one of many countries that have internal problems, and that such a fact should not prevent the conclusion of international documents.<sup>106</sup> It has also been argued that the FTA, in promoting trade and investment liberalization, as well as by endorsing safeguards for labour and

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<sup>106</sup> *Supra* note 100 at 25-27.

environmental rights, will necessarily “reinforce the rule of law and spread the values of capitalism in Colombia and anchor hemispheric stability”.<sup>107</sup> As well as being completely misleading, such a statement is highly tautological when we take it for what it is. First, it might be early to assess the effects of the FTA on the internal Colombian system, but it can be said that according to past experience like *NAFTA*, none of the neoliberalist declarations are bound to happen. This is quite the contrary when we consider the result of various investor/state dispute settlements. One element of the statement is close to the truth; the *CCFTA* will necessarily lead to a diffusion of capitalistic values. The following pages will present the effects of another *habitus* affecting the realm of free trade between Canada and Colombia. We will argue that provisions of the FTA on labour and investment issues are bound to create a culture that will, by its structural interactions with different actors in Colombia, be a major impediment to the safeguard of fair labour standards, one of the professed goals of the *CCFTA* and its *ALC*.

First, we will take a look at one of the *CCFTA*’s most obvious flaws, the apparent double standard that is applied to different dispute resolution mechanisms that may arise from the application of the document. As was said before, *CCFTA* provides a procedure for the review of obligations of a party when there are complaints filed for failure to comply with one’s obligations under the FTA.<sup>108</sup> Without going into too much detail, this procedure can be solved by the imposition, by a panel of experts of a monetary assessment in the event that a party violated its obligations and did not comply with the final report of the established panel.<sup>109</sup> As noted before, such a procedure can only be initiated if the panel finds that the matter is “trade related”.<sup>110</sup> Earlier, we indicated that under the body of the main FTA, reproducing the language of previous agreements, the reparation for other “trade related” disputes that are not related to questions of labour rights such as trade sanctions like abrogation of preferential status are far more substantial.<sup>111</sup>

There is seemingly a double standard that is applied under *CCFTA*, evidently favours trade matters, as the sanctions to trade disputes are a lot stronger than those provided for in the case of labour complaints. On this matter, the Canadian Labour Congress (CLC) noted the serious cynicism emanating from the agreement with regards to the implementation of fines by an eventual panel (which has to go through a prior ministerial consultation), versus trade sanctions and a party-to-party dispute resolution process.<sup>112</sup> In our view, this cynicism is also clear as the magnitude of human and labour rights violation in Colombia, and the “anti-union” *habitus* of the government on various levels, are anything but an acceptable and effective sanction.<sup>113</sup> A monetary punishment would realistically not address the direct cause of the problems relating to labour rights in Colombia, neither would it really put the

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<sup>107</sup> Bolle, *supra* note 69 at 1.

<sup>108</sup> *Canada-Colombia Labour Cooperation Agreement*, *supra* note 27 at art 12.

<sup>109</sup> *Ibid* at art 13, 18-20.

<sup>110</sup> *Ibid* at art 13(a).

<sup>111</sup> *Canada-Colombia Free Trade Agreement*, *supra* note 31 at art 2114.

<sup>112</sup> *Supra* note 41 at 1819.

<sup>113</sup> Rownlinson et al, *supra* note 5 at 10.

offending party's attention on such causes. Such a punitive approach could actually be a major impediment seeing as one of the main sources of the problem is a lack of capacity to enforce labour standards, which is usually at least part of the issue. A disciplinary approach like that provided in the *ALC* of the *CCFTA* could amount to taking funds away from a process that is possibly already underfunded by national authorities.<sup>114</sup>

On the question of investment dispute settlement, such a contrast is present as well. Whereas under the *ALC* only a party can bring forward a complaint to another party,<sup>115</sup> a process that is then submitted to the procedure stated above, investors are subject to a very broad investment dispute settlement process provided for in articles 818-819 of the *CCFTA*. Chapter VIII provides very broad definitions of "investment" and "government measures",<sup>116</sup> while giving a relatively broad definition to "indirect expropriation".<sup>117</sup> This then gives an arbitration panel extensive jurisdiction when it comes to the protection of "investments" against "governmental measures". As explained previously, however, such wording is not exceptional, representing the common wording of investment chapters in FTAs to which Canada is a party, namely those of the Canada-Peru, Chile and Panama FTAs.

In terms of reparation, an arbitration panel can award monetary damages and interests, as well as the restitution of property when applicable.<sup>118</sup> There are little possibilities for the treatment of complaints (as they have to be "trade related") in comparison to the very broad rights of investors to settle disputes when their "investment" is conflicting with a "government measure". The double standard here shows the importance of investment and the general disregard toward labour rights in the context of the FTA. Giving a dominant status to trade and investment in dispute resolution clearly demonstrates the capitalistic policy statement behind the words of the treaty; attribution of such importance to capital versus the rights of workers highlights the glorification of capital, deeply ingrained in the agreement. Again, such a reification of capital as an end in itself shows the establishment of power relations between various objectives of the treaty, labour rights being on the downside. Easily viewable through the structural positioning of labour versus trade/investment rights, these power relations obviously create some form of symbolic capital or violence, leading to the creation of a neoliberal *habitus* that has a major impact on the *langue* of the agreement. This engenders a fundamental bias that changes the underlying meaning and workings of the agreement.

On another level, the creation of a culture or *habitus* of a neoliberal nature, translating to the exaltation of capital over the rights of workers, is found in the practices of the Canadian government and Canadian companies. First, we shall look at

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<sup>114</sup> Kimberly Ann Elliot, *Fin(d)ing Our Way on Trade and Labour Standards?* (April 2001), online: Peterson Institute for International Economics <<http://www.iie.com/publications/pb/print.cfm?ResearchId=73&doc=pub>>.

<sup>115</sup> *Canada-Colombia Labour Cooperation Agreement*, *supra* note 27 at art 12.

<sup>116</sup> *Canada-Colombia Free Trade Agreement*, *supra* note 31 at art 838.

<sup>117</sup> *Ibid* at Annex 811.

<sup>118</sup> *Ibid* at art 834(2).



official statements of the Canadian government. The website of the Canadian Trade Commissioner Service is riddled with statements that lay down the various opportunities of Canadian companies that are undeniably true. For example, we can find statements such as

from the perspective of Canadian investors, Colombia has 34.5 million hectares available for agricultural land development and a climate that supports efficient production<sup>119</sup> or

Canada has already positioned itself as a leader in the Colombian oil and gas industry, and the Canada-Colombia Free Trade Agreement (FTA) [...] will increase trade and investment by eliminating tariffs of up to 20 percent in this important sector.<sup>120</sup>

Such declarations have to be read in conjunction with another declaration according to which “the Colombian government has made gains in improving the local investment climate, including significant progress with respect to security”.<sup>121</sup> As we have seen earlier, this last declaration is only partially true, as such security gains are met with an equal loss on the part of workers’ rights and social disturbances are commonplace due to the actions of paramilitary groups siding with the Colombian government, still struggling against the decades long guerrilla war. As such, security matters take on a whole new meaning when faced with the reality of the context in Colombia, and structural actors have varying interpretations of the Colombian security apparatus due to the effects of the capitalist and anti-union *habitus* that have impacted Colombian society.

On a similar subject, with regards to CSR, incorporated in Section 817 of *CCFTA* and reproducing the wording of previous Canadian FTAs, the Canadian government states that:

The Canada-Colombia FTA contains provisions to promote corporate social responsibility (CSR). By undertaking voluntary activities to operate in an economically, socially and environmentally sustainable manner, companies can achieve sustainable results and contribute to the sustainable development of communities, regions and countries in which they operate.<sup>122</sup>

This last statement, which promotes corporate social responsibility, reminds us of the purely voluntary nature of CSR provisions in the *CCFTA*.<sup>123</sup> When read in

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<sup>119</sup> Canadian Trade Commissioner Service, *Canada-Colombia Free Trade Agreement—Agriculture Sector Opportunities*, online: The Canadian Trade Commissioner Service <<http://www.tradecommissioner.gc.ca/eng/document.jsp?did=133049>>.

<sup>120</sup> Canadian Trade Commissioner Service, *Canada-Colombia Free Trade Agreement—Oil and Gas Sector Opportunities*, online: The Canadian Trade Commissioner Service <<http://www.tradecommissioner.gc.ca/eng/document.jsp?did=133064>>.

<sup>121</sup> Canadian Trade Commissioner Service, *Canada-Colombia Free Trade Agreement—Invest in Colombia*, online: Canadian Trade Commissioner Service <<http://www.tradecommissioner.gc.ca/eng/document.jsp?did=133059>>.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Canada-Colombia Free Trade Agreement*, *supra* note 31 at art 816-817.

conjunction with the above mentioned statements from the Canadian government, we see a predatory nature to investment possibilities in Colombia, especially in sectors that have already been subject to questionable practices by Canadian or Colombian companies like the oil sector (Pacific Rubiales), or the agricultural sector (highly controversial case of sugarcane workers). Such greed, is met with the affirmation that companies should buy into the philosophy of CSR, reminding us of its voluntary character. Again, we see a double standard that could be blatantly explained by the words of sugar-cane workers:

Today the conditions of sugar-cane workers could even be worse than in the times of slavery, because one has to remember that the large landowners gave to their slaves a roof over their heads and something to eat. Today, even that isn't the case.<sup>124</sup>

Investments in sectors that have been deemed by many as “unethical” are valued, while social responsibility of companies are stated as only being “voluntary”. This means, in a way, that the government is tacitly accepting violations committed by companies.

On another note, the Canadian government, through its international development agency, CIDA, sponsored a technical assistance project in Colombia to help in the reform of its mining law.<sup>125</sup> As we all know Canada has an expertise in the mining sector. Gibbs and Leech explain how CIDA modified the Colombian mining code in order to make the Colombian investment environment friendlier to foreign investors.<sup>126</sup> Provisions of the code were modified in order to extend the length of concessions issued to foreign companies, by reducing the royalty rates owed by companies to the Colombian authorities, and by amending environmental, labour and indigenous guarantees, making them more “flexible”.<sup>127</sup> This action by Ottawa might have been motivated by the presence of many Canadian mining companies in Colombia, such as Colombia Goldfields, Greystar Resources and Conquistador Gold.<sup>128</sup> Once more, we see that Canadian actions in the Colombian context are driven by a capitalist culture, creating a power relation between capital acquisition and the rights of workers; the modification of the Colombian mining laws is a move to make it easier for foreign corporations to infiltrate the Colombian market. The modifications to the mining code have undermined the prospects for better work standards by rendering the system provided in the document more lax, emphasizing the power of capital over that of labour rights.

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<sup>124</sup> Dawn Paley, “Deadly dealings surround Canada-Colombia Free Trade Agreement”, *This Magazine* (24 August 2009), online: This Magazine <<http://this.org/magazine/2009/08/24/canada-colombia-free-trade-agreement/>>.

<sup>125</sup> Rowlinson et al, *supra* note 5 at 2.

<sup>126</sup> Terry Gibbs & Gary Leech, *The Failure of Global Capitalism: From Cape Breton to Colombia and Beyond* (Cape Breton, Nova Scotia: Cape Breton University Press, 2009).

<sup>127</sup> *Ibid.*

<sup>128</sup> Janet Eaton, “Canada Colombia Free Trade Agreement CCFTA Why Oppose?” (Speech delivered to Liberal MP Scott Brison, 8 August 2009), online: Sierra Club Canada <<http://www.sierraclub.ca/en/trade-and-environment/publications/canada-columbia-free-trade-agreement-ccfta-why-oppose>>.

As we have seen, the Canadian government itself is deeply embedded in the creation of the “capitalist” *habitus* that impacts the provisions of the *CCFTA*. Also, as has been said, Canadian companies also have an important role to play in this redefinition of the underlying *langue* of the treaty. As a matter of fact, the extractive sector in Colombia is saturated with Canadian companies, and although not all of them are involved in scandals, each has its fair share of complicity with the Colombian government’s “anti-union” culture. Sixteen Canadian companies occupy up to 52 % of the Colombian mining sector, and the Canadian embassy has estimated that investments in the mining sector reach up to 3 billion dollars.<sup>129</sup> Obviously, such massive investments in resource rich region are prone to attract trouble; regions that offer rich deposits of oil or minerals are under the control of supposedly disbanded paramilitary forces, and are marked by having up to 83 % of the total share of assassinations of union leaders in the country.<sup>130</sup>

The evidence casts a reasonable doubt on the causal link behind these assassinations; resource rich regions exploited by Canadian mining companies (for example Grand Tierra Energy Incorporated, or Parex Resources in Putumayo department, Nexen and Talisman Energy elsewhere in Colombia),<sup>131</sup> that employ local workers that, according to Colombian law, appeal to their right to freedom of association, attract right-wing paramilitaries (and sometimes the army itself, for example in the case of a Pacific Rubiales exploitation where 600 army troops are stationed, and where striking workers faced brutal police repression in July 2011).<sup>132</sup> The mining corporations are affected by the “anti-union” culture because of their structural relationships with other actors such as the government. These groups then presumably “quell” the workers’ aspirations to unionize (which is the case in Putumayo, where the Canadian company has not been proven to be complicit, but is certainly benefitting from paramilitary actions).<sup>133</sup> As such, engaging in the fundamentally capitalistic activity of transnational capital acquisition in the context of deep inequalities, forced displacement and threats of violence against labour rights activists, risks carrying with it the necessary contribution or at least the tacit acceptance of Canadian companies that, in the end, benefit from such exactions.

Investment opportunities in Colombia carry high risks that should be met with high standards of diligence on the part of corporations and governments involved in investment. This is, factually and legally speaking, neither a reality, nor an obligation. As we have seen, the obligations contained in the *CCFTA* are far from being sufficient to prevent outbursts of violence as they only value a “voluntary”

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<sup>129</sup> Canadian Foundation for Labour Rights, *supra* note 103 at 2.

<sup>130</sup> *Ibid.*

<sup>131</sup> Dawn Paley, “Global Capitalism, Oil, and the Canada-Colombia Free Trade Agreement” (Speech delivered at Parkland Institute’s 14th annual conference, Edmonton, 20 November 2010), online: <<http://dawnpaley.ca/2010/11/24/global-capitalism-oil-and-the-canada-colombia-free-trade-agreement/>>; Hassan Yussuf, “CLC Secretary-Treasurer Hassan Yussuf speaks before the Standing Committee on International Trade” (Speech before the Standing Committee on International Trade, 7 June 2012), online: Canadian Labour Congress <<http://www.canadianlabour.ca/news-room/speeches/clc-secretary-treasurer-hassan-yussuff-speaks-standing-committee-international-tr>>.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

approach to CSR. There is no possibility for labour activists or organizations to make claims against said violations, other than under a weak system of complaint consultation, or through national institutions that, in the case of Columbia, are not effective due to the prevalent anti-union culture. Due to the very strong commercial and investment enforcement mechanisms of *CCFTA*, there would be, if the Colombian system was in any way effective in prosecuting violations of labour rights, the threat of a regulatory chill, preventing governments from imposing legal or declaratory obligations on companies that would not be complying with labour rights.

Thus, through the various provisions emphasizing trade and investment over the rights of workers in the *CCFTA*, and through the various actions of the Canadian government and mining companies, we see the delineation of another fundamental *habitus*. These actors and the structural positions they have acquired, by way of their symbolic capital, creates a context marked by symbolic violence that inhibits other possible meanings from being transposed into reality. For example, the prevention of constitutionally and internationally recognized notions of human or labour rights, or CSR, of having any real meaning in the context at hand. The new cultural framework then created employes power relations inside the text of the treaty itself, as well as external structural relations, such as those of the Canadian companies in relation to paramilitary forces and worker groups, in order to create a sphere of meaning. Biased by neoliberalism, it will have a fundamental effect on the core language of the treaty. Through the effect of this new cultural meaning that underlies the *langue* of the treaty, the meaning of the treaty's object is altered to account for this new capitalist variable that is implemented by the effect of the *habitus*. As has been stated, the general reproduction of the language of the law can be seen in Canada's free trade policy.

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As a concluding reference, it is be pertinent to note a statement from the Canadian Association of Labour Lawyers;

(T)rade 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. While some improvements have been made in the Canada-Colombia agreement, the essential structure of the labour clauses found in previous trade agreements (the NAFTA, Canada-Chile and Canada-Costa Rica), FTAs remain largely unchanged.<sup>134</sup>

As we have seen throughout this essay, the structural relationships surrounding the conclusion of the *CCFTA* have been very asymmetrical, showing clear power delineations and the permeability of the word of the law by the *langue* underlying it. This has pushed actors to reproduce the language of trade agreements, and has thus had the effect of perpetuating the status quo with regards to workers'

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<sup>134</sup> Georgetti, *supra* note 40 at 15.

rights. In the Colombian context, power relations have had the effect of creating a *habitus* based on the anti-union culture prevailing in Colombia, a culture that is prevalent as well in Canada, even if only to a lesser extent. This culture is the offspring of the interactions of the various actors taking part in the conflict in the country; the government, by use of symbolic capital, spreads its symbolic power. It stems from state legitimacy and the emergence of a general culture of opposition with regards to labour unionization and general labour rights, fuelled by fear of them becoming a source of opposition. Such a use of symbolic capital is reproduced in the context of the negotiation of FTAs, as structural actors, in order to keep and perpetuate their structural positions as political or legal actors, will tend to reproduce the language of the law. This essay has argued that *CCFTA* illustrates this reproduction through its side agreement as the language used in the agreement is substantively similar to that of previous FTAs. This is true even though the Colombian context might require superior safeguards for workers due to specific circumstances and power relations, not present to the same extent in other FTA contexts like those of Chile and Peru, for example. The *habitus* created by the anti-union culture of the Canada/Colombia situation permeates into the language of the law, and reproduces structural relations between actors.

This culture in Colombia is also deeply embedded in another variant of a *habitus* that is based on a culture formed from the Canadian background. At its roots is the neoliberal order and the sacralisation of capitalism, and thus the promotion of investments and trade over anything else. This last form of *habitus* finds its basis in the actions and declarations of the Canadian government as well as in the hands of other actors, such as Canadian mining and oil companies interacting with the structure of the *CCFTA*. The effects of these foundations will have a fundamental relation of power over other considerations like labour and human rights. In the present case, considerations relate mostly to the right to unionization, which is affected by the practices of companies that impede on the possibility of unionizing. Examples of such a capitalistic *habitus* can be seen in subcontracting and in the use of deterrents such as death threats and assassinations by paramilitary groups that have close relationships with the Colombian government, serving as a means of symbolic (as well as direct) power. Such practices will necessarily lead to effects that change the general understanding of the words of the *CCFTA*. In this case, the *habitus* of capitalist neoliberalism furthers the importance of trade and investment provisions over those that offer protections to workers. When read with similar provisions in previous FTAs, this highlights the reproduction of the language of the law and its perpetuation of the structural positions of various actors like corporations and investors. To quote the CLC, this agreement has “at its centre the protection of investors’ rights as well as a defence of neo-liberalism”<sup>135</sup>.

The fundamental problem of the *CCFTA* is its underlying scheme of meaning. Because the direct meaning of the agreement’s words relating to labour provisions is only a declaration of principle that does not seem to be taking reality into account, there is considerable room for the possibility of underlying schemes of

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<sup>135</sup> Georgetti, *supra* note 40 at 4.

meaning to take over its *langue*, thereby fundamentally changing the meaning of the words of the agreement. There is something inherently vague in such an agreement; a certain striving for a hollow ideal that remains perceivable, but never really possible to grasp. In this sense, the tools of pragmatists give useful hints to changing such a bad situation; there has to be a fundamental understanding and acceptance of the reality behind the sought ideal in order to make it legally intelligible. In our context, this corresponds to giving workers' rights a real substantive and binding content.

To translate this into our lexical background, there has to be a complete understanding of the *langue*, so that it can finally be reunited with the word of the agreement. An understanding of the factual reality in Colombia and Canada, of the structural position of actors and of their interactions will lead to an understanding of the norms of the agreement, and eventually of their possibilities. By understanding the structures surrounding violations of labour rights in Colombia, it would be possible to actually highlight options for change through innovative agreement provisions that would fit within the particular context of Colombia, rather than the following of general principles and provisions.

The ongoing negotiations on the Trans-Pacific Partnership (TPP) could allow for a chance to put such ideas into practice. Last December (2012), talks on the labour chapter of the TPP began with Canada joining Vietnam, Brunei, Malaysia, Australia and New Zealand in opposing the American proposal of making labour standards enforceable in the body of the agreement itself instead of in a side agreement.<sup>136</sup> The goal of the US proposal was, following the words of their previous FTAs with Peru, Panama, South Korea and Colombia,<sup>137</sup> to make labour violations enforceable through broader trade sanctions as well as fines, and through the same dispute resolution system as that of investment violations that could, for example, suspend benefits of the TPP until labour violations would stop.<sup>138</sup> The model supported by the US is also that supported by the CLC in their representations to the Canadian government,<sup>139</sup> saying that

any agreement on labour issues will be meaningless insofar as workers' rights are undermined by investors' rights provisions, relegated to a side agreement, or defended by sanctions that are non-binding and not enforceable.<sup>140</sup>

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<sup>136</sup> "Canada Pushes Alternative Enforcement for TPP Labor Rights Obligations", (12 December 2012) 30:49 Inside US Trade 5.

<sup>137</sup> Ian F Fergusson et al, *The Trans-Pacific Partnership Negotiations and Issues for Congress*, (R42694) (Washington, DC: Congressional Research Service Report for Congress, 17 June 2013) at 41 [Fergusson].

<sup>138</sup> *Ibid.*

<sup>139</sup> International Trade Union Confederation, *The Trans-Pacific Partnership Agreement: Model Labour & Dispute Resolution* (03 July 2012), online: International Trade Union Confederation <[http://www.ituc-csi.org/IMG/pdf/Final-Official\\_ITUC\\_TransPacific\\_Partnership\\_Labor\\_Chapter.pdf](http://www.ituc-csi.org/IMG/pdf/Final-Official_ITUC_TransPacific_Partnership_Labor_Chapter.pdf)>.

<sup>140</sup> Canadian Labour Congress, "Consultations on Potential Free Trade Agreement Negotiations with Trans-Pacific Partnership Members", (Submission by the Canadian Labour Congress to the Department of Foreign Affairs and International, 14 February 2012), online: Canadian Labour

Again, the position of the Canadian government remains one similar to that enshrined in *CCFTA*; a regime in which workers' rights are found in a separate document. These rights are enforceable through a mechanism that leads only to fines, when infringements are a result of a free trade deal that is punishable.<sup>141</sup> Of course, as it has been highlighted in the current essay, such a position is a serious limitation to obligations found in the first article of all labour side agreements to which Canada is a party.

The situation of the TPP, even though contextually very different to that of *CCFTA*, still allows for a structural critique. The CLC's submission to the Canadian government, with regards to the TPP shows the underlying schemes of meaning in the actions of the parties within the context of negotiations leading to the agreement. For example, the capitalistic *habitus* is ingrained in Canadian positions in the context of the TPP, as shown by the presence of Canadian companies in New Zealand for the negotiations of the TPP, counting amongst its attendees the biggest Canadian agro-industrial corporations. These will make sure that national trade policy works for them.<sup>142</sup> In this situation, the CLC has highlighted that FTAs, and here the TPP, are not written to take into account the need to ensure food security and the concerns for the livelihoods and security of smaller scale farmers, which would indeed be affected if Canadian agro-industrial goods flood South-East Asian markets, or if other Canadian companies, especially in the extracting sector, invest heavily in South-East Asia.<sup>143</sup> Our position is not to argue that investors' rights and concerns are illegitimate, but rather that if the goal of negotiators is to have a binding labour rights regime, it has to be on the same level, using the same language, as that of investors. Thus, relegating workers' rights to a side agreement, or enforcing them with non-binding sanctions and fines, is meaningless insofar as the rights of these workers, like in the case of *CCFTA*, are undermined by the rights of investors. These investor rights challenge, through private tribunals, the laws and regulations of foreign governments that ensure safeguards for workers, such as occupational health and safety standards that set performance requirements for investors. Governments should have the possibility to impose performance requirements on foreign corporations in order to allow for a binding and effective system of labour rights to emerge.

In other words, if the agreement is to have an effective labour regime talks revolving around the conclusion of the TPP and its labour regime need to address reality as it is, paying special attention to the seriously disadvantageous power relations enjoyed by negotiating countries. This means that the known *habitus* that has an effect on international trade, whether it be the capitalistic and anti-union cultures developed in this essay, or other cultures that take root in the structural position of actors, only perpetuating an unjust status quo, need to be studied, discussed and

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Congress <<http://www.canadianlabour.ca/sites/default/files/pdfs/tpp-brief-trade-negotiations-2012-02-14-en.pdf>>

<sup>141</sup> Fergusson, *supra* note 137.

<sup>142</sup> BJ Sierkierski, "Which Canadian Industries are in New Zealand for the 15th TPP Round?", *iPolitics* (December 4th 2012), online: *iPolitics* <<http://www.ipolitics.ca/2012/12/04/which-canadian-industries-are-in-new-zealand-for-15th-tpp-round/>>.

<sup>143</sup> Fergusson, *supra* note 137.

challenged. This will allow for the words of an agreement to have a genuine meaning in and of themselves. In the context of the TPP for example, labour and investment/commercial dispute settlement would have to be subjected to the same procedures and sanctions. However, taking account of such a reality might equate the negotiation process to a deadlock, as a major part of the negotiating parties (Vietnam, Brunei, Malaysia, Australia, New Zealand, now Canada and potentially others), are not in favour of a strong binding labour regime. In this context, the comprehension and challenge to power relations would force the parties to accept concessions that they may not be ready to make. The proposition for a new labour regime put forward by the United States would provide such a change in the language of the law. It would break with the Canadian practice of reproducing the language of its prior agreements, tainted with its capitalist and anti-union culture. This might allow for a new chapter in Canadian trade policy.

Finally, this analysis gives us the possibility to look at fundamental questions on the subject of structuralism in the context of law. In the current context, it is obvious that symbolically violent structures of power have riddled the schemes of reference underlying the meaning of the *CCFTA*, and might act as such in the case of the TPP. It would thus seem that violence has various sources in the current context, whether it be the actions of the paramilitary, of the Colombian government or the mere acceptance of the situation by Canadian corporations or officials. Structures of power are embedded in the prevalence of violence and in the perpetuation of the language of the law to keep up the status quo and the structural position of actors. This could lead oneself to ask about prospects for justice in such a context; wondering how justice can be rendered effective in a situation riddled with structural inequalities. Obviously, equality would be one of the previously said vague principles leading to a vicious circle. The quote from Pascal that introduced this essay is quite enlightening on this subject. It also gives the impression of running in circles; “Justice without force is contradictory [...]; force without justice is accused of wrong”. The situation studied in the current essay is one such case in which we have both contradictory justice and usage of force. As such, reaching a compromise between the two through the acceptance of the flaws of reality and in recognizing structural relations of power, could lead to both the promotion of the effectiveness of the law and a just use of the force of the law by challenging the *langue* of the law and allowing for a change to take into account the particular circumstances surrounding the conclusion of each FTA with regards to workers’ rights.