PUBLIC SUBMISSION TO THE OFFICE OF TRADE & LABOR AFFAIRS (OTLA) UNDER CHAPTERS 17 (LABOR) AND 21 (DISPUTE SETTLEMENT) OF THE COLOMBIA-UNITED STATES TRADE PROMOTION AGREEMENT

CONCERNING THE FAILURE OF THE GOVERNMENT OF COLOMBIA TO COMPLY WITH CHAPTER 17 OF THE COLOMBIA-UNITED STATES TRADE PROMOTION AGREEMENT

SUBMITTED BY:

THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO)

CENTRAL UNITARIA DE TRABAJADORES (CUT)

CONFEDERACIÓN DE TRABAJADORES DE COLOMBIA (CTC)

CORPORACIÓN COLOMBIANA PARA LA JUSTICIA Y EL TRABAJO (COLJUSTICIA)

SINDICATO NACIONAL DE TRABAJADORES DE LA INDUSTRIA AGROPECUARIA (SINTRAINAGRO)

UNIÓN SINDICAL OBRERA (USO)

I. INTRODUCTION

The government of Colombia (GOC) has failed to comply with multiple obligations under Chapter 17 of the U.S.-Colombia Trade Promotion Agreement (TPA). The GOC has failed to effectively enforce its labor laws through a sustained and recurring course of inaction and action in a manner that affects trade and investment; waived or otherwise derogated from its statutes and regulations in a manner affecting trade or investment; failed to adopt and maintain in its statutes and regulations, and practices thereunder, the rights as stated in the International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work; failed to ensure that proceedings in its administrative, judicial or labor tribunals are transparent and do not entail unwarranted delays and failed to ensure that final decisions from its administrative, judicial or labor tribunals are made available without undue delay. The GOC is therefore in violation of its obligations under Chapter 17, Articles 17.2.1 (a)-(b), 17.2.2, 17.3.1 (a), 17.4.2 and 17.4.3. (b) of the TPA,[1] which entered into force on May 15, 2012.[2]

The labor unions and federations and non-governmental organizations (the "petitioners") listed on the cover page hereby jointly file this petition with the U.S. Department of Labor's Office of Trade and Labor Affairs (OTLA) in accordance with the procedures set forth at 71 Fed. Reg. 76691, Section F. Upon completing its investigation, petitioners request that the U.S. invoke Cooperative Labor Consultations under Article 17.7 of the TPA to ensure the GOC takes all measures necessary to amend its laws, regulations and procedures in accordance with ILO fundamental labor rights and address the legal, institutional, and practical obstacles to the effective enforcement of labor laws and access to justice. If these consultations fail to bring about full compliance with Chapter 17 within a year of their commencement, the petitioners urge the U.S. to invoke the dispute settlement process under Chapter 21. As described in this petition, the GOC has been out of compliance with its labor obligations since the first day the TPA went into effect. There is no legitimate reason that workers should continue to be denied their rights. Delay hurts not only the working people whose rights are denied, but all other working people whose pay and benefits are dragged down as a consequence, including workers in the U.S.

A. TPA PROVISONS VIOLATED BY THE GOVERNMENT OF COLOMBIA

The GOC has failed to comply with the following provisions of Chapter 17 of the TPA:

- Regarding Article 17.2.1 the GOC has failed to "adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the ILO

[1] U.S.-Colombia Trade Promotion Agreement *Available at* https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file993_10146.pdf (hereinafter TPA). In this document, we refer to the English version of the TPA. Under Article 23.6 of the TPA the English and Spanish versions have equal authority.

[2] Proclamation 8818 of May 14, 2012 To Implement the United States-Colombia Trade Promotion Agreement and for Other Purposes, United States Federal Register *Available at* https://www.federalregister.gov/articles/2012/05/18/2012-12220/to-implement-the-united-states-colombia-trade-promotion-agreement-and-for-other-purposes.

Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998) (ILO Declaration): (a) freedom of association; (b) the effective recognition of the right to collective bargaining;"

- Regarding Article 17.2.2 the GOC has waived or otherwise derogated from its statutes and regulations implementing 17.2.1 (a) and (b) "in a manner affecting trade or investment between the Parties, where the waiver or derogation" is inconsistent with the fundamental rights set out in 17.2.1 (a) and (b).

- Regarding Article 17.3.1 (a), the GOC has failed to: "effectively enforce its labor laws, including those it adopts or maintains in accordance with Article 17.2.1, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties, after the date of entry into force of this Agreement."

- Regarding Article 17.4.2, the GOC has "failed to ensure that proceedings before [administrative, quasi-judicial, judicial or labor tribunals] are … transparent" and "do not entail … unwarranted delays;" and

- Regarding Article 17.4.3 (b), the GOC has failed to "provide that final decisions on the merits of cases [in proceedings before its administrative, quasi-judicial, judicial or labor tribunals] are … made available without undue delay to the parties to the proceedings."

B. COLOMBIAN LABOR LAWS

Under the TPA, labor laws are defined as "statutes and regulations, or provisions thereof, that are directly related to "enumerated internationally recognized worker rights," including freedom of association [and] the effective recognition of the right to collective bargaining."[3] Provisions of the Colombian Constitution, Labor Code and Penal Code are directly aimed at upholding these rights, and are therefore "labor laws" within the meaning of Chapter 17.[4]

Article 55 of the Colombian Constitution protects the right to collective bargaining and Article 39 protects freedom of association. Further, Article 53 of the Colombian Constitution specifically incorporates ratified international conventions into domestic law. The GOC has ratified ILO Convention 87 on freedom of association and protection of the right to organize, codified as Law 26 of 1976, and Conventions No. 98 and No. 154 on the right to organize and collective bargaining, codified through Law 524 of 1999. Article 86 of the Colombian Constitution allows judicial review when fundamental rights are violated or threatened by the action or inaction of public authorities.

The Colombian Labor Code protects the right to freedom of association in Article 353. Article 354 prohibits anti-union practices, including retaliatory dismissals against workers who organize or join unions and refusing to negotiate with unions, and states that anyone interfering with

[3] TPA, Article 17.8.
[4] Relevant laws available in Annex.

freedom of association is subject to fines and criminal penalties. The fines specified range from five to one hundred times the monthly minimum salary. Article 59 states that employers cannot limit or in any way interfere with workers' exercise of freedom of association. Article 433 states that the employers must meet with workers within, at most, 5 days of the workers filing a petition listing demands. Under Article 433, negotiations should begin within 24 hours of filing a petition, except if the representative identified in the petition is not authorized to resolve the complaint, in which case they must notify the workers and either obtain authorization or establish a different point of contact within 24 hours. Under Article 434, initial negotiations are supposed to last up to 40 days. Under Article 444 if the negotiating period elapses without resolution workers can hold a strike vote or submit the differences to arbitration. Article 444 also protects the right to hold strike votes by secret ballot and requires either an absolute majority of workers at an enterprise or a majority of members at a general assembly composed of more than half of the workers. Article 448 states that police authorities are tasked with maintaining the peace during strikes. Article 17 charges Ministry of Labor officials with enforcing social rights. Article 486 specifically empowers the agency to access worksites and records, order preventative measures to protect labor rights, and impose fines on violators.

C. LEGAL CHANGES UNDER THE LABOR ACTION PLAN

Colombia has long been one of the most dangerous countries in the world in which to exercise labor rights,[5] and concerns about ongoing, severe violations led the U.S. government to insist that the GOC agree to a Labor Action Plan (LAP) on April 7, 2011.[6] Both parties recognized the GOC was not in compliance with core requirements of the TPA's Labor Chapter.[7] The GOC was to enact legal and procedural reforms to address the root causes of that non-compliance, including anti-union violence,[8] inadequate enforcement, and illegal labor intermediation. These

[5] *See, e.g*. Escuela Nacional Sindical, Informe Sobre los Cuatro Primeros Años de Implementacion del Plan de Accion Laboral (2011-2015) Available at http://ens.org.co/apc-aa-files/4e7bc24bf4203c2a12902f078ba45224/Informe_final_completo_Plan_de_Acci_n_Laboral_2011_2015_Versi_n_4_Abril..pdf; Staff Report on behalf of U.S. Representatives George Miller and Jim McGovern to the Congressional Monitoring Group on Labor Rights in Colombia, The U.S.-Colombia Labor Action Plan: Failing on the Ground (October 2013) *Available at* http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/Colombia%20trip%20report%20-%2010.29.13%20-%20formatted%20-%20FINAL.pdf; International Trade Union Confederation, Annual Survey of Trade Union Violations (2011); Dan Kovalik, "Colombia Retains Position as the Most Dangerous Country in Latin America," June 9, 2010 http://www.huffingtonpost.com/dan-kovalik/colombia-retains-position_b_605970.html.

[6] Colombian Action Plan Related to Labor Rights (April 2011) *Available at* https://ustr.gov/sites/default/files/uploads/agreements/morocco/pdfs/Colombian%20Action%20Plan%20Related%20to%20Labor%20Rights.pdf (hereinafter LAP).

[7] *See, e.g*. Joint Statement of the Labor Affairs Council of the United States – Colombia Trade Promotion Agreement (June 2013) *Available at* https://ustr.gov/sites/default/files/06052013%20Colombia%20LAC_Joint%20Statement.pdf (recognizing the need to address persistent "challenges in order to ensure full implementation of the Labor Chapter").

[8] Chapter 17 requires Colombia's laws be consistent with the ILO Declaration, and specifically the right to freedom of association, which makes anti-union violence a violation of the TPA. As discussed below, the ILO has on numerous occasions found that the right to freedom of association can 'only be exercised in a climate that is free

laws were designed and implemented with the intention of furthering fundamental labor rights, particularly freedom of association and the right to collective bargaining, and therefore they are also 'labor laws' within the meaning of Chapter 17 of the TPA. Regrettably, the LAP did not include all necessary changes to Colombian law, nor did it require that the GOC demonstrate effective implementation of the required reforms before the TPA entered into force. The government never fully updated its legal framework and new regulations that were enacted were not effectively enforced.[9]

Anti-union violence has been a defining feature of Colombian industrial relations for decades. The ILO has repeatedly recognized that a failure to address violence against labor activists and leaders constitutes a violation of the right to freedom of association in general,[10] and has specifically cited this obligation in multiple cases in Colombia specifically.[11] To address this legacy of violence and intimidation, the GOC agreed in the LAP to establish and properly fund 95 full-time judicial police investigators to ensure crimes against union members are accurately identified, investigated and prosecuted; reform Article 200 of the Colombian Penal Code to make certain violations of the right to association or assembly a criminal offense; and enhance penalties for violence against trade unionists. Law 1719 of 2014 reformed Article 83 of the Criminal Code to impose prison sentences of 30 years for the murder of a trade unionist, and Article 347 of the Criminal Code to impose higher prison sentences and fines for threatening or intimidating trade unionists.

However, these measures have failed to address the problem. Cases are not meaningfully investigated and prosecuted.[12] Since the TPA has been in force, workers attempting to exercise their rights have suffered at least 1,466 threats and acts of violence, including 99 assassinations, 6 kidnappings and 955 death threats (see Graph 1 below). The two national unions whose cases are discussed below suffered six assassinations, 62 threats, 11 arbitrary detentions and 17 attempted murders (see Graph 2 below). For trade union murders, impunity presently stands at 87%. For death threats, the most common threat used against Colombian unionists, the rate of

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from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected.'

[9] Escuela Nacional Sindical, What's the status of the implementation of the Labor Action Plan?: Quantitative and Qualitative Evaluation (April 7, 2015) *Available at* http://www.ens.org.co/index-en.shtml?apc=Na--;1;-;-;&x=20170891; *See also* United States Trade Representative, Colombia, Protecting Labor Rights Through Trade (2015) https://ustr.gov/sites/default/files/Protecting-Labor-Rights-Trade-Colombia_0.pdf (acknowledging remaining challenges to implementation).

[10] International Labor Organization, Committee On Freedom of Association (hereinafter "CFA") 291st Report, Case No. 1700, ¶ 310; ILO CFA 288th Report, Cases Nos. 1273, 1441, 1494 and 1524, ¶ 30; 291st Report, Cases Nos. 1273, 1441, 1494 and 1524, ¶ 241; 297th Report, Cases Nos. 1527, 1541 and 1598, para. 162. *See also* Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, Geneva, International Labour Office, Fifth (revised) edition, 2006 (hereinafter "CFA Digest of Decisions") ¶ 35-36, 42-53, 58-60 *Available at* http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_090632.pdf

[11] *E.g.*, International Labor Organization CFA 372nd Report, Case No. 1787 ¶ 23; CFA 294th Report, Case No. 1761, ¶ 726-27; 292nd Report, Cases Nos. 1434 and 1477, para. 255.

[12] Organization for Economic Cooperative and Development, Reviews of Labour Market and Social Policies: Colombia 2016 103 (January 2016) *Available at* http://www.oecd.org/countries/colombia/oecd-reviews-of-labour-market-and-social-policies-colombia-2015-9789264244825-en.htm.

impunity comes to a scandalous 99.8%.[13] Further, after five years not a single Article 200 case has resulted in a conviction.[14]

Table 1: Violations of Life, Liberty and Safety Committed Against Colombian Trade Unionists May 12 2012 – April 19, 2016		
Violation	**Cases**	**%**
Threats	955	65,14
Harassment	195	13,30
Murders	99	6,75
Attempted Murders	66	4,50
Arbitrary Detentions	68	4,64
Forced Displacement	55	3,75
Illegal Searches	9	0,61
Forced Disappearances	7	0,48
Kidnapping	6	0,41
Torture	6	0,41
Total	**1466**	**100,00**

Source: Sistema de Información de Derechos Humanos, Sinderh, Escuela Nacional Sindical.

Table 2: Violations of Life, Liberty and Safety Committed Against USO and Sintrainagro May 12 2012 – April 19, 2016		
Violation	**USO**	**SINTRAINAGRO**
Threats	58	4
Harassment	13	-
Attempted Murder	12	5
Arbitrary Detention	11	
Murder	4	2
Total	**98**	**11**

Source: Sistema de Información de Derechos Humanos, Sinderh, Escuela Nacional Sindical.

The National Protection Unit was also established in 2011 to ensure that workers and other individuals who faced threats of violence received protection. Located under the Ministry of the Interior, this unit is charged with implementing protection measures for individuals, groups and communities who are under extreme risk of violence. However, as noted above, workers and

[13] Escuela Nacional Sindical, Anniversary of the Labor Action Plan, Five Years Waiting for Real Changes. (in Spanish) http://www.ens.org.co/index.shtml?apc=a---;1;-;-;&x=20171767.

[14] Escuela Nacional Sindical, Informe Sobre los Cuatro Primeros Anos de Implementacion del Plan de Accion Laboral 44 (2011-2015) *Available at* http://ens.org.co/apc-aa-files/4e7bc24bf4203c2a12902f078ba45224/Informe_final_completo_Plan_de_Acci_n_Laboral_2011_2015_Versi_n_4_Abril..pdf.

union leaders continue to be subjected to threats and violence. Further, in the last two years the National Protection Unit has been accused of diverting funds intended to help at-risk individuals.[15]

The LAP required the GOC to create a Ministry of Labor and amend labor laws, with the goal of ensuring the government conduct adequate inspections and issue timely, substantial fines and penalties. Law 1610 of 2013 modified Article 486 of the Labor Code to emphasize that Ministry of Labor officials "have the character of police authorities" over labor code violations, and allows the imposition of penalties up to five thousand times the monthly minimum wage, depending on the severity of the offense. The Ministry of Labor has hired numerous inspectors, but over 85% are temporary hires, and few inspectors visit workplaces or perform more than paperwork administrative reviews of compliance.[16] When inspections are conducted, these rarely result in fines, and when fines are applied, few are actually collected.[17]

Article 63 of Law 1429 of 2010 and Decree 2025 of 2011 were designed to address labor intermediation, the practice of setting up one or more sub-contracting entities -- labor intermediaries -- to provide labor to companies, which obscures a direct employment relationship even when these lead companies directly supervise, discipline and provide tools to workers. Most often workers are only offered short-term contracts, regardless of the nature of the work performed. These contracts can be easily cancelled, particularly if workers attempt to organize or otherwise exercise their labor rights. The vast majority of Colombia's workers were and continue to be hired through labor intermediaries, and this informality has long been identified as one of the primary barriers to the exercise of freedom of association in Colombia.

Article 63 of Law 1429 of 2010 prohibits the use of labor intermediaries to conduct permanent core activities of businesses in a manner that affects constitutional rights, legal rights and social benefits under current labor law. Article 1 of Decree 2025 defines permanent activities broadly, as activities or functions directly related to the production of goods or services characteristic of the company. Under Law 1429, the GOC is supposed to conduct inspections, and ensure that private and public companies contracting with labor intermediaries are fined. Article 2 of Resolution 321 of 2013 allows unions to propose formalization agreements and the government is then supposed to support negotiations with the employer to reach a resolution. However, these laws have proved inadequate in scope, particularly when combined with reluctance on the part of government officials to proactively pursue the issue.

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[15] La Semana, Los líos de la Unidad Nacional de Protección (August 11, 2015) *Available at* Http://www.semana.com/nacion/articulo/los-lios-de-la-unidad-nacional-de-proteccion/438132-3.

[16] Escuela Nacional Sindical, What's the status of the implementation of the Labor Action Plan?: Quantitative and Qualitative Evaluation (April 7, 2015) *Available at* http://www.ens.org.co/index-en.shtml?apc=Na--;1;-;-;&x=20170891.

[17] Escuela Nacional Sindical, 8ª Informe Nacional Sobre Trabajo Decente (October 7, 2015) *Available at* http://www.ens.org.co/index.shtml?apc=a---;-;20171494;-20171494;&x=20171494. ("Since its creation in 2010, the Ministry of Labor has imposed 9,048 fines and penalties, but only 38 have actually been paid, around 0.5% of the total. Since the deterrent role of penalties is nonexistent and the amount of the fines is ridiculously low, there is almost complete impunity").

The reforms focused primarily on the use of one specific form of labor intermediary: "associated work cooperatives." Under Article 63 and Decree 2025, the Ministry of Labor is specifically tasked with ensuring the dissolution of these entities and the application of fines against violators. While the use of cooperatives has markedly declined, other forms of indirect employment, such as collective pacts and simplified stock companies, have simply replaced them.[18] These arrangements perform the same function as the now-banned cooperatives: providing one or more layers between the employer and the worker performing the business' core activities to escape the direct employment relationship and the legal obligations that come with it. Nothing in the law prevents the Ministry of Labor from dissolving these other forms of intermediation, but there is no affirmative duty to do so. There has also been a sharp increase in the use of *contratos sindicales* ("union contracts"), agreements made by "unions" to provide services. These agreements are not negotiated or ratified by the workers they purport to represent and do not otherwise reflect collective bargaining as defined by the ILO and Colombian laws related to the ratification of Convention 98. These *contratos sindicales* increased from 50 in 2010 to 707 in 2012 to 1,925 in 2014.[19]

D. RECENT DECREES

Several new decrees regarding labor rights have been enacted in the first months of 2016, notably Decree 017 of 2016, Decree 036 of 2016, and Decree 583 of 2016.

Decree 017 purports to address the longstanding problem of delays when convening or incorporating Arbitration Tribunals. Unfortunately, while some issues are addressed, new opportunities for delay have also been created. For example, the decree requires that employers supply all necessary paperwork before the process can move forward, but includes no penalties if the employer fails to do so, potentially providing an opportunity for indefinite delay.

Decree 036 enacts some limits to the use of *contratos sindicales*, but it does not explicitly prohibit these agreements from being used for labor intermediation of core, permanent activities. Nor does it eliminate the government's misleading practice of including *contratos sindicales* in statistics on collective bargaining. Ultimately, this decree risks legitimizing *contratos sindicales* rather than addressing them.

Decree 583 attempts to clarify third party contracting (*tercerización*) conducted through entities other than cooperatives. However, the decree does not apply the more rigorous protections applied to cooperatives, and expressly permits sub-contracting permanent activities so long as the form does not violate constitutional, legal or labor rights. Much of the language in the decree is ambiguous, and it is difficult to ascertain the impact it will have on the large percentage of the workforce that remain in contingent employment arrangements.

[18] Testimony of Luciano Sanín, Guaranteeing Labor Rights as an Instrument of Peace, Panel on Labor and Post-Conflict Justice before the Supreme Court of Justice (October 26, 2015) *Available at* http://www.ens.org.co/index.shtml?apc=a---;-;20171541;-20171541;&x=20171541.

[19] Testimony of Luciano Sanín, Guaranteeing Labor Rights as an Instrument of Peace, Panel on Labor and Post-Conflict Justice before the Supreme Court of Justice (October 26, 2015) *Available at* http://www.ens.org.co/index.shtml?apc=a---;-;20171541;-20171541;&x=20171541.

While it is too soon to determine whether these decrees will significantly impact the GOC's entrenched failure to promote labor rights and protect workers, there appear to be structural weaknesses that will inhibit their effectiveness. Further, as documented below, often it is not just the lack of adequate laws and procedures, but a profound lack of will on the part of the GOC to act, that inhibits the free exercise of labor rights.

II. CASES

As discussed below, the GOC is in violation of Articles 17.3.1 (a), 17.2.2, 17.2.1 (a) and (b), 17.4.2 (d), and 17.4.3 (b). Sections A and B discuss specific cases in the oil and sugar sector and violations of Articles 17.3.1 (a) and 17.2.2, Sections C and D discuss violations of Article 17.2.1 (a) and (b), and Section E discusses violations of Article 17.4.2 (d) and 17.4.3 (b).

In addition to the two sectors identified in this petition, we urge the United States government to conduct investigations into other key sectors, including priority sectors identified in the LAP,[20] where there have been ongoing, documented violations of worker rights,[21] as the failure to comply with the requirements of Chapter 17 is widespread throughout the Colombian economy.

A. Pacific Rubiales

1. Statement of Facts

a. Background

The Unión Sindical Obrera (USO) is one of Colombia's oldest unions.[22] It plays a prominent role in defending the interests of oil workers, and as a result its leaders and members have been the

[20] The LAP identifies flowers, ports and palm oil as other key sectors.

[21] For example, The Central Unitaria de Trabajadores (CUT) and Sintrainagro filed complaints in November 2015 with the Ministry of Labor regarding the widespread abuse of labor intermediation in the cut flower export industry, Radicado # 226057 (November 24, 2015) on file with CUT. The port sector has one of the highest rates of illegal labor intermediation, and deaths in the sector are extremely high. *See, e.g.* Central Unitaria de Trabajadores, Foro Nacional de Formalización en Bucaramanga (March 19, 2014) *Available at* http://cut.org.co/foro-nacional-de-formalizacion-en-bucaramanga/; International Labor Organization, Proposal for Formalization in the Colombian Port Sector (November 2014) on file with Coljusticia. Response from the Ministry of Labor regarding Accidental Port Deaths, on file with Coljusticia. The ILO has documented unsuccessful attempts by workers to engage the Colombian government to protect the right to freedom of association and collective bargaining in the mining sector. *See, e.g*., International Labor Organization, Context of Labor Relations at Mining Companies in the Cesar Department (September2015), on file with Coljusticia); Portafolio, Contratistas de Cerrejón y Drummond, a huelga (July 9, 2014) *Available at* http://www.portafolio.co/negocios/empresas/contratistas-cerrejon-drummond-huelga-63056. As documented in a forthcoming investigation by Coljusticia, the violations specified in this petition, including labor intermediation and violations of freedom of association and collective bargaining, can be found throughout Colombia's export sectors. Coljusticia, Análisis del Comportamiento de la Justicia en Contextos de Alta Conflictividad Laboral (forthcoming 2016), on file with Coljusticia.

[22] Renán Vega Cantor, Luz Ángela Núñez Espinel and Alexander Pereria Fernández, Petróleo y protesta obrera, Editorial Corporación Aury Sará Marrugo, 189 (2009).

victim of anti-union violence, threats, legal harassment and criminal persecution.[23] Of the 710 union leaders under the protection of the National Protection Unit as of December 2014, 110 of those with the most serious measures—over fifteen percent of the total—are USO leaders.[24]

Pacific Rubiales is a Canadian-based extractive company registered in Colombia as Metapetroleum. In 2008, the company secured a concession from the state-owned Ecopetrol S.A to extract gas and oil at the Rubiales, Quifa, Piriri, CPE6, and CP012 fields in the department of Meta. According to Pacific Rubiales, the region's oil production has since increased from 14,000 barrels per day (bpd) to 200,000 bpd.[25] The department of Meta currently produces more oil than the traditional leading region of Magdalena Medio.[26] According to Global Securities Colombia, in 2013 Pacific Rubiales exported 45% of its production to the United States and 38% to Europe. This level of exports produced revenues of $349.8 million in the first nine months of 2014.[27]

In 2011, approximately 12,000 workers were employed in the Pacific Rubiales oilfields in Meta. Approximately 241 companies contract with Pacific Rubiales for various services, including supplying labor to the oilfields.[28] Many workers at these intermediaries performed activities directly related to the production of oil, the good or service characteristic of Pacific Rubiales' enterprise, as defined in Article 1 of Decree 2025. This included pumping, extraction and cleaning, and assembling and maintaining pumps. These types of workers continue to work through contracting entities.

The situation at Pacific Rubiales reflects broader national trends, which indicate that labor intermediation remains common. Most of the workforce in the oil sector is hired under short-term contracts to perform core permanent functions.[29] To date the Ministry of Labor has failed to use its inspection powers to examine and regulate illegal labor intermediation within multiple

[23] En el periodo 1984-2010 han sido asesinados 96 sindicalistas de la USO. Mauricio Archila, Violencia contra el Sindicalismo 1984-2010, Editorial CINEP, 245 (2012).
[24] National Protection Unit, Oficio Nº OFI14-00032756 (December 4, 2014).
[25] Pacific Rubiales Energy, Puerto Gaitán Caso Éxito en Reconciliación (November 3, 2014) *Available at* https://www.pacific.energy/es/comunicado/puerto-gaitan-caso-exito-reconciliacion.
[26] Pacific Rubiales Energy, Informe de Gestión (May 14, 2015) *Available at* https://www.pacific.energy/sites/default/files/documents/reports/2015/reportes%20finacieros/q1/PRE%20MD&A%20Q1%202015.pdf; See also Portafolio, Precios del Petróleo afectaron a Pacific (May 14, 2015) *Available at* http://www.portafolio.co/negocios/pacific-rubiales-informe-financiero.
[27] El Tiempo, Pese a tropezón, Pacific sube ganancias en nueve meses (November 6, 2014) *Available at* http://www.eltiempo.com/economia/empresas/ganancias-pacific-rubiales-2014/14801182.
[28] Affidavits of Norlay Acevedo Gaviria (December 1, 2015), Campo Elias Ortiz (December 9, 2015), Hector Sanchez (December 18, 2015), Leila Stella Arias Toro (December 11, 2015), Marleny Estrada Cordoba (December 11, 2015), Hector Vaca (January 10, 2016), Martin Ravelo (January 19, 2016) on file with AFL-CIO and ColJusticia. Formal complaints filed with Ministry of Labor from Jose Dilio Naranjo Gualteros, Alexander Barreto Ballesteros, Luis Hernando Rosas Moreno and Diego Iván Díaz Rivera, on file with USO and ColJusticia. *See also* USO Press Release, A pesar de la agresión y desinformación mediática los trabajadores y sus dirigentes seguimos en la lucha por nuestra dignidad y nuestros derechos (July 7, 2011).
[29] Mauricio Uribe, ¿Política de Formalización Laboral en crisis? (Accessed April 19, 2016) *Available at* http://www.aliriouribe.com/politica-de-formalizacion-laboral-en-crisis/.

large petroleum firms.[30] This is the case even when the government itself owns a majority of shares in a company, as is the case with Ecopetrol.[31] While the GOC claims that formalization overall increased by 2% between 2011 and 2014,[32] an independent analysis of available data demonstrates that the formalized workforce only increased by well under one half of one percent.[33] An October 2015 study concluded over 73% of the workforce is still informally employed, many through labor intermediaries, and workers continue to have limited access to labor rights and lack the benefits of stable employment, including social security.[34] In a January 2016 report, the OECD found that "high informality and a strong reliance on non-standard contracts have weakened the bargaining power of workers in Colombia."[35]

b. Specific Incidents

Workers at Pacific Rubiales oilfields began to organize in February 2011, hoping to address the rampant labor intermediation, as well as excessive hours, health and safety violations and a failure to provide adequate equipment, water and food to workers in isolated camps.[36]

On June 20, 2011, 1,110 workers at Pacific Rubiales' subcontractor Montajes JM took part in a work stoppage. All were subsequently dismissed. On June 30, USO filed complaints with the Attorney General, General Ombudsman and Ministry of Defense regarding this retaliation

[30] *See* International Labor Organization Governing Body, Committee on Freedom of Association, 374th Report, Case No. 2946 (March 2015) *Available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_357167.pdf.

[31] *See* 374th Report of the Committee on Freedom of Association, International Labor Organization Governing Body, 323rd Session, Geneva, Case No. 2946 (March 2015).

[32] Government of Colombia, Informe Final Plan de Acción de Colombia y Estados Unidos Para Derechos Laborales (2014) *Available at* http://www.mintrabajo.gov.co/publicaciones-mintrabajo/3792-informe-final-plan-de-accion-de-colombia-y-estados-unidos-para-derechos-laborales.html.

[33] According to the ENS, "Illegal labor subcontracting is a widespread phenomenon that leaves at least 3,700,000 people in the country who provide services to an employer without the guarantee of labor rights or social protection." Escuela Nacional Sindical, 8ª Informe Nacional sobre Trabajo Decente (October 2015) *Available at* http://www.ens.org.co/index.shtml?apc=a---;-;20171494;-20171494;&x=20171494 ("La práctica de relaciones laborales ilegales es un fenómeno extendido que padecen al menos 3´700.000 personas en el país, quienes prestan sus servicios a un empleador y éste no les garantiza derechos laborales ni protección social").

[34] Testimony of Luciano Sanín, Guaranteeing Labor Rights as an Instrument of Peace, Panel on Labor and Post-Conflict Justice before the Supreme Court of Justice (October 26, 2015) *Available at* http://www.ens.org.co/index.shtml?apc=a---;-;20171541;-20171541;&x=20171541.

[35] Organization for Economic Cooperative and Development, Reviews of Labour Market and Social Policies: Colombia 2016, 97 (January 2016) *Available at* http://www.oecd.org/countries/colombia/oecd-reviews-of-labour-market-and-social-policies-colombia-2015-9789264244825-en.htm.

[36] Affidavits of Norlay Acevedo Gaviria (December 1, 2015), Campo Elias Ortiz (December 9, 2015), Hector Sanchez (December 18, 2015), Hector Vaca (January 10, 2016) and Martin Ravelo (January 19, 2016) on file with AFL-CIO and ColJusticia; USO Press Release, Con Artimañas empresas petroleras se burlan de los trabajadores y la legislación laboral colombiana (June 25, 2011) *Available at* http://www.usofrenteobrero.org/index.php/actualidad/boletin-de-junta/703-con-artimanas-empresas-petroleras-se-burlan-de-los-trabajadores-y-la-legislacion-laboral-colombiana.

against workers,[37] and the fact that an agent of the Colombian national police appeared as part of the employer's negotiating team during a meeting between the employer and the union hosted by the Ministry of Social Protection. On July 6 and July 14,[38] Colombian civilian police and police from Colombia's "mobile anti-disturbance squadron" known as ESMAD, forcibly broke up protests by Montajes JM workers.

On July 18, approximately 4,000 workers - around one-third of the workforce throughout Pacific Rubiales' operations, including nearly every labor intermediary - convened an extended assembly and conducted a work stoppage to demand changes to precarious working conditions.[39] USO representatives entered the worker camps to meet with new and potential members and stayed overnight. On the morning of July 19, 150 ESMAD officials entered the camps.[40] The troops fired rubber bullets, percussion bombs and tear gas into tents and attacked workers with clubs.[41] Fifteen workers were seriously injured, including suffering the loss of an eye and an ear, fractured bones, punctures and severe burns. This resulted in permanent damage in several victims, including loss of vision and brain function.[42] During Colombian Congressional hearings held in July and August 2011, Senators expressed alarm that the GOC appeared to be responding to a labor dispute with military intervention rather than dialogue.[43] Several workers who were injured filed charges against the ESMAD for personal injuries, but none of the charges were ever resolved.[44]

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[37] Complaints registered at the Prosecutor General´s Office, Inspector General´s Office, National Ombudsman´s Office and Ministry of Defense (June 30, 2011); Urgent Appeal also filed with the Office of the United Nations High Commissioner for Human Rights (June 30, 2011), on file with USO.

[38] Central Unitaria de Trabajadores de Colombia (CUT), Denuncia nacional e internacional en Colombia se le da tratamiento de guerra al conflicto laboral en Puerto Gaitán Meta (July 13, 2011) *Available at* http://cut.org.co/denuncia-nacional-e-internacional-en-colombia-se-le-da-tratamiento-de-guerra-al-conflicto-laboral-en-puerto-gaitan-meta-2/; USO Press Release, Quién manda a quién y en donde manda (July 14, 2011) *Available at* http://usofrenteobrero.org/index.php/actualidad/boletin-de-junta/739-quien-manda-a-quien-y-en-donde-manda.

[39] Affidavits of Norlay Acevedo Gaviria (December 1, 2015), Campo Elias Ortiz (December 9, 2015), Hector Sanchez (December 18, 2015), Leila Stella Arias Toro (December 11, 2015), Marleny Estrada Cordoba (December 11, 2015), Hector Vaca (January 10, 2016), Martin Ravelo (January 19, 2016) on file with AFL-CIO and ColJusticia; *See also* USO Press Release, La marcha sindical ya está en Campo Rubiales, July 19, 2011 *Available at* http://prensarural.org/spip/spip.php?article6159.

[40] Affidavit of Norlay Acevedo Gaviria (December 1, 2015); *See also* USO Press Release, Denuncia Agresiones del ESMAD del 19 de julio de 2011 (July 22, 2011) on file with USO. The worker encampments attacked were Consorcio Oriente and Morichal (aprox. km 155-160 vía Puerto Gaitán Vereda Rubiales), Base Antigua (Km 161 vía Santa Elena) and the pumping station Oleoducto de los Llanos Orientales (Km 155 y 160 Puerto Gaitán Vereda Rubiales).

[41] Affidavits of Norlay Acevedo Gaviria (December 1, 2015), Campo Elias Ortiz (December 9, 2015), and Hector Vaca (January 10, 2016) on file with AFL-CIO and Coljusticia.

[42] Medical records of Ulises Carrillo Ducuara, Yesid Vasquez Alvarez, Winston Betancourt Pineda, and Winston Betancourt Pineda, on file with Coljusticia. *See also* Complaint filed with the Prosecutor General´s Office regarding events which occurred on July 19, 2011 (July 25, 2011) on file with Coljusticia.

[43] Press Release issued by Senator Jorge Enrique Robledo, Enclave colonial de Pacific Rubiales en los Llanos, un campo de concentración contra los trabajadores (August 17, 2011).

[44] *See* Complaint filed with the Prosecutor General´s Office regarding events which occurred on July 19, 2011 (July 25, 2011) on file with Coljusticia; Medical records of Ulises Carrillo Ducuara, Yesid Vasquez Alvarez, Winston Betancourt Pineda, and Winston Betancourt Pineda, on file with Coljusticia.

On July 25, USO submitted a complaint to the Colombia Ministry of Social Protection detailing numerous violations, including labor intermediation and a refusal to bargain with the union.[45]

Colombian army and police agents established a heavy presence in the area in response to the protests, in coordination with Pacific Rubiales.[46] On at least seven occasions between July 20 and September 21, army and police forces, working with Pacific Rubiales' private security forces, prevented USO leaders from communicating with their members by using company vehicles and heavy equipment to block public roads.[47] On September 18, ESMAD agents once again entered the worksite following a work stoppage, leaving more than sixty workers with different kinds of injuries.[48] The military continues to maintain a constant presence in the area to this day, citing the importance of protecting the oil business.

Workers continued to join USO, and by September 2011, USO had 3,493 new members from the workforce at Pacific Rubiales and its more than 200 contractors.[49] Pacific Rubiales and its intermediaries responded by conducting mass dismissals of workers affiliated to USO, beginning in July 2011 and escalating throughout that year.[50] Approximately one thousand workers were fired.[51] On August 22, USO notified the Ministry of Social Protection that Pacific Rubiales and its intermediaries were terminating contracts with workers who had participated in the work stoppages. Employers claimed the terminations were due to projects being completed, but dismissed workers reported that others were subsequently hired to perform the same tasks.[52]

In response to the repeated work stoppages and protests, the Ministry of Social Protection convened a meeting between USO and Pacific Rubiales in September 2011. On September 21, USO, Pacific Rubiales and the GOC signed agreements.[53] Workers agreed to suspend further protests, and Pacific Rubiales agreed to engage in collective bargaining and refrain from retaliating against workers who had participated in the work stoppages. The agreement provided for follow-up negotiations, including with Pacific Rubiales and many of its intermediaries, scheduled to take place on October 6 and October 25 in Bogotá.

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[45] Complaint from USO to Ministry of Social Protection, Department of Meta regarding Violation of Worker Rights (July 25, 2011).

[46] National Police, Oficio Nº 006380 COMAN-COSEC 3.7.7.5 (August 28, 2011).

[47] Affidavits of Hector Vaca (January 10, 2016) and Martin Ravelo (January 19, 2016) on file with AFL-CIO and ColJusticia.

[48] Affidavits of Norlay Acevedo Gaviria (December 1, 2015) and Campo Elias Ortiz (December 9, 2015) 2015, on file with AFL-CIO and Coljusticia; *See also* USO Acción Urgente, Agresión contra trabajadores y Comunidad de Campo Rubiales – Meta (September 20, 2011) on file with USO.

[49] Affiliations to USO, June-October 2011, Digital Archive of Corporación Colectivo de Abogados "José Alvear Restrepo" – CCAJAR, on file with Coljusticia.

[50] USO, Public Communication: June 20, 2011. Digital Archive of Corporación Colectivo de Abogados "José Alvear Restrepo" – CCAJAR.

[51] Affidavit of Norlay Acevedo Gaviria (December 1, 2015).

[52] Letter from USO to the Minister of Social Protection (August 22, 2011).

[53] Agreement for the Installation of a Negotiating Table Between Pacific Rubiales Energy-PRE, La Union Sindical Obrera de la Industria del Petroleo - USO and the National Government (September 21, 2011) on file with Coljusticia.

Instead, on October 6, Pacific Rubiales signed a "Labor Normalization Agreement" with the National Union of Energy Workers (UTEN).[54] UTEN had no prior presence in the region and no relationship with the workers. The agreement resembled a commercial contract for delivery of services and was never registered with the Labor Ministry. As such, it cannot be regarded as a valid collective bargaining agreement.

Following the October 6, 2011, agreement with UTEN, Pacific Rubiales refused to negotiate with USO, citing its agreement with UTEN at the final scheduled negotiation in October.[55] At the opening of the final scheduled negotiation meeting between USO, Pacific Rubiales and the government on October 25, the company announced that there was no need to continue negotiating with USO, since it had signed an agreement with UTEN. The GOC accepted this explanation and did nothing to enforce the existing agreement with USO or question the validity of the UTEN agreement, a situation which continues to this day. As of March 2016, UTEN has not attempted to negotiate a collective bargaining agreement or made any other attempts to represent workers' interests.[56]

Beginning in October 2011, Pacific Rubiales began systematically excluding workers who were affiliated with USO or who had participated in the work stoppages. Pacific Rubiales terminated contracts with intermediaries by mutual agreement while projects were ongoing and work was still required.[57] The intermediaries subsequently were offered new contracts to fulfill either the exact same or similar responsibilities, after they had dismissed their workforce. Only workers not affiliated to USO were then re-hired to staff the new contracts.[58] Workers were directed to quit USO and join UTEN to secure new contracts.[59] These intermediaries had hundreds of workers who were USO members in 2011, but all reported having zero by February 2012.[60] Workers

[54] Labor Agreement between Meta Petroleum Corporation and the National Union of Workers of the Energy Industry and Public Services- UTEN (October 6, 2011) on file with Coljusticia.

[55] Affidavits of Campo Elias Ortiz (December 9, 2015) and Hector Sanchez (December 18, 2015) on file with Coljusticia.

[56] On May 1, 2012, UTEN and Pacific Rubiales signed a *contrato sindical* but this was not ratified by workers and contained no improvements in working conditions.

[57] Records of contract terminations: 5500000366, 4700000273, 5400000226, 5400000171, 5400000194, 5500000510, 5400000194, 5500000514, 5500000902, 5500000443, 5400000309, 5400000295 and 5500000411 with Pacific Rubiales Energy – Metapetroleum, on file with Coljusticia.

[58] Complaint (*denuncia penal*) presented to the Fiscalía General de la Nación under Article 200 of the Penal Code (filed May 30, 2013).

[59] Sworn declarations in USO formal complaint to Ministry of Labor, July 24, 2012 and August 8, 2012 on file with ColJusticia.

[60] USO records held in the Department of Meta from May 20, 2013, copies on file with ColJusticia, Records of the following Pacific Rubiales contractors document mass disaffiliation from USO: Montajes J.M. USO had 976 members in 2011. By January 2012 there were none; DUFLO had 173 members between July and November 2011 and 0 in February 2012; ITRICON had 250 affiliated between July and September 2011 and reported 0 members in February 2012. ICC only reported 36 members' dues check-offs in February 2012 in spite of 307 of its workers having affiliated to USO between July and September; the contracting Company CER, reported only four members' dues discounts although 189 of its workers joined USO in 2011.

report that these companies continue to maintain contracts for services with Pacific Rubiales to this day, but will not hire workers who are USO members.[61]

More than 90% of the 3,493 new USO members resigned after being dismissed, pressured or excluded from work by February 2012.[62] USO received at least 292 requests for disaffiliation that expressly state the choice was not made voluntarily.[63] Another group of 221 workers presented letters of voluntary resignation, stating it was necessary to maintain their jobs at intermediaries.[64] Due to this sustained campaign of repression, as of February 2016 the union only has thirty-four members at the company.[65] Some workers also report that they were required to become members of UTEN as a condition of keeping their job or returning to work for intermediaries of Pacific Rubiales.[66] Workers recount being sent directly from the offices of Pacific Rubiales to UTEN, where they were instructed to resign from USO and join UTEN, and informed that failure to do so would result in their not being hired.[67] Pacific Rubiales has been public about its support for UTEN, with a 2014 third-party social audit concluding the company "proactively supports the UTEN."[68] Given that this interference with workers' right to freedom of association and collective bargaining continue to the present, these ongoing violations are subject to the obligations of the TPA.

By November 2011, Pacific Rubiales' private security created a checkpoint at Kilometer 132 of the public road between Puerto Gaitán and the Rubiales oil fields. Workers report that Pacific Rubiales security staff check any individual trying to enter the worksite against a database called Andromeda, which is shared between Pacific Rubiales and its intermediaries.[69] Workers affiliated with USO are prohibited from entering, even if the worker presents a valid labor

[61] *E.g.*, Affidavits of Leila Stella Arias Toro (December 11, 2015) and Marleny Estrada Cordoba (December 11, 2015), on file with ColJusticia.

[62] USO Archives, Requests for Disaffiliation on file with Coljusticia.

[63] *See, e.g.*, USO Archives, Disaffiliation request from Luis Fernando Barrios (December 19, 2011) on file with Coljusticia.

[64] *See, e.g.*, USO Archives, Disaffiliation request from Luis Alberto Pérez Samboni (February 7, 2012) on file with Coljusticia ("the request to resign from this organization I am affiliated to is not voluntary. It complies with the pressure and threats that Pacific Rubiales Energy exercises over Montajes JM and this company demands of workers under penalty that they will not be hired to work again in the Rubiales oil fields and the obligation to affiliate to the union chosen by the employer called UTEN so that they will give us work and access to the oil fields.").

[65] USO Statement, La USO denunciará a Pacific por practicas antisindicales (September 22, 2015) *Available at* http://www.usofrenteobrero.org/index.php/subdirectivas/meta/4131-la-uso-denunciara-a-pacific-rubiales-por-practicas-antisindicales.

[66] Complaint (*denuncia penal*) presented to the Fiscalía General de la Nación under Article 200 of the Penal Code (filed May 30, 2013).

[67] Ministry of Labor, Declaration made by Alexander Barreto Ballesteros (July 24, 2012).

[68] Equitable Origin, Certified Site Profile: Quifa and Rubiales Production Fields (2015) *Available at* http://www.equitableorigin.org/media/eoweb-media/files_db/PRE_summary_UPDATE2.pdf.

[69] Affidavit of Hector Sanchez (December 18, 2015) on file with Coljusticia. Pacific Rubiales website, Andromeda system *Available at* http://www.pacific.energy/es/solicitud-ingreso-campos-pacific.

contract with one of the intermediaries.[70] The system is further used to prevent local union leaders from entering workplaces, using public roads or accessing local communities, thus barring USO from associating with or representing its membership. As of March 2016, workers report that this checkpoint and the blacklist remain in place.

Local Community Action Boards (*ASOJUNTAS*), organizations established in part to ensure companies comply with obligations regarding hiring within local communities, have also found that when they include USO members on local hiring lists, the companies demand those workers' names be removed and replaced with others.[71]

On February 2, 2012, the national USO filed an administrative complaint with the Ministry of Labor detailing the fact that Pacific Rubiales and its intermediaries conducted mass dismissals of USO members, pressured workers to disaffiliate with USO and join UTEN, set up a system to prevent workers affiliated with USO from entering the worksite and prevented union leaders from accessing the worksite and living camps of workers.[72] The complaint included testimony and other evidence that intermediaries acted not on their own initiative but at the direction of Pacific Rubiales.

It took more than a year for the Ministry of Labor to reach a decision.[73] In April 2013, the case was dismissed.[74] USO filed a motion to reconsider and an appeal against the decision, noting that the investigation did not meaningfully examine the continued use of blacklists or the mass firings of USO members, and that the Ministry had permitted the dissolution of the intermediaries' contracts without analyzing whether this was done to stifle worker organizing.[75] Both appeals were dismissed on the basis that no direct employment relationship existed between the fired workers and Pacific Rubiales.[76] The ministry made no further inquiries and conducted no interviews to investigate whether the employment relationship no longer existed precisely because workers had been fired for union membership.

[70] Constitutional claim (*tutela*) filed on behalf of Hector William Marin (August 23, 2013). In this case Marin was fired from his job following PRE security guards refusal to allow him passage at the checkpoint, as a result of his name appearing on the blacklist on file with USO.

[71] Declaration made to Ministry of Labor by Luis Hernando Rosas Moreno (July 24, 2012); Projet Accompagnement Solidarité Colombie, Impactos en los Derechos Humanos de la implementación del Tratado de Libre Comercio entre Colombia y Canadá *Available at* http://www.pasc.ca/sites/pasc.ca/files/u6/Colombian-Base-TLC-final1.pdf

[72] USO Complaint to Ministry of Labor (February 2, 2012) includes declaration from Diego Iván Díaz Rivera (August 10, 2012); Luis Hernando Rosas Moreno (July 24, 2012); Alexander Barreto Ballesteros (July 24, 2012) and Jose Dilio Naranjo Gualteros (July 24, 2012).

[73] The investigative process took over a year. On March 12, 2012, the labor inspector of Puerto Gaitan acknowledged the complaint; on June 29, 2012 the President of USO in Meta gave a statement; on July 24, 2012, several workers gave testimony; a procedural hearing was held on August 10, 2012; the initial decision was passed down on April 19, 2013. Ministry of Labor, Resolution No 00000483 (April 19, 2013).

[74] Ministry of Labor, Resolution No 00000483 (April 19, 2013).

[75] USO Motion to Reconsider and Appeal against Resolution N° 00000483 (*recurso de reposición y subsidio apelación*) (May 17, 2013).

[76] Ministry of Labor, Resolution No. 817 (July 2, 2013) (stating that the appeal was resolved).

While the case before the Ministry of Labor was pending, Pacific Rubiales signed two *contratos sindicales* with UTEN in May and July of 2012.[77] As discussed in Section I.C of this complaint, these are not collective bargaining agreements. The two agreements cover approximately 3,000 workers conducting permanent activities in the oil fields who were never presented with the agreement or asked to vote on or otherwise approve the contents. In early 2016 the GOC changed the law to require that workers ratify *contratos sindicales*, but no evidence suggests this has actually been carried out with respect to the UTEN "contract."

On May 17, 2013, USO attempted to use the criminal provisions in Article 200 intended to address impunity with regard to violations of freedom of association, naming Pacific Rubiales, its contractors, and the National Police and Military in the complaint.[78] The complaint was originally assigned to the Third Specialized Prosecutor Unit in July 2013.[79] On October 17, 2013, the prosecution held an initial conciliation meeting.[80] Since then, the case has been reassigned among different units at least three times. First, the Attorney General's Office sent it to a "special agency," under the responsibility of Attorney 9 in the Judicial Criminal II office. On August 15, 2014, the case was reassigned to Prosecutor 51 of the specialized Contexts and Analysis Division of the Attorney General's Office. In July 2015, the case was again reassigned, this time to the National Human Rights Unit's Chief Prosecutor, Dr. Dagoberto Ardila. To the best of our knowledge, no action has been taken since. Thirty-three months after it was filed, the complaint remains in the procedural inquiry stage, with no resolution in sight.

In December 2013, five months after USO filed its criminal complaint, the Colombian Attorney General's office issued arrest orders against three USO leaders in Puerto Gaitan. Hector Sanchez, Dilio Naranjo and Campo Elias Ortiz[81] were charged with kidnapping and conspiracy for participating the 2011 work stoppage and subsequent protests.[82] Hector Sanchez, Campo Elias Ortiz and Dilio Naranjo were charged and arrested after they testified in July and August 2013 before the attorney general against Pacific Rubiales in the Article 200 case described above.[83] To effect these arrests, resources and efforts were deployed efficiently and actions swiftly taken. Charges were filed at three different locations, in two different departments, and all three were

[77] *Contrato sindical* between Meta Petroleum Corporation and la Union de Trabajadores de la Industria Energetica Nacional y de servicios públicos "UTEN" (July 2012) *Available at* https://www.pacific.energy/proveedores/docs/BDBinDoc.asp?ID=%7B6108F280-6668-47D3-B65A-54FC1CBC80A5%7D&DownLoad=1.

[78] The case named Pacific Rubiales and its contractors, including Montajes J.M. S.A., ISMOCOL de Colombia S.A., DUFLO S.A., INTRICON S.A., ICC LTDA, CER, Barsainc-Consorcio Rubiales, and members of the ESMAD, National Police and Army. Denuncia Penal presented by USO before Fiscalía General de la Nación under Article 200 of the Penal Code (filed May 30, 2013).

[79] Claim (*denuncia penal*) presented by USO, Fiscalía 52 Unidad de Derechos Humanos, Radicado Nº 110016099051201300002.

[80] Attorney General's Office, Unit of Analysis and Contexts-UNAC, Specialized Prosecutor 39 (October 17, 2013)

[81] Fiscalía General de la Nación, Proceso Penal contra líderes de la USO Hector Sánchez, Dilio Naranjo y Campo Elías Ortiz. Radicado No. 505686100000201180417

[82] CCAJAR, Sindicalistas de la USO detenidos y judicializados (January 2014) *Available at* http://www.colectivodeabogados.org/Sindicalistas-de-la-USO-detenidos

[83] Affidavits of Campo Elias Ortiz (December 9, 2015), Hector Sanchez (December 18, 2015) on file with Coljusticia and AFL-CIO.

arrested that same day in different locations.[84] USO and its lawyers filed legal responses to the arrests. After three months, the USO leaders were finally released, but the charges remain active.

The application of Article 200 of the Colombian Penal Code has been exceeding rare.[85] In fact, while unions have filed 1,146 criminal complaints since the law was enacted, not a single employer has ever been convicted.[86] The new unit within the Attorney General's office created to respond to labor rights violations and reduce impunity is insufficiently staffed, has a long backlog of cases and rarely pursues charges against violators.[87]

Several of the USO workers who appeared as witnesses in the criminal complaint against Pacific Rubiales subsequently received death threats.[88] In October and December 2013, several pamphlets making threats against USO and its leaders appeared in Puerto Gaitán. These pamphlets accused the union of being an illegitimate criminal organization.[89] On July 16, 2013, Hector Sanchez found a note on his dining room table threatening his family, and two weeks later an envelope was left on his doorstep labeled "death to USO informers."[90] While the National Protection Unit provided protective measures for Dilio Narano and Hector Sanchez, no suspects were ever identified or prosecuted.

On June 16, 2015, USO presented a list of demands to Pacific Rubiales in an attempt to negotiate a contract for direct employees of the company who had recently affiliated to the union. The negotiating period ended without the parties reaching agreement on a single point of the list of demands. Following the failure to reach an agreement, Pacific Rubiales prevented the union from entering the work camps, which was accompanied by officials from the Ministry of Labor, to conduct a workers assembly and strike vote consistent with Article 444 of Colombian Labor Code.[91] At the time, Ministry officials did not defend the right of the union to enter the work camps, the only place it would be possible to conduct a vote since most workers live on-site, and

[84] Dilio Naranjo was arrested in Bogota after a meeting with a lawyer of PRE; the arrest of Campo Elias Ortiz came in Bogota near his residence, while Hector Sanchez was turned over to the prosecution in the Rubiales village of Puerto Gaitan, while he was at the offices of Pacific Rubiales, filing documents connected with a claim for his community.

[85] *See* Escuela Nacional Sindical, Protección contra actos de discriminación antisindical - Aplicación del artículo 200 del Código Penal (April 7, 2016) *Available at* http://www.ens.org.co/index.shtml?apc=Na--;1;-;-;&x=20171767

[86] Fiscalía General de la Nación. Oficio Nº 00683 de mayo de 2015. On file with Coljusticia.

[87] Coljusticia, Acceso a la Justicia y Protección Penal del Derecho de Asociación Sindical (April 8, 2016) *Available at* https://dl.dropboxusercontent.com/u/63381205/acceso%20a%20la%20justicia.pdf; Organization for Economic Cooperative and Development, Reviews of Labour Market and Social Policies: Colombia 2016, 19 (January 2016) *Available at* http://www.oecd.org/countries/colombia/oecd-reviews-of-labour-market-and-social-policies-colombia-2015-9789264244825-en.htm.

[88] Complaint of threats against José Dilio Naranjo Gualteros, Criminal Notice. No. 110016000132012068 70; Complaint of threats against Héctor Sánchez Gómez, Criminal Notice. No. 110016000023201409260.

[89] Photos on file with Coljusticia.

[90] "RIP Juan David and Mrs. Sánchez. We know you and your family's every move. You can ask for help but it will serve no purpose. We also know when you go to work. Do not look for a needless death for your wife and son. We offer our condolences on the loss of your wife and son. Do not leave your son without a father and wife a widow or find yourself a widower." Photo on file with AFL-CIO.

[91] USO Communication sent to the Ministry of Labor and Pacific Rubiales informing both of the intent to hold a strike vote in accordance with Article 444 of the Labor Code, on file with Coljusticia.

has not acted since to gain access for the union or install an arbitration panel to initiate negotiations. USO filed a complaint with the Ministry against Pacific Rubiales for violation of freedom of association for the employer's refusal to allow USO to hold a workers meeting and vote regarding collective bargaining and a possible work stoppage.[92] In denying the union access to the work camps, Pacific Rubiales made the false claim that strikes in the oil sector are illegal. Since the union presented its list of demands, Pacific Rubiales has not renewed the contracts of any USO members, resulting in a drop from an initial bargaining unit of 66 to less than 34 at present. The workers who presented the list of negotiating demands lost their contracts between August and December 2015.[93]

In 2014, USO and other unions sent complaints to the ILO's Committee on Freedom of Association (CFA) detailing sustained, recurring violations of labor rights in the oil sector, at Pacific Rubiales, other private employers and the state-owned Ecopetrol.[94] In March 2015, the CFA issued a report noting the GOC's failure to examine the relationship between Pacific Rubiales and its intermediaries, and requesting that the government "immediately conduct or complete inquiries into the alleged anti-union termination of contracts between enterprises."[95] The CFA requested additional measures to address the continued use of short-term contracts and its effect on freedom of association, and stated that the government must guarantee union representatives access to the worksite. To date, the GOC has not implemented any of the ILO recommendations.

After USO and other unions filed the 2014 ILO CFA complaint naming Ecopetrol, USO's national vice-president Edwin Palma was dismissed on April 3, 2015 after he denounced corruption at the company,[96] and worker Félix Alberto Thomas Rueda was arbitrarily arrested and detained by the National Police while protesting mass layoffs by an Ecopetrol intermediary.[97]

Both before and after the TPA's entry into force, state security forces have handled workplace issues with violence in many high-profile cases in Colombia. For example, in March 2015

[92] Complaint filed by USO with Ministry of Labor, Radicado Nº 174682 (September 14, 2015).

[93] Pacific Rubiales retaliated against workers who presented the list of negotiating demands by refusing to renew their employment contracts between August and December 2015. Trade unionists who were victims of retaliation include 1) Urban Jhonatan 2) Oscar Javier Restrepo; 3) Basilio Chipiaje; 4) Miguel Cortez; 5) Edgar Yanave; 6) Milton Silva; 7) Arnulfo Pictures; 8) Alejandro Gallo; 9) Freddy Reyes; 10) Fidelmo Medina. In contrast, in January 2016 15 non-unionized workers had their contracts renewed, while unionized workers did not. Records of dismissals on file with USO.

[94] The ILO CFA has the authority to hear cases on violations of freedom of association and make determinations on whether violations have occurred, issue directives to governments, or request more information.

[95] International Labor Organization Governing Body, Committee on Freedom of Association, 374th Report, Case No. 2946 ¶ 249, 257(f) (March 2015) *Available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_357167.pdf.

[96] USO Statement, Con despido de Edwin Palma Ecopetrol desafía a la USO *Available at* http://www.usofrenteobrero.org/index.php/secretarias/asuntos-juridicos-y-laborales/3626-con-despido-de-edwin-palma-ecopetrol-desafia-a-la-uso.

[97] USO Statement, Detenido trabajador petrolero por protestar despidos masivos *Available at* http://www.usofrenteobrero.org/index.php/secretarias/derechos-humanos/3644-detenido-trabajador-petrolero-por-protestar-despidos-masivos.

ESMAD officers attacked workers protesting at the Risaralda sugar plantation. Five workers were seriously injured, including one individual who lost brain function and motor skills after an officer fired a tear gas canister directly at his head.[98] On July 7, 2014, ten striking workers and others performing regular duties at the Bucarelia palm oil plantation were met with excessive force by ESMAD, leading to serious injuries for three workers including one worker losing an eye. [99] Port workers in Buenaventura suffered similar abuses of excessive force by ESMAD when seeking to exercise labor rights and a legal strike in pursuit of direct employment in August 2012.[100] There have been several critical analyses looking particularly at the role of ESMAD in preventing the exercise of labor and other fundamental rights through the use of excessive force.[101]

On January 20, 2016, the OECD released a review of Colombian labor policies, which noted continued weakness in the enforcement of labor laws and labor inspection, widespread abuse of short-term contracts, and continued violence against trade union leaders and members.[102] The report confirms that the GOC is not maintaining fundamental worker rights and frequently does not enforce its own labor laws across sectors.

[98] Escuela Nacional Sindical, El Esmad arremetió contra corteros de caña en huelga en el Ingenio Risaralda: 5 heridos, dos graves (March 3, 2015) *Available at* http://www.ens.org.co/index.shtml?apc=a---;1;-;-;&x=20170788; Central Unitaria de Trabajadores, La CUT rechaza brutal ataque del esmad contra corteros de caña del Ingenio Risaralda (March 3, 2015) *Available at* http://cut.org.co/la-cut-rechaza-brutal-ataque-del-esmad-contra-corteros-de-cana-del-ingenio-risaralda/; Escuela Nacional Sindical, Criminalization and Judicial Harassment of Union Activity (February 9, 2016) http://www.ens.org.co/index.shtml?apc=a---;-;20171703;-20171703;&x=20171703.

[99] Paola Andrea Pabon Ortega, Bucarelia: en huelga imputable al empleador, Centro de Atencion Laboral *Available at* http://calcolombia.co/publicaciones/cronicas-del-cal/bucarelia-en-huelga-imputable-al-empleador/.

[100] Senator Alexander López, Las autoridades deben cesar la agresión a los trabajadores en el terminal marítimo de Buenaventura (August 29, 2012) *Available at* http://www.senado.gov.co/sala-de-prensa/senadores-noticias/item/14692-las-autoridades-deben-cesar-la-agresion-a-los-trabajadores-en-el-terminal-maritimo-de-buenaventura-senador-alexander-lopez?tmpl=component&print=1.

[101] Colectivo de Abogados José Alvear Restrepo (CCAJAR), Escuela Nacional Sindical, Corporación Colombiana para la Justicia y Coljusticia, Protestar No Es Delito (forthcoming May 2016); Escuela Nacional Sindical, Criminalización y judicialización de la actividad sindical sigue al orden del día (February 9, 2016) *Available at* http://www.ens.org.co/index.shtml?apc=Na--;1;-;-;&x=20171703; El Espectador, Denuncian agresión de policías y ESMAD a funcionarios judiciales en paro (February 1, 2016) *Available at* http://www.elespectador.com/noticias/judicial/denuncian-agresion-de-policias-y-esmad-funcionarios-jud-articulo-614011; Colectivo de Abogados José Alvear Restrepo (CCAJAR), Escuadrón móvil antidisturbios ESMAD dispara arma de fuego contra las instalaciones de bodegas Navarro (July 21, 2015) Available at http://www.colectivodeabogados.org/cajar_old/spip.php?article7098; Website of Senator Alvaro Uribe Munoz A debate extralimitación de funciones del ESMAD y la Fuerza pública *Available at* http://www.aliriouribe.com/a-debate-extralimitacion-de-funciones-del-esmad-y-la-fuerza-publica; http://www.pasointernational.org/es/2015/05/espanol-comunicado-publico-grave-situacion-en-rubiales/.

[102] Organization for Economic Cooperative and Development, Reviews of Labour Market and Social Policies: Colombia 2016, 19 (January 2016) *Available at* http://www.oecd.org/countries/colombia/oecd-reviews-of-labour-market-and-social-policies-colombia-2015-9789264244825-en.htm.

2. Argument

a. Colombia has failed to effectively enforce its labor laws, particularly those adopted in accordance with Article 17.2.1, through a sustained and recurring course of action and inaction, in a manner affecting trade or investment between the Parties, and is therefore in violation of Article 17.3.1(a).

i. The GOC failed to effectively enforce Article 63 of Law 1429, adopted in accordance with Article 17.2.1.

The GOC failed to effectively enforce Article 63 of Law 1429 of 2010 regarding labor intermediation. Law 1429 of 2010 is a labor law within the meaning of Article 17.8 of the TPA, as it is a regulation directly related to the internationally recognized right to freedom of association. Under Article 63, workers performing core permanent functions of a company should not be contracted in any way that restricts their legal or constitutional rights. Article 1 of Decree 2025 defines "permanent" as workers "performing activities or functions directly related to the goods or services that characterize the business." The GOC was aware that workers at Pacific Rubiales were permanent workers within the meaning of Article 63 and Decree 2025, as this evidence was presented in complaints filed in 2012, supplemented on appeal in 2013, and May 2013. Labor intermediation of this kind was specifically identified in the LAP as a significant barrier to freedom of association in Colombia, and Law 1429 was enacted, consistent with Article 17.2.1, with the express purpose of addressing this issue. However, despite complaints in 2012 and 2013 with both the Ministry of Labor and the Prosecutor's Office, efforts to enlist the GOC to respond to the use of labor intermediation with the intent to stifle union organizing at Pacific Rubiales went unanswered. Thus, the GOC failed to enforce Article 63 of Law 1429.

ii. The GOC failed to effectively enforce Article 200 of the Criminal Code, adopted in accordance with Article 17.2.1.

The GOC failed to effectively enforce Article 200 of the Criminal Code. These provisions were specifically enacted to address ongoing employer impunity for violations of freedom of association, in accordance with Article 17.2.1. Article 200 is a labor law within the meaning of the TPA because it is a statute directly related to the internationally recognized labor right of freedom of association, pursuant to Article 17.8.

The Article 200 complaint filed by USO in May 2013 demonstrated repeated and ongoing use of labor intermediation and retaliation against union members by the company, and the improper and excessive use of force by the government, resulting in injuries and frustrating the legitimate exercise of trade union rights. As of this writing, almost three years after the case was originally filed, the GOC has still not acted. The case has been reassigned at least three times. During that time, threats were made against the leaders who testified in the case, which were not investigated. The last transfer took place in July 2015. No further action has been taken to address the charges as of April 2016. The government has repeatedly ignored its responsibility to address this case according to its own laws and procedures. This is part of a broader pattern on

the part of the GOC, which has consistently failed to respond to Article 200 cases brought by unions, and has yet to prosecute or secure a single conviction against any employer under this law despite receiving 1,146 complaints. The GOC has failed to effectively enforce Article 200 of the Criminal Code in the USO case, and indeed has yet to effectively enforce the law in any case, in violation of Article 17.3.1(a).

iii. The GOC failed to effectively enforce Article 354 of the Labor Code.

The GOC did not effectively enforce Article 354 of the Colombian Labor Code, which calls for fines and other penalties against employers who interfere with the right to freedom of association. Article 354 is a labor law within the meaning of the TPA because it is a statute directly related to the internationally recognized labor right of freedom of association, pursuant to Article 17.8. Pacific Rubiales and its intermediaries conducted mass dismissals of workers affiliated to USO, established a blacklist system to prevent workers affiliated with USO from returning to work, pressured workers to renounce USO membership, and made joining UTEN a condition of contract renewals. These events were documented in multiple complaints to the GOC. The GOC repeatedly failed to take meaningful action to enforce the law and ensure that the employers involved were penalized and workers reinstated. When Colombia failed to respond to these acts of anti-union discrimination, it failed to effectively enforce a labor law in violation of Article 17.3.1(a).

iv. The GOC failed to effectively enforce Article 486 of the Labor Code.

The GOC did not effectively enforce Article 486 of the Labor Code, which gives the Ministry of Labor 'police power' over employers, empowers the Ministry to conduct thorough inspections, and states that violations should be met with fines and penalties. Article 486 is a labor law within the meaning of the TPA because it is a statute directly related to the internationally recognized labor right to freedom of association, pursuant to Article 17.8. The Ministry of Labor did not exercise its power to defend workers' rights in the Pacific Rubiales case. It held some initial meetings following mass actions by workers, complaints from union officials and publicized state violence against protesting workers that drew national and international condemnation, but took no measures to punish Pacific Rubiales, hold public officials accountable or compensate workers for their losses. USO filed complaints in 2012, supplemented on appeal in 2013, detailing mass dismissals, forced disaffiliation, and blacklisting. The Ministry did not conduct adequate inspections into these claims or apply appropriate penalties. By failing to conduct adequate inspections or apply appropriate penalties under Article 486 the GOC violated Article 17.3.1(a).

v. The GOC failed to effectively enforce Article 59 of the Labor Code.

The GOC did not effectively enforce Article 59 of the Labor Code, which prohibits employers from limiting or in any way interfering with workers' exercise of freedom of association. Article 59 is a labor law within the meaning of the TPA because it is a statute directly related to the internationally recognized labor right to freedom of association, pursuant to Article 17.8. USO filed complaints in 2012 and 2013 detailing that Pacific Rubiales and its intermediaries prevented workers from exercising their freedom of association by conducting mass dismissals,

blacklisting, demanding affiliation with another union, and forcing disaffiliation with USO to obtain employment. Colombian officials never acted on any of these complaints. In so doing, the GOC failed to effectively enforce Article 59 of the Labor Code.

vi. The GOC failed to effectively enforce Article 353 of the Labor Code.

The GOC failed to effectively enforce Article 353 of the Colombian Labor Code, which states that workers have the right to freely form and join unions of their own choosing. Article 353 is a labor law within the meaning of the TPA because it is a statute directly related to the internationally recognized labor right of freedom of association, pursuant to Article 17.8. As discussed above, the GOC has been aware for several years that labor intermediation, violence and retaliation severely interfere with Pacific Rubiales workers' ability to join USO, the union of their choice. GOC officials have not used the powers granted to them in the Labor Code and various reforms enacted in accordance with the LAP to effectuate Article 17.1 of the TPA to address these violations. This constitutes a failure to effectively enforce Article 353 of the Labor Code in violation of Article 17.3.1(a).

vii. The GOC failed to effectively enforce Law 26 of 1976.

The GOC failed to effectively enforce Law 26 of 1976, which codifies ILO Convention 87 on freedom of association into domestic law. Law 26 of 1976 is a labor law within the meaning of the TPA because it is a statute directly related to the internationally recognized labor right of freedom of association, pursuant to Article 17.8. By failing to act to prevent violence and threats against USO members and leaders, failing to prevent retaliatory acts from Pacific Rubiales and its intermediaries, and failing to address the use of labor intermediation to stifle workers' ability to exercise their rights, the GOC has repeatedly failed to effectively enforce the protections afforded in Law 26. This constitutes a failure to comply with Article 17.3.1(a).

viii. The GOC failed to effectively enforce Article 347 of the Criminal Code.

The GOC failed to effectively enforce Article 347 of the Criminal Code, which imposes fines and jail terms on individuals who threaten or intimidate trade unionists. Article 347 is a labor law within the meaning of the TPA because it is a statute directly related to the internationally recognized labor right of freedom of association, pursuant to Article 17.8. Article 347 was reformed under Law 1719 of 2014 specifically to bring Colombia into compliance with the ILO Declaration. USO leaders and their families were sent death threats after they testified against Pacific Rubiales in a criminal case. The GOC never conducted a meaningful investigation, despite being obligated to do so under Article 347. By declining to identify and hold those responsible accountable, the government failed to effectively enforce Article 347.

ix. The GOC failed to effectively enforce Article 444 of the Labor Code.

The GOC failed to enforce Article 444 of the Colombian Labor Code, which gives workers the right to hold strike votes by either an absolute majority of workers at a business or a majority of workers at a general assembly. Unions may request that Ministry of Labor officials be present to

verify the vote. Article 444 is a labor law within the meaning of the TPA because it is a statute directly related to the internationally recognized labor right of freedom of association, pursuant to Article 17.8. In 2015, USO officials were barred from accessing workers to conduct a strike vote, in the presence of Ministry of Labor officials, who took no action. Ministry officials have repeatedly failed to ensure the right to engage in peaceful industrial actions. During organizing efforts in 2011, workers were repeatedly prevented from engaging in work stoppages through the violent intervention of Colombian security forces. USO specifically requested inquiries be made into this use of force in its 2012 and 2013 complaints, but this never resulted in any investigations or action against the perpetrators or intellectual authors of this intervention. The GOC neither took affirmative action to correct misbehavior by officials nor responded to requests to do so. In so doing, the GOC has failed to effectively enforce Article 444 in violation of Article 17.3.1(a).

x. The GOC failed to effectively enforce Article 448 of the Labor Code.

The GOC failed to enforce Article 448, which tasks public authorities with maintaining peace at industrial actions. Article 448 is a labor law within the meaning of the TPA because it is a statute directly related to the internationally recognized labor right of freedom of association, pursuant to Article 17.8. During organizing efforts in 2011 workers were repeatedly prevented from engaging in work stoppages through the violent intervention of Colombian security forces. The GOC has never investigated or rectified this improper use of force, in violation of the police's role according to Colombian Labor Law, despite repeated and ongoing requests from the union to investigate. The GOC failed to effectively enforce Article 448 in violation of Article 17.3.1(a).

xi. The GOC failed to effectively enforce Law 524 of 1999.

The GOC did not effectively enforce Law 524 of 1999, which codified ILO Convention 154 on collective bargaining into national law. Law 524 of 1999 is a labor law within the meaning of the TPA because it is a statute directly related to the internationally recognized labor right to the effective recognition of collective bargaining, pursuant to Article 17.8. Pacific Rubiales and its subcontractors publicly refused to engage in collective bargaining with USO on multiple occasions. Such refusals were often made in the presence of Colombian labor officials, and were amply documented in complaints sent to multiple government agencies in December 2012, with additional evidence submitted on appeal in May 2013, and in a separate complaint in June 2015. The Colombian government repeatedly failed to enforce these core labor protections, in violation of Article 17.3.1(a).

xii. The GOC has failed to effectively enforce its labor laws through a sustained or recurring course of action or inaction.

The GOC's many failures to enforce its own laws constitute a sustained or recurring course of action or inaction within the meaning of Article 17.3.1 of the TPA. Between 2012 and 2015, the Colombian government repeatedly failed to conduct adequate inspections, did not issue timely decisions, did not fully or faithfully apply the relevant law and in some instances intervened by force or legal prosecution to quell worker protests and organizing efforts. The GOC was aware of labor rights violations at Pacific Rubiales conducted by both private companies and state security

forces when the TPA went into effect in 2012, and the issues remain unaddressed to this day, demonstrating a sustained course of inaction and action. USO filed official complaints in 2012, 2013 and 2015, none of which the Colombian government acted on appropriately. The failure to respond to complaints or address impunity on the part of both the employer and state security officials that occurred repeatedly, over a number of years, across different Ministries and agencies, demonstrates a sustained or recurring course of both inaction and action.

Further, as demonstrated in the ILO complaint, labor intermediation, retaliation and a refusal to bargain with independent unions are issues in the oil industry as a whole.[103] Most of the workforce performing core, permanent functions in the oil sector is still hired through intermediaries. Union members and leaders at other companies also report acts of retaliation by employers and violent intervention by state security forces. The GOC has failed to use its inspection powers to examine and regulate labor intermediation, has responded with violence to workers acting collectively to exercise their rights, and has failed to remedy abusive practices at multiple large petroleum organizations. This is the case even when the government itself owns a majority of shares in a company, as is the case with Ecopetrol.[104] Further, many violations by the GOC in this case echo the case in the sugar industry set forth below, and are prevalent throughout the Colombian economy. The GOC has engaged in a sustained or recurring course of inaction or inaction throughout the Colombian economy which denies workers their fundamental rights.

xiii. The GOC has failed to effectively enforce its labor laws in a manner affecting trade or investment between Colombia and the United States.

The GOC's failure to enforce its labor laws has a profound effect on trade and investment between Colombia and the United States. The failure to enforce fundamental labor rights artificially distorts the cost of labor in the oil sector because Colombian companies "face different conditions of competition than they would face were the laws effectively enforced."[105] Producers avoid higher labor costs, particularly by obscuring any direct employment relationship with the workers they rely on to perform permanent functions of their business through illegal labor intermediation, firing workers who attempt to address poor working conditions and refusing to bargain over wages and benefits.[106] As the United States has previously recognized, a

[103] Uribe M, A (2015, abril). "¿Política de Formalización Laboral en crisis?". Disponible en: http://www.aliriouribe.com/politica-de-formalizacion-laboral-en-crisis/ . These hiring practices violate article 63 of law 1429 of 2010.

[104] *See* 374th Report of the Committee on Freedom of Association, International Labor Organization Governing Body, 323rd Session, Geneva, Case No. 2946 (March 2015).

[105] In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, Initial Written Submission of the United States ¶ 104 (November 3, 2014) Available at https://ustr.gov/sites/default/files/US%20Initial%20Written%20Submission.pdf.

[106] In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, Initial Written Submission of the United States ¶ 110 (November 3, 2014) Available at https://ustr.gov/sites/default/files/US%20Initial%20Written%20Submission.pdf.

country's failure to compel companies to comply with the law creates a culture of impunity that "has a spillover effect" on entire sectors.[107]

The U.S. is the leading buyer of Colombian oil, purchasing almost half of Colombia's total exports in 2013.[108] As of February 2016, Colombia was the fifth leading source of U.S. oil imports at 371,000 barrels per day.[109] The GOC placed extractive industries at the center of consecutive four-year National Development Plans in 2010 and 2014, presenting oil production and other extractives as the "locomotive" for economic growth and the "generation of employment."[110] According to the Colombian central bank, the oil sector received $4.9 billion in foreign direct investment (FDI) in 2013, accounting for 30% of total FDI in Colombia.[111] This investment is partially based on artificially cheap labor costs. While the oil industry increased production by 28% between 2010 and 2015, formal employment has not increased and working conditions have deteriorated.[112] This robs Colombian workers of the opportunity to share in the wealth the industry creates. Further, U.S. producers of oil face barriers to the Colombian market as the result of the government's failure to protect workers.[113] Human rights violations are not a "natural endowment" nor are they a legitimate basis for trade and investment competition. The GOC's failure to ensure workers can freely organize and join trade unions, bargain for better wages and working conditions, and exercise their rights without fear of retaliation or physical violence has distorted the cost of labor in the oil sector, which affects trade and investment between Colombia and the United States.

[107] In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, Rebuttal Submission of the United States, ¶ 130 (March 16, 2015) *Available at* https://ustr.gov/sites/default/files/files/Issue_Areas/Labor/US%20Rebuttal%20Submission.pdf.

[108] The Observatory of Economic Complexity, Colombia Trade Data (Accessed November 7, 2015) *Available at* http://atlas.media.mit.edu/en/profile/country/col/.

[109] US Energy Information Administration, Company Level Imports (April 2016) http://www.eia.gov/petroleum/imports/companylevel/.

[110] Departamento Nacional de Planeación (DNP). Plan Nacional de Desarrollo -Resumen ejecutivo 2010-2014, disponible en: https://colaboracion.dnp.gov.co/CDT/PND/Resumen%20Ejecutivo%20Ultima%20Version.pdf ; DNP. Plan Nacional de Desarrollo 2010-2014 - Tomo I, p. 65.

[111] Colombia Reports, Accessed April 3, 2015, http://colombiareports.co/colombia-fdi-statistics.

[112] *Portafolio.co,* Inversiones del año pasado explican el millón de barriles (April 2015) *Available at* http://www.portafolio.co/economia/petroleo-barriles-diarios-colombia; Portafolio.co, Producción de petróleo en Colombia creció un 16,9 por ciento en 2010 (January 2011) *Available at* http://www.portafolio.co/economia/produccion-petroleo-colombia-2010.

[113] In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, Rebuttal Submission of the United States ¶ 131 (March 16, 2015) *Available at* https://ustr.gov/sites/default/files/files/Issue_Areas/Labor/US%20Rebuttal%20Submission.pdf.

b. The GOC has waived or otherwise derogated from its statutes and regulations in a manner affecting trade or investment between Colombia and the United States, and that waiver or derogation is inconsistent with the fundamental rights set out in 17.2.1 (a) and (b) (Article 17.2.2).

i. The GOC has waived or otherwise derogated from its statutes and regulations, and that waiver or derogation is inconsistent with the fundamental right to freedom of association.

The GOC has waived or otherwise derogated from the Colombian Labor Code, Criminal Code and Constitution in a manner inconsistent with the fundamental right to freedom of association. As explained above, the GOC has failed to effectively enforce multiple statutes and regulations implementing freedom of association.

Through its failure to ensure that workers at Pacific Rubiales and its subcontractors can exercise their right to freedom of association, the GOC has waived or otherwise derogated from Articles 353, 354 and 486 of the Colombian Labor Code, Article 63 of Law 1429 of 2010, Article 200 of the Criminal Code and Article 39 of the Constitution in a manner inconsistent with the fundamental right to freedom of association. Neither waive nor derogate is defined in Chapter 17 of the TPA. Looking to the plain meaning in line with Article 31 of the Vienna Convention, Merriam-Webster's Dictionary defines waive as "to refrain from pressing or enforcing," or "to officially say that you will not use or require something that you are allowed to have or that is usually required," while it defines derogate as "to take away a part so as to impair."[114]

The GOC's repeated failure to press or enforce Colombian laws and regulations regarding freedom of association, particularly with respect to intermediation, has allowed Pacific Rubiales and its intermediaries to operate with impunity, flouting established laws and protections without consequence, and incentivizing others in the industry to join in abuse of labor rights in order to remain competitive with Pacific Rubiales. By failing to meaningfully act to ensure protections afforded in the law are afforded in practice, the GOC has effectively removed a part of the laws so as to impair the right to freedom of association.

While a number of statutes and regulations in Colombian law protect freedom of association on their face, (for example, Article 200 of the Criminal Code) the refusal of the Ministry of Labor to investigate worker allegations adequately and in a timely manner or to sanction violations establishes an effective waiver or derogation of these statutes and regulations. GOC officials did not respond to evidence that Pacific Rubiales retaliated against workers for belonging to USO, did not prevent the employer from openly favoring UTEN by requiring membership as a condition of employment, and did not act to prevent the use of labor intermediation. The GOC declined to pursue an Article 200 case against Pacific Rubiales despite ample documentation of multiple violations of freedom of association under Colombian law, and declined to pursue charges against any employer despite receiving at least 1,146 complaints since the law was enacted. Further, the GOC failed to conduct investigations or prosecutions into violence and threats against USO members and leaders. In so doing, the GOC refrained from pressing or

[114] *See* Merriam-Webster *Available at* http://www.merriam-webster.com/.

enforcing Colombian law and impaired the rights of workers to freedom of association. This repeated failure constitutes an effective waiver for Pacific Rubiales, as it became clear over time the GOC would not require the company to comply with statutes or regulations implementing the right to freedom of association. By failing to enforce these statutes and regulations, the government effectively removed critical portions of the Labor Code, the Criminal Code and the Constitution *vis a vis* Pacific Rubiales and its intermediaries. This waiver or derogation is inconsistent with the fundamental right to freedom of association as defined in 17.2.1(a).

ii. Colombia has waived or otherwise derogated from its statutes and regulations in a manner inconsistent with the fundamental right to collective bargaining.

The GOC has waived or otherwise derogated from Articles 444 and 448 Colombian Labor Code, Article 63 of Law 1429 of 2010, and Article 39 of the Constitution in a manner inconsistent with the fundamental right to collective bargaining. As explained above, the GOC has failed to effectively enforce multiple statutes and regulations implementing the effective recognition of the right to collective bargaining.

The GOC's repeated failure to press or enforce the provisions of Colombian law that protect the effective recognition of collective bargaining constitute an effective waiver or derogation of the right of workers for Pacific Rubiales and its intermediaries. The GOC allowed Pacific Rubiales to reject good-faith bargaining in 2011 and 2015 without incurring any of the penalties mandated in the Labor Code. The GOC gave its open approval to the UTEN deal and accepted the company's argument that this removed any obligation to bargain with USO, offering an implicit waiver of Labor Code and Constitutional provisions that required the company to respond to USO. Further, the GOC allowed both the company and its own officials to interfere with strike votes and peaceful protests. In so doing, the GOC effectively waived the requirement that Pacific Rubiales and its intermediaries comply with statutes and regulations implementing the right to collective bargaining. Further, the failure of the GOC to address Pacific Rubiales' use of intermediation prevented workers employed by intermediaries from even having a fair opportunity to bargain with their true employer. The GOC's failures effectively removed the critical provisions of the law which sought to ensure the effective recognition of collective bargaining, thus impairing the rights of Colombian workers, both with respect to the behavior of the employer and the behavior of the state as a neutral entity. As such, the GOC has waived or derogated from statues and regulations in a manner inconsistent with the fundamental right to collective bargaining set out in 17.2.1 (b).

iii. Colombia has waived or otherwise derogated from its statutes and regulations implementing 17.2.1 (a) and (b) in a manner affecting trade or investment between Colombia and the United States.

Colombia has waived or otherwise derogated from its statutes and regulations implementing the rights for freedom of association and effective recognition of collective bargaining in a manner affecting trade or investment between Colombia and the United States. As discussed in Section II.A.2(a)(xiii) above, waiving or otherwise derogating from these rights by failing to secure the meaningful enforcement of the laws that implement them artificially lowers the cost of labor in

the Colombian oil sector by preventing workers from organizing or bargaining over wages, benefits and working conditions. The failure to protect these workers has industry-wide ramifications, and that impunity has spillover effects that depress wages and working conditions in the economy as whole.[115] Oil is a major export to the United States. U.S. producers and workers compete on an uneven playing field, and Colombia attracts investment and supports increased exports through the continued suppression of wages and benefits for Colombian oil workers.

B. Ingenio La Cabaña

1. Statement of Facts

a. Background

Ingenio La Cabaña (La Cabaña) is a large sugar production and processing company based in the Valle de Cauca.[116] According to the employers' association Asocaña, it is one of the country's largest agri-business companies, "with the capacity to grind 5,200 tons of sugar daily and produce more than 3,600,000 sacks of sugar annually."[117]

Cane cutters are a critical part of the sugar company's core permanent activities. The company owns the land, plants the cane and manages the value chain of the crop through transformation, sales and distribution. Nonetheless, companies in the sugar sector have long sought to avoid direct employment relationships with workers in this core part of the production process. Most cutters at La Cabaña have worked for the company at least 5 continuous years, and many have been on the same job for over fifteen years,[118] yet are hired under short-term subcontracts.[119]

Sugar is a key industry in Colombia's national economy and a major export. In 2015, Colombia exported 725,033 tons of sugar.[120] Under the TPA, Colombia has a quota to export 53,000 tons to the United States in 2016, which it is expected to fill. Colombia is also able to export sugar under

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[115] *See, e.g.*, Florence Jaumotte and Carolina Osorio Buitron. "Power from the People." IMF Finance & Development, Vol. 52, No. 1 (March 2015) (By weakening earnings for middle- and low-income workers by reducing their bargaining power, deunionization "necessarily increases the income share of corporate managers' pay and shareholder returns ... Moreover, weaker unions can reduce workers' influence on corporate decisions that benefit top earners, such as the size and structure of top executive compensation").

[116] Located in the Guachene municipality, Department of Cauca.

[117] Asocaña. Reseña Histórica Ingenio La Cabaña *Available at* http://www.asocana.org/publico/ingenios/historias.aspx?SCid=94.

[118] Complaint submitted to Ministry of Labor (December 28, 2012).

[119] Among the labor intermediaries contracted to provide workers to Ingenio La Cabaña in 2012, when workers began organizing, were Corteagro S.A.S. (which changed its name and legal registration to Cañafuerte S.A.S.); Agropecuaria Garcia y Martinez S.A.S. (which changed its name and legal registration to Agropecuaria El Cañaveral Gama GAMA S.A.S.); and Cañacort D.Y.B. S.A.S. (which changed its name and legal registration to Servicios Agricolas Agricosecha S.A.S.).

[120] Asocaña. Balance Azucarero Colombiano 2000-2015 *Available at* http://www.asocana.org/modules/documentos/5528.aspx.

the World Trade Organization, with a quota for 2015-2016 of 31,559 tons, which it also likely ot be filled.[121]

b. Specific Incidents

In November 2012, sugar cane cutters working through intermediaries for La Cabaña attempted to organize a union to bargain with the company to gain better working conditions and address rampant labor intermediation.[122] Workers across the sugar sector in Colombia, particularly cane cutters, have long faced extremely poor working conditions and retaliation, threats, and violence for attempts to organize unions or otherwise demand recognition of their fundamental rights. An advertising campaign by the Ministry of Labor, a component of public outreach based on the LAP's requirements, invited Colombians to exercise their right to formal employment, freedom of association and the right to bargain collectively.[123] Workers at La Cabaña report their organizing campaign was in part a response to this advertising.

The union registered with the Ministry of Labor and began a formal membership drive on November 28, 2012. On December 1, La Cabaña company representatives visited the worksite to hold a mandatory meeting where they reproached workers for joining a union. Fifty cane cutters and the union's newly elected leadership attended. According to a July 8, 2013 statement by cane cutter and Sintrainagro local union President Mauricio Ramos, company representatives stated they "would not permit [a union] and that there would be inquiries into who was behind the unionization effort and those workers would be dismissed."[124] The representatives of labor intermediaries present immediately called on La Cabaña's Human Resources Director, Oscar Mora, to lead the meeting. Mora proceeded to tell workers that they had made a mistake by joining Sintrainagro. He stated unions already existed at La Cabaña and suggested workers join Sintraincabaña. Sintraincabaña is heavily aligned with the employer and has historically refused to organize cane cutters. Mora stated that the company had figured out who the new union's leader was, naming Ramos. Mora said that he would do "whatever was necessary" to prevent Sintrainagro from gaining recognition, including the use of the riot police (ESMAD) to attack the cane cutters. He stated that Ramos was doing very bad things as president of the new union and would be punished by God.[125]

In a sworn statement, a Sintrainagro member who was fired after eighteen years working for labor intermediaries of La Cabaña stated, "Mr. Oscar Mora, who represents La Cabaña, called a meeting and told us that he'd do whatever he had to and that he'd get rid of any person who joined the union because as long as he was alive he would never accept Sintrainagro being in the

[121] United States Department of Agriculture, Colombia Annual Sugar (2016) *Available at* http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Sugar%20Annual_Bogota_Colombia_4-15-2016.pdf.
[122] The workers decided to join Sintrainagro on November 24, 2012. On November 28, a formal request to be added to the union registry as Seccional "Ingenio La Cabaña" de Sintrainagro was sent to the Ministry of Labor, where it was accepted. Constancia Mintrabajo de depósito de Juntas (November 28, 2012).
[123] Declaration to Ministry of Labor by Mauricio Ramos (July 8, 2013) on file with Coljusticia.
[124] Declaration to Ministry of Labor by Mauricio Ramos (July 8, 2013) on file with Coljusticia.
[125] Declaration to Ministry of Labor by Mauricio Ramos (July 8, 2013) on file with Coljusticia.

company … He told us to take care of our jobs because everyone who joined the union was going to end up without work because the company does not allow unions."[126]

On December 7, the union held an assembly of over 300 workers and approved a list of bargaining demands to be presented to the company.[127] On December 17, these demands were formally filed with both La Cabaña and one of its intermediaries, Cañacort D&B S.A.S. (Cañacort), informing both that a negotiating committee with elected representatives and advisors had been established.[128] Among the key issues workers identified was the need for recognition of the union by all companies involved, direct hiring of workers performing core permanent functions, registration in social security, improved working conditions, and protection from replacement workers. The companies did not respond to the filing, despite the legal obligation to do so within at most 5 days under Article 433 of the Colombian Labor Code.

On December 12, Cañacort began issuing notifications to union members that their contracts would not be renewed in January. Supervisors and security guards for La Cabaña handed out fliers which stated that workers who did not renounce union membership would not have their contracts renewed.[129]

The intermediary Cañacort distributed letters formally ending contracts with 89 workers on December 14 and 15. The short-term contracts were supposed to end on either December 20 or January 3. Cañacort falsified the dates on the letters, dating them as November 20 to appear as if the company had complied with the thirty-day notice required by Article 46 of the Labor Code.[130] Cañacort advised workers that their contracts would not be renewed because the contract between Cañacort and La Cabaña was not being renewed.[131]

La Cabaña's other labor intermediaries also made it known they would not renew contracts with any union members. La Cabaña printed large quantities of resignation forms, and presented them to workers stating that any worker who did not sign and revoke their membership with Sintrainagro would not be called back to work on January 3, 2013. The intermediaries attempted to withhold final payment of fixed term contracts if the workers did not sign the forms disaffiliating.[132]

On December 28, 2012, the union filed a complaint with the Ministry of Labor and formally requested that the agency undertake an inspection into the company's violations and ensure

[126] Statement to Ministry of Labor by Quintilaino Sanchez Moreno (July 3, 2013) on file with Coljusticia.
[127] Statement to Ministry of Labor by Quintilaino Sanchez Moreno (July 3, 2013); List of Demands presented to Ingenio La Cabaña and Cañacort D&B S.A.S (December 17, 2021).
[128] List of Demands presented to Ingenio La Cabaña and Cañacort D&B S.A.S (December 17, 2021).
[129] Declarations to Ministry of Labor by Mauricio Ramos (July 8, 2013) and Quintiliano Sanches Moreno (July 3, 2013).
[130] Declarations to Ministry of Labor by Mauricio Ramos (July 8, 2013) and Quintiliano Sanches Moreno (July 3, 2013). Article 46 of the Labor Code states that workers must be given 30 days notice of a decision not to renew a fixed term contract.
[131] Declaration to Ministry of Labor by Mauricio Ramos (July 8, 2013).
[132] Declarations to Ministry of Labor by Mauricio Ramos (July 8, 2013) and Quintiliano Sanches Moreno (July 3, 2013).

collective bargaining rights. The letter informed the Ministry that the company was violating laws in the following areas: 1) the refusal to bargain collectively, 2) committing acts of anti-union discrimination and retaliation; and 3) illegal labor intermediation.[133]

The complaint filed on December 28 was a single document. Under Colombia's Code of Administrative Procedure, investigations should be guided by the principles of effectiveness, procedural economy and speed.[134] The union expected a comprehensive investigation that would lead to a single administrative decision, particularly since the violations involved the same core set of facts and legal persons. However, when the Ministry of Labor opened investigations in mid-January, it decided to initiate separate processes on the failure to bargain collectively and freedom of association.[135] This decision has no basis in Colombian labor law and contradicts administrative regulations. It made the process unnecessarily confusing and burdensome on the workers seeking redress, and made it impossible for Ministry inspectors to conduct a holistic, effective investigation.

Meanwhile, on January 3, 2013, the company and its intermediaries began making good on threats contained in the letters delivered December 14 and 15. The company explained to workers and leaders of the union in December that the only way to ensure contract renewal was to quit the union.As a result of the pressure many workers resigned their membership by signing form letters which were distributed by La Cabaña and its intermediaries.[136] Approximately 89 workers were fired by January 3, 2013.[137] La Cabaña human resources director Oscar Mora also used threats to pressure workers to resign from Sintrainagro and offered loans and payments to workers who would sign the resignation form and refuse to participate in a work stoppage should there be one.[138] Mora repeated his threat that La Cabaña would immediately secure help from Army and ESMAD units posted nearby if workers engaged in a stoppage. ESMAD had been involved in a stoppage at La Cabaña in 2005, where the use of excessive force led to the injury of twenty-six cane cutters,[139] and had been more recently involved in several high-profile crack-downs on worker protests, including at Pacific Rubiales as discussed in Section II.A.1(b) of this

[133] Complaint filed with Ministry of Labor (December 28, 2012).
[134] Article 3.
[135] On January 17, 2013 the Regional Coordinator for Prevention, Inspection, Monitoring, Control and Conflict Resolution at the Cauca Ministry of Labor requested that the Labor Inspector at Santander de Quilichao make a preliminary investigation into the employer's failure to negotiate, eventually resulting in decisions Auto Nº 136 (September 17, 2013) and Resolutión 025 (November 27, 2013). Also on January 17, 2013, the Ministry of Labor opened a separate preliminary investigation against Ingenio La Cabaña, as well as subcontractors Benigna Duque, Omar Toro and Hawer García (CAÑACORT S.A.S.) also stemming from the December 2012 complaint. On January 22, 2013, the Santander de Quilichao Labor Inspector opened proceedings to investigate violations of freedom of association, ultimately resulting in Auto Nª 157, motion Nº 006 (November 12, 2013).
[136] Declaration to Ministry of Labor by Mauricio Ramos (July 8, 2013) on file with Coljusticia.
[137] Letters notifying workers of non-renewal of contracts and documenting final payments (January 13, 2013) on file with Sintrainagro.
[138] Declaration to Ministry of Labor by Mauricio Ramos (February 6, 2013).
[139] The Office of the Inspector General of Colombia found that the ESMAD used excessive force at La Cabaña in 2005 in at least two cases filed by injured workers. The case is currently on appeal, and no payments have been made. *See* Preliminary Decision Concepto No.317/2012 *Available at* http://colombiaaldia.co/estados/boletines/boletin_6_2011/19012331000200600279 00.pdf.

complaint. These credible threats and violations continued throughout the course of Ministry of Labor investigations, without any sanctions issued or fines being imposed.

On January 28, 2013, while local union leaders and officials of the national Sintrainagro union were trying to engage with the Ministry of Labor, union activist Juan Carlos Pérez Muñoz was shot seven times by unidentified assailants and killed,[140] drawing condemnation from worker rights organizations in Colombia and abroad.[141] Pérez Muñoz had affiliated with Sintrainagro on December 19th, and was working with the organization at La Cabaña. Three years later, the case is still being handled by the Analysis Unit and National Contexts.[142] However, no one has been identified as a suspect or charged with the crime.

As discussed in the introduction, workers across Colombia continue to face repeated acts of violence for attempting to exercise their rights.[143] The rate of impunity for such acts of violence remain extremely high, well over 95% for murder and other violations.[144] Sintrainagro in particular has been the victim of an unconscionable number of violent acts over its history, with 816 leaders and members killed between 1984 and 2010,[145] accounting for 25.2% of the total number of trade unionists murdered during that period. [146]The La Cabaña human resources director specifically cited this history in mandatory company meetings to discourage workers from affiliating to the union that at least 400 of them had already chosen.[147] According to the database maintained by the Escuela Nacional Sindical, from May 15, 2012, until November 24, 2015, two Sintrainagro members have been murdered, five have suffered attempts on their life and four have been victims of death threats.[148]

In February 2015, Sintrainagro President Guillermo Rivera was the victim of an assassination attempt in the municipality of Florida, also located in Valle del Cauca, while conducting union

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[140] Escuela Nacional Sindical, Requién y rabia por muerte de Cortero de Caña (February 2013) *Available at* http://ens.org.co/apc-aa-files/4e7bc24bf4203c2a12902f078ba45224/Cr_nica_1_Feb_2013..pdf.

[141] Letter from la Regional Latinoamericana – UITA al presidente de la República Juan Manuel Santos, ante el asesinato del dirigente sindical (January 29, 2013) *Available at* http://www.rel-uita.org/index.php/es/sectores/lacteos/item/2990-asesinato-dirigente-sindical-juan-carlos-perez-munoz; Justice For Colombia, Letter to HE Mauricio Rodríguez Múnera, Colombian Ambassador to the UK (February 6, 2013) *Available at* http://www.justiceforcolombia.org/resources/GMB%20letter.pdf.

[142] Fiscalía General de la Nación, Response to Petition presented by Coljusticia, Radicado Nº20157710036681 (June 1, 2015).

[143] Escuela Nacional Sindical, Informe Sobre los Cuatro Primeros Anos de Implementacion del Plan de Accion Laboral 44 (2011-2015) *Available at* http://ens.org.co/apc-aa-files/4e7bc24bf4203c2a12902f078ba45224/Informe_final_completo_Plan_de_Acci_n_Laboral_2011_2015_Versi_n_4_Abril..pdf.

[144] Escuela Nacional Sindical, Informe Sobre los Cuatro Primeros Anos de Implementacion del Plan de Accion Laboral 44 (2011-2015) *Available at* http://ens.org.co/apc-aa-files/4e7bc24bf4203c2a12902f078ba45224/Informe_final_completo_Plan_de_Acci_n_Laboral_2011_2015_Versi_n_4_Abril..pdf.

[145] Mauricio Archila, Violencia contra el Sindicalismo- 1984-2010, Editorial CINEP p. 198 (August 2012).

[146] Leon Valencia and Juan Carlos Celis Ospina, Sindicalismo Asesinado, Editorial Debate (January 2013).

[147] Declaration to the Ministry of Labor by Mauricio Ramos (July 8, 2013) on file with Coljusticia.

[148] Escuela Nacional Sindical, Sistema de Información en Derechos Humanos, SINDERH Base de datos (November 24, 2015).

business.[149] Florida is the municipality where the greatest number of workers fired from La Cabaña live. The union has demanded better protection measures from the Colombian government.[150] The assailants were never identified and no prosecutions were ever pursued.

On January 17, 2013, the union sent a complaint to the Inspectorate of the Ministry of Labor for violations of the prohibitions on illegal labor intermediation,[151] explicitly arguing that violations of freedom of association and collective bargaining were a result of the illegal labor intermediation. To this day, the Ministry has failed to take action to address the issue.

On February 11, 2013, given the continued retaliation, the union sent updated information to the Labor Inspectorate at Santander de Quilichao. This included documentation of the employer's refusal to negotiate in the form of a statement from La Cabaña openly refusing to negotiate and a detailed list of all the workers that had been dismissed since the beginning of January. The documents also contained information about labor intermediation.[152]

The union heard no response at all for over two months, as workers continued to be dismissed and threatened. On March 4, 2013, the national President of Sintrainagro sent a formal request to the Ministry of Labor to establish consultations and negotiations with workers and the company. The request notes La Cabaña and its intermediaries continued to use illegal labor intermediation, and that it had dismissed, at that point, 145 workers.[153] Still, the ministry performed no on-site inspection.

On April 10, 2013, the local union met with the company through a special process created by the ILO and the Ministry of Labor, the Special Commission for the Treatment of Conflicts before the ILO (CETCOIT for its initials in Spanish).[154] Since the CETCOIT process is entirely voluntary, the company cannot be compelled to participate and once again simply refused to negotiate. No agreement was reached.[155] The failure to ensure collective bargaining is not limited to La Cabaña or the sugar sector, in 99.6% of Colombian workplaces, no collective bargaining exists.[156]

Instead of addressing the company's refusal to negotiate, on May 17 the Vice Minister of Labor Relations and Inspections informed the union that the case would be closed because the company

[149] El País, Presidente de Sintrainagro fue víctima de un atentado en Florida (February 25, 2015) *Available at* http://www.elpais.com.co/elpais/judicial/noticias/presidente-sintrainagro-fue-victima-atentado-florida-valle
[150] Comunicado CUT. "Condena atentado contra dirigentes nacionales de Sintrainagro" Disponible en: http://cut.org.co/cut-condena-atentado-contra-dirigentes-nacionales-de-sintrainagro/.
[151] Complaint (*querella*) regarding labor intermediation (January 17, 2013) on file with Sintrainagro.
[152] Supplementary Information sent to the Ministry of Lanbor (February 11, 2013) on file with Sintrainagro.
[153] Letter from National Sintrainagro President Guillermo Rivera to Minister of Labor Rafael Rueda (March 4, 2013) on file with Coljusticia.
[154] In recognition of the ongoing problems regarding freedom of association and other labor rights in Colombia, the ILO has formed a special tri-partite committee in Colombia to review and mediate domestic cases that would otherwise have to be sent to the ILO Geneva headquarters.
[155] CETCOIT Acta (April 10, 2013).
[156] Escuela Nacional Sindical, 8ª Informe Nacional Sobre Trabajo Decente (October 7, 2015) *Available at* http://www.ens.org.co/index.shtml?apc=a---;-;20171494;-20171494;&x=20171494.

refused to negotiate under the CETCOIT, and stated that the ILO would be informed that the case was no longer active.[157] The government ignored its responsibility to secure collective bargaining rights, and has continued to do so for nearly three years.

In May 2013, the union presented a constitutional claim (*tutela*), under a provision that allows judicial review when fundamental rights are threatened by the action or inaction of public authorities.[158] The union presented evidence of ongoing repression of freedom of association and the right to collective bargaining and the inaction of local authorities.

In contrast to the slow process at the Ministry of Labor, it took less than a month for a municipal judge in Cali to reject the claim.[159] The judge stated that the union had failed to illustrate immediate harm, a condition for bringing a *tutela*, despite the fact that workers were losing their livelihoods, and in one case their life, for trying to organize. The judge also claimed that the case was merely a labor conflict, and should be resolved through the ordinary labor justice system, ignoring the fact that the basis of the union's claim was in fact its repeated, rebuffed attempts to seek remedy through the Ministry of Labor. The court had the power to both compel the Ministry to move forward with legal proceedings and institutional procedures in a timely fashion, and to order the company to bargain. It did neither.

On June 6, 2013, the union appealed the *tutela*.[160] On July 9, a judge from the 4th Civil Circuit of Cali upheld the lower court's decision, agreeing that the protection of fundamental rights was not a constitutional claim but a labor conflict that should be resolved before a labor judge.[161]

On June 4, 2013, the union tried once again to raise the issue of labor intermediation through another complaint to the Ministry of Labor against La Cabaña and its contractors. On June 20 the union resubmitted and expanded the charges.[162] Sworn declarations made by workers and union leaders with the Ministry of Labor document the direct managerial and operation roles exercised by La Cabaña personnel among the intermediaries that provided services and the role La Cabaña's human resources director played in driving the intermediaries behavior.[163]

The Ministry of Labor conducted its first and only on-site inspection of La Cabaña and its intermediaries on June 18, 2013. This inspection resulted from the June 4, 2013, complaint and examined only the issue of illegal labor intermediation. Complaints filed in February 2013 and earlier had produced no inspection. The Ministry dismissed the union's concerns regarding violations of freedom of association and collective bargaining in September 2013.[164] The official inspection report states that the union was notified of the inspection, but the union never received

[157] Ministry of Labor, Oficio 30000000, Rad. 93852 (May 17, 2013).
[158] Copy of tutela presented by Sintrainagro on file with Coljusticia.
[159] Judgment of the First Civil Municipal Court, Sentence No. 75 Radicación Nº201300331-00 (May 27, 2013).
[160] Appeal (*escrito de impugnación de sentencia*) presented by Sintrainagro (June 6, 2013) on file with Sintrainagro
[161] Judgment of the Cali Fourth Civil Circuit Court, Sentencia Nº 58 (July 9, 2013).
[162] On April 14 2015 the Ministry of Labor consolidated the June 4 and June 20 complaints into a single complaint. Ministry of Labor Oficio Nº 7219001-0660, (April 14, 2015).
[163] Declarations to Ministry of Labor by Mauricio Ramos (July 8, 2013) and Quintiliano Sanches Moreno (July 3, 2013), on file with Coljusticia.
[164] Records of case closures No 000408 (auto 136) and No 000410 (auto 157) (September 2013).

any documentation.[165] When the union president requested a copy of the report from the inspector at Santander de Quilichao, he eventually received a less detailed report than the one that had been issued by the Ministry of Labor in Bogotá, excluding details like the hiring process, diagrams of the production process and recommendations.[166] Despite gathering evidence of illegal labor intermediation, the government has not taken action.

On September 17, 2013, the Inspector of Labor at Santander de Quilichao issued decision No. 136 regarding La Cabaña and Cañacort, dismissing the union's case regarding collective bargaining.[167]The decision focused not on the employer's actions, but on the underlying validity of the union's bargaining request. The inspector interviewed both union and non-union workers, but the report excluded statements workers made in favor of the union and only included interviews with four non-union workers, some of whom the employer identified. The four had previously signed up with the union. Based only on these statements, the report justified the dismissal by stating that the union had misrepresented itself to the workers, and was therefore illegitimate.

On October 16, the president of the union filed a motion with the labor inspectorate to reconsider its findings in the inspection.[168] While the union stressed that the report's focus on the union's legitimacy was inappropriate, the union addressed the issue, demonstrating that it complied with all rules regarding union creation, worker affiliation and presentation of bargaining proposals.[169] The motion also noted that the report did not include statements from any workers currently affiliated with the union. On November 27, the inspector declined to reconsider. The union appealed the case.

Meanwhile, on November 12, 2013, after almost a full year of retaliation with impunity on the part of the employer, the Ministry closed the investigation into freedom of association.[170] The union does not know what specific steps the Ministry undertook to investigate the allegations beyond the interviews conducted regarding bargaining, and whatever investigation did take place appeared to ignore the issue of labor intermediation. In the decision, the Inspector from Santander de Quilichao erroneously claimed that the union had the burden to prove its allegations, despite there being no such obligation in Colombian law.

On November 27, 2013, the union sent a new request regarding freedom of association to the Ministry of Labor, expanding on the original complaint.[171] On December 5, 2013 the union also filed a motion to reconsider with the Labor Inspector from Santander de Quilichao, noting the inadequacy of the inspection, and the inspector's troubling decision to selectively include in

[165] Ministry of Labor, Record of Inspection (*actas de inspección*) Ingenio La Cabaña (June 18, 2013).
[166] Ministry of Labor, Record of Inspection (*actas de inspección*) Ingenio La Cabaña (June 18, 2013).
[167] Ministry of Labor, Notification of Decision to Close Case (*auto de archivo*) Nº 136 (September 17, 2013).
[168] Sintrainagro Appeal and Motion to Reconsider (*recurso de reposición y subsidio apelación*) against Auto de archivo Nº 136 (October 16, 2013).
[169] The Labor Code establishes requirements for union formation in Articles 359, 361, 362 and 363.
[170] Ministry of Labor, Notification of Decision to Close Case (*auto de archivo*) Nº 157 (November 12, 2013).
[171] Sintrainagro Supplemental Filing (*ampliación y ratificación de querella*) (November 27, 2012).

reports only those worker statements that opposed the union.[172] On March 6, 2014, the Inspector denied the motion to reconsider, and the union filed yet another appeal, having waited well over a year for the government to respond to repeated dismissals.

Meanwhile, more than a year after cane cutters for La Cabaña formed and legally registered a union of their own choosing and presented collective bargaining proposals, La Cabaña and its intermediaries pressured cane cutters to join a union called Sintrázucar. The leadership committee of this new organization is the same as that of the company-dominated union mentioned above, Sintraincabaña, with Raúl Vergara presiding over both unions.[173] Cane cutters were not permitted to participate in Sintrázucar's leadership or to present bargaining demands.[174] On January 30, 2014, Hower Garcia, one of La Cabaña's intermediaries, held a meeting with approximately one hundred cane cutters working in La Cabaña's cane fields. Seventy-five of the workers present had recently joined Sintrainagro. Garcia assured workers that he spoke on behalf of Oscar Mora, the human resources director at La Cabaña. Garcia encouraged the workers to resign from Sintrainagro and join the union Sintrázucar. Garcia offered payments and guaranteed, in the name of La Cabaña and himself, that workers who joined Sintrázucar would receive all legal protections as union members, be covered by a collective bargaining agreement and no one would be fired or attacked as happened with Sintrainagro. Workers present recorded the meeting.[175]

On April 10, 2014, the Regional Coordinator for Prevention, Inspection, Monitoring, Control and Conflict Resolution for the Cauca Ministry of Labor dismissed the appeal regarding the refusal to initiate collective bargaining. While the appeal was pending, the intermediary Cañacort liquidated and formed another company (Servicios Agricolas Agricosecha). That company provided the exact same services to La Cabaña. However, the court dismissed the union's case because the employer Cañacort no longer existed, stating there was no longer any employment relationship, any link to La Cabaña or any possibility of bargaining.[176]

On September 22, 2014, the Cauca Regional Coordinator for Prevention, Inspection, Monitoring, Control and Conflict Resolution for the Ministry of Labor dismissed the union's appeal regarding freedom of association. While the decision found that throughout the course of the local inspector's investigation she "appeared to question the validity of the union,"[177] that did not provide a reason to question the overall adequacy of the inspection, despite the fact that the inspector made no attempt to verify the dismissals or threats.

[172] Sintrainagro Motion to Reconsider (*recurso de reposición y apelación*) against the decisión to close Auto Nº 157 (December 5, 2013).
[173] Copies of collective bargaining agreements signed by Sintrázucar and Sintraincabaña, naming Raúl Vergara as president of both unions. On file with Coljusticia.
[174] According to the Ministry of Labor, Sintrázucar has a collective agreement with La Cabaña. However, it is unclear whether this agreement is the result of negotiations between that union and La Cabaña, or resulted from negotiation between that union and the contracting companies operated by Hawer García.
[175] Recording of January 30, 2014 meeting on file with Coljusticia.
[176] Ministry of Labor Resolution No 102 (April 10, 2014).
[177] Ministry of Labor Resolution No 0301 (September 22, 2014).

On April 14, 2015, after the union made repeated inquiries into the status of the labor intermediation inspection conducted two years earlier, the Cauca Territorial Director of the Ministry of Labor stated the case was still pending, but claimed that it could not make a final decision until the national Ministry of Labor made a technical ruling on labor intermediation, which the regional officials had requested "on many occasions."[178] There appears to be no legal basis for this claim: territorial directors have the authority to make findings and issue sanctions on cases on labor intermediation under Law 1610 of 2013. The territorial director's statement acknowledges that deadlines imposed by Colombian law had required that the Ministry issue a response in 2013, yet still no action was taken by April 2015.

After the Ministry of Labor repeatedly failed to act, the union tried another tactic. On February 26, 2015 Sintrainagro presented a proposal for formalization[179] in accordance with Law 1610 of 2013 and Resolution 321 of the same year, to the Ministry of Labor and La Cabaña.[180] On April 15 the Cauca Regional Directorate of the Ministry of Labor declared that the proposal was under review. In a formal meeting convened by the Ministry of Labor on June 2, 2015, La Cabaña human resources director Oscar Mora stated that the company was not going to formalize any workers.[181]

While Colombian law encourages the Ministry of Labor to use these proposals to call employers and unions together to reach an agreement on formalization, in practice it is not required to do so. More than a year later, there has been no formal response. This is not an isolated incident, many attempts at using formalization procedures have either gone nowhere, or resulted in agreements that do not include most workers.[182] In several high profile cases where formalization accords were reached in Colombia, this occurred only after government security forces were involved in violent suppression of worker organizing,[183] including at the Risaralda sugar plantation in March 2015 and the Bucarelia palm oil plantation in November 2014.[184]

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[178] Ministry of Labor, Oficio No 7219001-0660 (April 14, 2015).

[179] El art. 13 de la Ley 1610 de 2013 es "aquel suscrito entre uno o varios empleadores y una Dirección Territorial del Ministerio del Trabajo, previo visto bueno del Despacho del Viceministro de Relaciones Laborales e Inspección, en el cual se consignan compromisos de mejora en formalización, mediante la celebración de contratos laborales con vocación de permanencia y tendrán aplicación en las instituciones o empresas públicas y privadas".

[180] Sintrainagro Local Ingenio La Cabaña Labor Formalization Proposal (*propuesta de acuerdo de formalización laboral*) (February 26, 2015).

[181] Statement of Mauricio Ramos (December 4, 2015) on file with Coljusticia.

[182] Escuela Nacional Sindical, Informe Sobre los Cuatro Primeros Anos de Implementacion del Plan de Accion Laboral 44 (2011-2015) *Available at* http://ens.org.co/apc-aa-files/4e7bc24bf4203c2a12902f078ba45224/Informe_final_completo_Plan_de_Acci_n_Laboral_2011_2015_Versi_n_4_Abril.pdf.

[183] *See, e.g*. Escuela Nacional Sindical, El Esmad arremetió contra corteros de caña en huelga en el Ingenio Risaralda: 5 heridos, dos graves (March 3, 2015) Available at http://www.ens.org.co/index.shtml?apc=a---;1;-;-;&x=20170788; Central Unitaria de Trabajadores, Paola Andrea Pabon Ortega, Bucarelia: en huelga imputable al empleador, Centro de Atencion Laboral Available at http://calcolombia.co/publicaciones/cronicas-del-cal/bucarelia-en-huelga-imputable-al-empleador/.

[184] *See* Ministry of Labor website, Superado conflicto laboral en Ingenio Risaralda (March 4, 2015) *Available at* http://www.mintrabajo.gov.co/marzo-2015/4256-superado-conflicto-laboral-en-ingenio-risaralda.html.

After repeated delays and inaction by the Ministry of Labor, in 2015 the union began helping individual union members who were fired between 2012 and 2014 file individual complaints in the ordinary labor justice system seeking reinstatement or severance.[185] This route is time-consuming, resource-intensive and based on past cases it will likely take three years or more to get any conclusive findings. This offers the chance, though not a guarantee, of individual compensation but the cases will not and cannot rectify the violations of collective rights to freedom of association and bargaining. Any finding or remedy that may emerge from this process will fail to address the issues that have been at the core of the La Cabaña cane cutters efforts to exercise their rights as workers and members of a union. Increasingly, workers and unions across sectors in Colombia are resorting to this expensive, inefficient and uncertain path because it is seen as the only viable option, but it is not a meaningful solution to entrenched violations or an acceptable substitute for functional labor relations.

In December 2012, Sintrainagro had 545 cane cutters working in the La Cabaña fields. Overall, at least 150 were fired in subsequent months. As of February 2016, there are only 345 Sintrainagro members working for La Cabaña and its intermediaries.

2. Argument

a. Colombia has failed to effectively enforce its labor laws, particularly those adopted in accordance with Article 17.2.1, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties, in violation of Article 17.3.1(a).

Colombia has failed to effectively enforce its labor laws, particularly those it adopted in accordance with Article 17.2.1, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment.

i. The GOC failed to effectively enforce Article 433 of the Labor Code

The Colombian government failed to effectively enforce Article 433 of the Colombian Labor Code, which establishes an absolute maximum of 5 days for an employer to respond to a petition of demands, and subjects employers that fail to respond to a daily fine until they comply. Article 433 is a labor law within the meaning of the TPA because it is a statute directly related to the internationally recognized right to the effective recognition of collective bargaining pursuant to Article 17.8. Sintrainagro filed a petition of demand on December 12, 2012, which under Article 433 triggers the obligation to respond. La Cabaña has never responded. Sintrainagro complained to the Ministry of Labor on December 28, 2012, and renewed this complaint in subsequent filings, appeals and petitions in January 2013, February 2013, May 2013, June 2013, October 2013 and April 2014. The government took no action to ensure that the company responded to the demands at all, let alone within the 5 day window required by law, and never applied any fines. Instead, government officials improperly allowed refusal to negotiate under non-binding

[185] Sixty-three Sintrainagro members fired by Cabaña subcontractors had filed complaints by November 10, 2015. Another ninety-one Sintrainagro members fired by these contractors have prepared complaints to file before the end of 2015. Letters of dismissal and individual complaints on file with Sintrainagro.

ILO procedures to act as a substitute for legitimate good faith bargaining. There is nothing in the law that indicates the responsibility to respond directly to the union can be waived, nor is there anything to support the contention that simply refusing to bargain in another forum constitutes an adequate response from the employer. The Colombian Labor Code requires that the employer's representative enter into negotiations or be subject to penalties, an outcome that was not even pursued, let alone ensured, by Colombian officials. Colombia failed to effectively enforce Article 433.

ii. The GOC failed to effectively enforce Law 524 of 1999

The GOC failed to effectively enforce Law 524 of 1999, which codifies ILO Convention No. 154 into domestic law. Law 524 is a labor law within the meaning of the TPA because it is a statute directly related to the internationally recognized right to the effective recognition of collective bargaining pursuant to Article 17.8. Law 524 requires the GOC to undertake measures to ensure collective bargaining, and even if the legal system is itself inadequate, "collective bargaining should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules."[186]

The GOC failed to ensure that La Cabaña or its subcontractors engage in meaningful dialogue with the union over the course of four years, despite at least 6 separate attempts to raise the issue with various government agencies and entities dating back to 2012. Officials accepted the company's failure to attend bargaining sessions as a substitute for good faith bargaining and improperly applied the law when investigating the issue to ignore whether the company had committed violations of Law 524 at all. The Ministry of Labor's inspection instead improperly focused on the underlying validity of the union, rather than examining whether the company violated Colombian law in refusing to negotiate. The GOC has taken no meaningful action to encourage, let alone require good faith bargaining, and has in fact frustrated the application of Law 524 through its own improper actions by accepting a refusal to use voluntary ILO procedures as a substitute for meaningful bargaining and failing to conduct a meaningful investigation. In so doing, the GOC failed to effectively enforce Article 53 of the Colombian Constitution, in violation of its obligation under Article 17.3.1(a).

iii. The GOC failed to effectively enforce Article 354 of the Labor Code

The GOC failed to effectively enforce Article 354 of the Labor Code with respect to anti-union discrimination. Article 354 is a labor law within the meaning of the TPA because it is a statute directly related to the internationally recognized labor right of freedom of association, pursuant to Article 17.8. The law prohibits retaliation against workers for union activities, including dismissals and harassment, and subjects violators to fines and possibly criminal penalties. The union made multiple attempts to raise retaliatory dismissals, harassment and intimidation by submitting complaints to the Ministry of Labor. Ministry inspectors were reluctant to take up the case even as the dismissals increased, and it is not clear whether there was ever any substantial investigation into the dismissals or other acts of retaliation. The documentation available uses only the selective testimony of non-union workers, and focuses on the underlying legitimacy of

[186] *See* Law 524 Article 5(d).

the union, rather than the retaliation. Violations, documented in multiple complaints, yielded no comprehensive investigations, fines or penalties, as mandated under the law. As such, the GOC failed to effectively enforce Article 354 on numerous occasions, in violation of its obligation under Article 17.3.1(a).

iv. The GOC failed to effectively enforce Article 486 of the Labor Code

The GOC failed to effectively enforce Article 486, which empowers the Ministry of Labor to conduct investigations, order protective measures and impose fines on employers who violate the Labor Code. Article 486 is a labor law within the meaning of the TPA because it is a statute directly related to the internationally recognized labor rights of freedom of association and collective bargaining pursuant to Article 17.8. The Ministry received multiple complaints that detailed violations of the Labor Code, particularly Articles 354 and 433. The Ministry did not meaningfully exercise its responsibility to conduct detailed inspections or impose fines. It took multiple filings before any investigation occurred at all. The only investigation report contains very little inquiry into the dismissals or failure to bargain, instead improperly focusing on the underlying validity of the union itself. The Colombian government failed to effectively enforce Article 486 of the Labor Code, in violation of Article 17.3.1(a).

v. The GOC failed to effectively enforce Article 59 of the Labor Code

The Colombian government did not effectively enforce Article 59 of the Labor Code, which prohibits employers from limiting or in any way interfering with workers' exercise of freedom of association. Article 59 is a labor law within the meaning of the TPA because it is a statute directly related to the internationally recognized labor right to freedom of association, pursuant to Article 17.8. Sintrainagro documented mass dismissals, threats, intimidation and labor intermediation conducted by La Cabaña and its intermediaries to deliberately frustrate workers' exercise of freedom of association. Colombian officials never acted to hold La Cabaña or its intermediaries accountable for repeated violations. In so doing, the Colombian government failed to effectively enforce Article 59 of the Labor Code.

vi. The GOC failed to effectively enforce Article 63 of Law 1429

The Colombian government failed to effectively enforce Article 63 of Law 1429 of 2010 with respect to labor intermediation. Article 63 of Law 1429 is a labor law within the meaning of the TPA because it is a statute directly related to the internationally recognized labor right of freedom of association, pursuant to Article 17.8. The Ministry of Labor must conduct inspections into companies that use labor intermediaries to conduct permanent functions of the company and issue timely fines. As defined by Decree 2025 and initially raised in the December 28 complaint, workers at La Cabaña perform core, permanent activities of the company. La Cabaña produces sugar, therefore sugar cane is a good that is "characteristic of the company" and cane cutting is indispensable to the company's business. Most cane cutters have been on the job for a period of at least five consecutive years, with many working well over a decade in the fields. Company representatives have openly stated they will not formalize these workers in the presence of GOC officials.

Law 1429 was specifically enacted to combat the use of intermediaries to frustrate freedom of association and other rights, but the Ministry of Labor has refused to exercise its responsibility to identify and remedy violations. The union filed complaints in December 2012, February 2013 and June 2013 before an inspection of any kind was conducted, and the union was initially not notified until after it took place. It took nearly two years for the union to ascertain additional information about the status of the case, and this was only the result of repeated information requests. Regional Ministry of Labor officials claimed they lacked the mandate to act without a technical ruling from the national office, which has apparently been pending for several years. It is not clear why the Ministry will not move forward, under Colombian law Ministry officials are empowered to make determinations regarding intermediation and issue fines. These violations have now gone unanswered for more than three years. The Colombian government failed to enforce Article 63 of Law 1429.

vii. Colombia has failed to effectively enforce Article 2 of Resolution 321

The Colombian government failed to effectively enforce Article 2 of Resolution 321 which states that government officials will support negotiations with employers to reach formalization agreements when unions or other actors propose them. Article 2 of Resolution 321 is a labor law within the meaning of the TPA because it is a statute directly related to the internationally recognized labor right of freedom of association, pursuant to Article 17.8. Sintrainagro presented a formalization petition in 2015 in accordance with these regulations. Thus far, the government has taken no action to ensure negotiations with La Cabaña occur at all, much less result in the completion of an agreement. This is particularly egregious given the long-standing nature of labor intermediation at the sugar company. The Colombian government failed to effectively enforce Article 2 of Resolution 321.

viii. *Colombia has failed to effectively enforce Article 347 of the Criminal Code*

The Colombian government failed to effectively enforce Article 347 of the Criminal Code, which imposes fines and jail terms on individuals who threaten or intimidate trade unionists. Article 347 is a labor law within the meaning of the TPA because it is a statute directly related to the internationally recognized labor right of freedom of association, pursuant to Article 17.8. Article 347 was reformed under Law 1719 of 2014 specifically to bring Colombia into compliance with the ILO Declaration. The complaints submitted between 2012 and 2015 detail an escalating pattern of threats and intimidation on the part of officials from La Cabaña and its intermediaries, including statements about unionization bringing trouble, about murders of Sintrainagro activists and the potential that the ESMAD, which had violently suppressed worker protests several years earlier, would be called in if there was a strike. The criminal reforms were designed specifically for cases like La Cabaña where employers use the climate of violence against trade unionists to stifle union activities. Officials are empowered to act on this information without a formal complaint. Officials should have responded, but did not. Therefore, the government failed to effectively enforce Article 347, in violation of the TPA.

ix. Colombia has failed to effectively enforce Article 353 of the Labor Code

The Colombian government failed to effectively enforce Article 353 of the Labor Code, which protects the right of workers to freely join and form trade unions of their own choosing. Article 353 is a labor law within the meaning of the TPA because it is a statute directly related to the internationally recognized labor right of freedom of association, pursuant to Article 17.8. Various branches of the Colombian government have been made aware that workers at La Cabaña have been prevented from joining Sintrainagro through threats, retaliation and harassment by the company and its intermediaries. Labor officials did not act to ensure that Labor Code protections ensuring this freedom of association were meaningfully applied over the course of several years, and instead allowed continued impunity to frustrate worker attempts to exercise their rights. The Colombian government failed to effectively enforce Article 353 of the Criminal Code over a period of four years, despite multiple attempts to raise complaints before various government bodies, thereby violating the TPA.

x. Colombia has failed to effectively enforce Article 3 of Law 1437

The Colombian government failed to effectively enforce Article 3 of Law 1437 of 2011, which states that administrative procedures should be guided by the principles of effectiveness, procedural economy and speed. Article 3 is a labor law within the meaning of the TPA because Colombia's revised Code of Administrative Procedure is a statute that aims to ensure effective administrative procedures within the agencies tasked with upholding labor rights, including the Ministry of Labor, and as such is directly related to upholding the internationally recognized labor rights to both freedom of association and effective recognition of collective bargaining pursuant to Article 17.8. The December 28 complaint was a single document involving a core set of facts and legal persons. Rather than conducting a single, comprehensive examination, the case was arbitrarily divided into separate components. This has no basis in Colombian law and inhibited an effective, meaningful investigation, something the reforms instituted under the LAP were specifically designed to promote.

xi. The GOC failed to effectively enforce Article 49 of Law 1437

The Colombian government failed to effectively enforce Article 49 of Law 1437 of 2011, which states that administrative officials should issue a decision in response to a complaint within thirty days of receiving that complaint. Article 49 is a labor law within the meaning of the TPA because Colombia's revised Code of Administrative Procedure is a statute that aims to ensure effective administrative and regulatory investigation procedures within the Ministry of Labor and Social Protection, which is tasked with upholding labor rights and as such is directly related to upholding the internationally recognized labor rights to both freedom of association and effective recognition of collective bargaining pursuant to Article 17.8. None of the complaints filed by Sintrainagro were answered within the mandated 30 day period. The union filed complaints in December 2012, January 2013, February 2013 and June 2013 before any formal inspection was conducted at all, and it then took several months to receive a decision. When the union appealed, it also took several months to receive a response. By repeatedly failing to respond to union complaints within the mandated 30 days, the Colombian government failed to effectively enforce Articles 49 of Law 1437 of 2011 in violation of Article 17.3.1(a).

xii. The GOC failed to effectively enforce Article 17 of the Labor Code

The GOC failed to effectively enforce Article 17 of the Colombian Labor Code, which tasks the Ministry of Labor with ensuring that social rights are protected. Article 17 is a labor law within the meaning of the TPA because it is a statute directly related to the internationally recognized labor rights of freedom of association and the effective recognition of collective bargaining, pursuant to Article 17.8. The complaints filed detail repeated violations of social rights, including the rights to collective bargaining and freedom of association, protected in the Colombian Labor Code and Constitution. The Ministry of Labor, at both the local and regional level, repeatedly ignored its own responsibilities mandated in the Labor Code and took no proactive measures to address ongoing, obvious violations of social rights despite repeated petitions and filings documenting the abuse. Thus, the Colombian government failed to effectively enforce Article 17 in violation of the TPA.

xiii. The GOC failed to effectively enforce Article 86 of the 1991 Constitution

The GOC failed to effectively enforce Article 86 of the 1991 Constitution, which allows citizens to seek judicial relief when fundamental rights are violated or threatened by the action or inaction of public authorities. Article 86 is a labor law within the meaning of the TPA because it is a statute directly related to upholding fundamental rights in the Colombian Constitution, which includes the internationally recognized labor rights of freedom of association and effective recognition of collective bargaining, pursuant to Article 17.8. Ministry of Labor officials repeatedly abdicated their responsibility to investigate and remedy core labor violations when they failed to respond to complaints in a timely manner, follow procedures, conduct adequate investigations or impose legally required penalties for violations. Due to this inaction on the part of GOC officials, workers at La Cabaña were faced with the choice between losing their livelihood or giving up their right to freely join a union and engage in collective bargaining, who took no measures to prevent the company from engaging in threats and retaliation or to ensure bargaining. Many workers were improperly fired, and many more were forced to give up the opportunity to bargain for better wages and working conditions. When workers turned to the courts to make use of their right to challenge this public inaction, the courts declined to uphold the law. The government of Colombia failed to enforce Article 86.

xiv. The GOC failed to effectively enforce its labor laws through a sustained or recurring course of action or inaction

Failure to enforce labor laws at La Cabaña demonstrates a sustained or recurring course of action or inaction on the part of the Colombian government because the failures were both numerous and repeated. The enumerated violations on the part of La Cabaña - labor intermediation, a refusal to bargain and retaliation - are all on-going and unchanged since the union first brought the issues to official attention in late 2012. The union filed no less than 6 separate complaints with different branches of the Colombian government, and additional supplementary filings and appeals, on both the national and local levels over the course of 2012-2014. In each case, the

GOC declined to meaningfully act on these petitions in a manner consistent with Colombian law, and that failure is ongoing.

The GOC failed to enforce its labor laws through a combination of inaction and action. Colombian officials repeatedly failed to respond to complaints in a timely manner. For example, the union filed complaints in December 2012, February 2013 and June 2013 before any investigations were conducted. Further, when officials did respond, the responses were often out of compliance with mandated law and procedures, by focusing on the validity of the union rather than violations or shifting the burden of proof onto the union without basis in Colombian law. Officials affirmatively accepted the company's failure to attend bargaining sessions as a substitute for good faith bargaining, and conducted improper and incomplete investigations into retaliatory dismissals, and failure to bargain. Colombia's officials demonstrated inaction in refusing to adequately respond to violation, as well as affirmative action in rejecting meritorious cases and actively misapplying the law. This constitutes a sustained or recurring course of both inaction and action.

xv. Colombia failed to effectively enforce its labor laws in a manner affecting trade or investment between Colombia and the United States

The GOC's failure to enforce its labor laws affects the "conditions of competition" in the sugar sector in Colombia, specifically the cost of labor.[187] Sugar is a key Colombian export, with much of it going to the United States. As noted above, Colombia is expected to export over 84,000 tons of sugar to the United States in 2016. The GOC's failure to enforce laws that protect workers' ability to organize and bargain for better wages and working conditions artificially depressed the cost of labor in the sugar sector, which is taken into account by businesses making trade and investment decisions.[188] Employers not only avoid the payment fines mandated under the law for violations, but escape "the costs associated with workers who are capable, through the support of a union, to advocate for better pay and improved working conditions … [and] the costs associated with workers who have access, through the support of a union, to the enforcement mechanisms."[189]

As discussed in the USO case, this has a profound effect on both trade and investment, as artificially cheap labor attracts foreign investment and boosts exports. U.S. sugar producers and workers are forced to compete on an uneven playing field. The labor protections of the TPA were designed specifically to guard against this form of unfair competition and prevent either party from deriving benefits from failing to protect workers.

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[187] In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, Rebuttal Submission of the United States ¶ 96 (March 16, 2015) *Available at* https://ustr.gov/sites/default/files/files/Issue_Areas/Labor/US%20Rebuttal%20Submission.pdf.

[188] *See* In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, Rebuttal Submission of the United States, March 16, 2015 *Available at* https://ustr.gov/sites/default/files/files/Issue_Areas/Labor/US%20Rebuttal%20Submission.pdf.

[189] In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, Rebuttal Submission of the United States ¶ 110 (March 16, 2015) *Available at* https://ustr.gov/sites/default/files/files/Issue_Areas/Labor/US%20Rebuttal%20Submission.pdf.

b. Colombia has waived or otherwise derogated from its statutes and regulations that implement Article 17.2.1(a) and (b) in a manner affecting trade or investment between Colombia and the Unites States, and that waiver and derogation is inconsistent with the rights to freedom of association and the effective recognition of the right to collective bargaining (Article 17.2.2)

i. Colombia has waived or otherwise derogated from its statutes or regulations, and that derogation is inconsistent with the fundamental right to freedom of association

The GOC has waived or otherwise derogated from the Colombian Labor Code, Criminal Code and Constitution in a manner inconsistent with the fundamental right to freedom of association. As demonstrated in the discussion above, the GOC has failed to effectively enforce multiple statutes and regulations implementing freedom of association, including Articles 59, 353, 354 and 486 the Colombian Labor Code, Article 347 of the Criminal Code and Article 53 of the Constitution.

As discussed in the USO section, neither waive nor derogate is defined in Chapter 17 of the TPA. Looking to the plain meaning in line with Article 31 of the Vienna Convention, Webster's Dictionary defines waive as "to refrain from pressing or enforcing," or "to officially say that you will not use or require something that you are allowed to have or that is usually required," while it defines derogate as "to take away a part so as to impair."

The GOC failed to press or enforce various aspects of Colombian law related to freedom of association, including prohibitions on retaliation and the use of labor intermediaries. The government was aware that La Cabaña had engaged in dismissals, issued threats, and otherwise frustrated workers' ability to freely join Sintrainagro, and by failing to meaningfully press or enforce laws protecting freedom of association and prohibiting and punishing this conduct, the government issued an implicit waiver to La Cabaña and its intermediaries, allowing it to engage in anti-union acts with impunity. While the GOC made no official statements to the employer that petitioners are aware of, the clear message to La Cabaña and its intermediaries was that the GOC would not use its' authority to punish violations of freedom of association, or require that the companies abide by laws and regulations upholding this right. By failing to act to redress violations and ensure protections in the law were implemented in practice, the GOC effectively removed the parts of the Labor Code which give effect to freedom of association, thereby providing an implicit waiver to La Cabaña and its intermediaries and impairing the right of workers to exercise freedom of association.

ii. Colombia has waived or otherwise derogated from its statutes and regulations in a manner inconsistent with the fundamental right to collective bargaining

Colombia has waived and otherwise derogated from Article 433 of the Labor Code, Article 63 of Law 1429 of 2010 and Article 39 of the Constitution in a manner inconsistent with the fundamental right to collective bargaining.

The GOC did not press or enforce the provisions of Colombian law that protect collective bargaining and require employers to respond in good faith to requests to enter into negotiations or be fined. Sintrainagro presented a petition of demands to La Cabaña in December 2012. In the following four years, the company never entered into negotiations. The GOC never applied the mandatory daily penalties established in the Labor Code, and took no other steps to promote the protections for collective bargaining enshrined in both the Labor Code and the Constitution. Instead, it allowed the substitution of voluntary ILO proceedings, which the company later simply refused to engage with, to supplant requirements of Colombian law. Further, the GOC failed to press or enforce Law 1429 regarding labor intermediation, despite numerous complaints detailing the practice at La Cabaña.

Through its repeated lack of action, the GOC issued an implicit statement to La Cabaña that it would not make use of its legal authority to punish the refusal to enter into good faith bargaining. Further, the GOC's public acceptance of voluntary ILO proceedings as a substitute for bargaining in line with Colombian laws was in effect an explicit official statement relaying this same message. Failing to require bargaining, and accepting La Cabaña's refusal, effectively removed the parts of the Labor Code and Constitution which give effect to collective bargaining. The GOC's failure waived the obligation to engage in good faith bargaining on the part of La Cabaña and derogated the right to the effective recognition of collective bargaining on the part of La Cabaña's workers. As such, the GOC has waived or derogated from statues and regulations in a manner inconsistent with the fundamental right to collective bargaining set out in 17.2.1 (b).

iii. Colombia has waived or otherwise derogated from its statutes and regulations in a manner affecting trade or investment between Colombia and the Unites States

Colombia has waived or otherwise derogated from its statutes and regulations in a manner affecting trade or investment between Colombia and the Unites States. As discussed in Section II.B.2(a)(xv) of this complaint, the failure to ensure the right to freedom of association and collective bargaining prevents workers from bargaining over wages, benefits and working conditions, thus artificially lowering the cost of labor in the sugar sector. The failure to ensure employers comply with the law has industry-wide ramifications, depressing wages and working conditions in the economy as a whole. Sugar is a major export to the United States. U.S. producers and workers compete on an uneven playing field, and Colombia attracts investment and supports increased exports through the suppression of wages and benefits for Colombian sugar workers.

C. Failure To Adopt and Maintain Rights In Practice Under Article 17.2.1(a) and (b)

The Colombian government has not adopted and maintained in its practices the rights to freedom of association and collective bargaining as stated in the ILO Declaration, as is required by Article 17.2.1 of the TPA.

1. The GOC has failed to adopt and maintain the right to freedom of association in practice

The GOC has not adopted or maintained a practice of enforcing the right to freedom of association. The GOC allows and engages in violent repression of trade union activity and fails to investigate cases of violence and threats against union members; allows labor intermediation to frustrate workers' right to freely form and join unions; allows employers to retaliate against workers for engaging in union activities; fails to ensure that trade union leaders have access to workers and the workplace; and fails to address blacklisting. It is not sufficient to simply have laws regarding freedom of association on the books, GOC practices under those laws must ensure the right to freedom of association can be meaningfully exercised. The GOC has not adopted in its practices the right to freedom of association as defined by the ILO Declaration, in a manner that affects trade and investment.

i. The GOC allows and engages in violent repression of trade union activity and does not investigate cases of violence and threats against union members, thereby failing to maintain freedom of association in practice as required by Article 17.2.1(a)

The GOC's engagement in and failure to respond to violence against trade unionists constitutes a failure to adopt and maintain in its practices the right to freedom of association as set forth in the ILO Declaration. "The rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected."[190] It is unequivocally a state's duty to protect workers and to adequately investigate and prosecute cases of violence.[191] Failure to do so creates a climate of impunity that stifles trade union activities and deters workers from trying to exercise their rights.[192] It is not enough to restrict violence against trade unionists in law, the Colombian government must maintain freedom of association in practice by actively preventing cases of violence against trade unionists and ensuring accountability for perpetrators.

When workers started organizing at Pacific Rubiales, they were met with violent resistance from both the local police and ESMAD forces, and violent confrontation, including blocked roads and denial of access to members that continued over a period of months. Workers and union leaders

[190] *E.g.*, ILO CFA 291st Report, Case No. 1700, para. 310.

[191] CFA Digest of Decisions ¶ 35-36, 42-53, 58-60.

[192] "The absence of judgments against the guilty parties creates, in practice, a situation of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights." ILO CFA 288th Report, Cases Nos. 1273, 1441, 1494 and 1524, para. 30. *See also* ILO CFA 291st Report, Cases Nos. 1273, 1441, 1494 and 1524, para. 241; 292nd Report, Cases Nos. 1434 and 1477, para. 255; 294th Report, Case No. 1761, para. 727; and 297th Report, Cases Nos. 1527, 1541 and 1598, para. 162.; CFA Digest of Decisions") ¶ 35-36, 42-53, 58-60.

suffered grave and permanent injuries, including loss of vision and brain function, due to these tactics. The GOC failed to investigate or prosecute the members of the police forces responsible. Further, the GOC failed to investigate and prosecute the threats made against USO leaders. No attempt was made to identify the individuals or entities responsible for sending USO leaders and their families death threats. In the La Cabaña case, the GOC did not adequately investigate the murder of leader Pérez Muñoz. No suspects have been identified or prosecuted. Officials did nothing to respond to threats issued by officials from La Cabaña and intermediaries who made it clear they were speaking on behalf of La Cabaña, who made explicit references to the history of violence against Sintrainagro members and stated they would use the ESMAD to violently break up any protests, as they had in the past. These statements were threats designed to foster fear and intimidation to suppress union activities. Failing to ensure accountability for threatening workers, particularly given the long history of violence against both unions which makes these threats credible and immediate, has a chilling effect on the exercise of freedom of association and constitutes a failure of the GOC to maintain freedom of association in practice.

Workers facing physical assault and threats of violence cannot possibly feel safe and secure in exercising their rights under 17.2.1. Since the TPA entered into force, there have been 1,466 acts of violence against trade unionists, including 955 threats and 98 murders. Four of those murdered were USO leaders or members, and two were leaders of Sintrainagro (see Graph 2, Section I.C). The GOC routinely fails to investigate cases and identify perpetrators, and has yet to prosecute a single criminal case against an employer under Article 200. This climate of impunity severely hampers workers' exercise of freedom of association, as workers are left with the impression that violence will not be investigated, let alone prevented, if they engage in union activities. Colombian workers literally put their life on the line when they attempt to exercise their right to association. The failure to act to ensure that workers can exercise their right to freedom of association constitutes a particularly egregious violation of the country's obligations under Article 17.2.1 of the TPA.

ii. Colombia allows labor intermediation to interfere with workers' ability to organize, thereby failing to maintain freedom of association in practice as required by Article 17.2.1(a)

The GOC has not adopted and maintained in practice protections against illegal labor intermediation, which is fundamental to the right to freedom of association. At Pacific Rubiales and La Cabaña, workers performing core, permanent functions, including extracting oil and cutting cane, are hired through intermediaries. This prevents these workers from exercising their legal and constitutional rights, including the right to freely join unions of their own choosing explicitly protected in the Constitution and Colombian Labor Code. Both the U.S. and Colombian governments have recognized that such intermediation interferes with the fundamental right to freedom of association.[193] The failure to address intermediation that interferes with the right to organize, despite guarantees in Article 63 of Law 1429 constitutes a failure to adopt and maintain a practice the right of freedom of association.

[193] *See, e.g.*, United States Trade Representative, Labor in the U.S.-Colombia Trade Promotion Agreement *Available at* https://ustr.gov/uscolombiatpa/labor.

In multiple instances at both Pacific Rubiales and La Cabaña, workers had short-term contracts systematically terminated in retaliation for exercising their right to join a union of their choosing, demonstrating precisely the chilling effect on the exercise of freedom of association these practices present. At Pacific Rubiales, workers were told they would not be hired by an intermediary unless they quit USO or joined UTEN. At La Cabaña, workers were told they would be fired. The GOC's recognition that labor intermediation can be used to deny fundamental labor rights (as in the LAP and laws such as Law 1429) is insufficient. It must investigate whether such intermediation is occurring, stop such practices, and sanction violators to deter future abuses in order to demonstrate that it has adopted and maintained in practice the right to freedom of association.

Despite receiving numerous complaints and requests to act on these practices, the GOC has taken no action to remedy the situation, thereby failing to maintain freedom of association as stated in the ILO Declaration, in violation of Article 17.2.1 (a) of the TPA.

iii. The GOC allows employers to retaliate against workers for engaging in union activities, thereby failing to adopt and maintain freedom of association in practice as required by Article 17.2.1(a)

The GOC has not adopted or maintained in its practices protections against discrimination against trade union members, thereby failing to protect the right to freedom of association. The ILO has repeatedly concluded that "[a]nti-union discrimination is one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions."[194] The GOC failed to respond to multiple complaints of discrimination against members of USO and Sintrainagro, including retaliatory dismissals, threats and harassment, a systematic prohibition against hiring members, and forced resignations to gain employment.

The state has a clear obligation to appropriately investigate and punish acts of anti-union discrimination,[195] and in both cases the unions made repeated attempts to raise these issues in complaints to multiple government agencies. None of the complaints resulted in a thorough investigation, much less any remedial action.[196] Freely joining and maintaining membership in a trade union of a worker's choosing is at the core of freedom of association as stated in the ILO Declaration. By systematically failing to protect workers from clear and repeated acts of retaliation, Colombia profoundly failed to adopt a practice of enforcing the right to freedom of association as required by Article 17.2.1.

[194] CFA Digest of Decisions ¶ 769.

[195] CFA Digest of Decisions ¶ 772 ("No one should be subjected to discrimination or prejudice with regard to employment because of legitimate trade union activities or membership, and the persons responsible for such acts should be punished"); *See also* CFA Digest of Decisions ¶ 788-89.

[196] *See, e.g.*, CFA Digest of Decisions ¶ 820 ("Respect for the principle of freedom of association clearly requires that workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress which are expeditious, inexpensive and fully impartial.").

iv. Colombia does not ensure trade union leaders have access to the workplace, thereby failing to adopt freedom of association in practice as required by Article 17.2.1 (a)

The Colombian government has not adopted in its statutes and regulations the right to access to the workplace that is fundamental to freedom of association. As the ILO CFA emphasized in its 2015 decision on Colombia's oil sector, "governments should guarantee the access of trade union representatives to workplaces."[197] USO leaders and union members have both been restricted from accessing the workplace. Union members cannot exercise their rights without access to their representatives, and the vast majority of USO workers live in workcamps near the oilfields and are otherwise inaccessible, making it particularly critical in this case. The inability of USO representatives to access members and engage in critical representation activities was documented in complaints in 2012, 2013 and 2015, and in at least one instance the refusal took place in the presence of Colombian officials. Adopting and maintaining the right to freedom of association requires that the government have practices that guarantee union leaders can effectively communicate with workers at the worksite. By failing to provide access, Colombia failed to maintain the right to freedom of association in practice as required by Article 17.2.1 (a).[198]

v. Colombia does not prevent blacklisting, thereby failing to adopt freedom of association in practice as required by Article 17.2.1(a)

The Colombian government has failed to prevent the creation and maintenance of blacklists used to discriminate against union members and deny freedom of association. Blacklists are "a serious threat to the free exercise of trade union rights and, in general, governments should take stringent measures to combat such practices."[199] As the ILO's Committee on Freedom of Association concluded, Pacific Rubiales and other oil companies building registers of trade union members "does not respect rights of the person (including privacy rights) and … may be used to compile blacklists of workers."[200] Pacific Rubiales and its intermediaries were allowed to maintain a database with union members and officials, which was clearly used to prevent them from obtaining work or entering the worksite. The Colombian government has taken no steps to address the practice, in this case or in general. By failing to prevent the creation and maintenance of lists of trade union members, Colombia failed to adopt and maintain the right to freedom of association in practice as required by Article 17.2.1.

[197] CFA Digest of Decisions ¶ 242.
[198] *See* CFA Digest of Decisions ¶ 342-44.
[199] CFA Digest of Decisions ¶ 803.
[200] International Labor Organization Governing Body, Committee on Freedom of Association, 374th Report, Case No. 2946 ¶ 249, 257(f) (March 2015) *Available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_357167.pdf *referencing* Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, Geneva, International Labour Office, Fifth (revised) edition, 2006 (hereinafter "CFA Digest of Decisions") ¶ 117 *Available at* http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_090632.pdf.

vi. Colombia does not ensure employer neutrality as between unions, thereby failing to adopt and maintain freedom of association in practice as required by Article 17.2.1(a)

The Colombian government has not adopted in its statutes and regulations the right to freedom of association with respect to employer neutrality. According to the ILO, "[b]oth the government authorities and employers should refrain from any discrimination between trade union organizations,"[201] and the state is obligated to enforce this neutrality. Pacific Rubiales has been open in its support for UTEN over the independent union USO, and made overt efforts to promote membership. Workers were told to join UTEN to maintain their jobs, some were even sent directly to UTEN offices from Pacific Rubiales and its intermediaries. Both the companies and the Colombian government were aware that workers supported USO and wanted USO to act as their agent in negotiations, but the company was allowed to recognize a union without worker support to frustrate USO's attempts at negotiations. La Cabaña and intermediaries also encouraged membership in a company-friendly union as an alternative to joining Sintrainagro. Despite receiving compelling evidence of these practices, the GOC did not respond to rectify this behavior. By failing to ensure its practices enforce employer neutrality as between unions, Colombia failed to adopt and maintain the right to freedom of association as required by Article 17.2.1(a).

2. The GOC has failed to adopt and maintain the right to collective bargaining in practice

The GOC has not adopted or maintained the right to collective bargaining in practice. The GOC is required to undertake measures to promote collective bargaining between unions and employers.[202] However, in both cases discussed above employers have been allowed to consistently refuse to engage with independent unions without consequence.

La Cabaña and its intermediaries openly and repeatedly refused to negotiate with Sintrainagro over a period of 4 years, despite multiple attempts by the union to engage the company. The government took no action for months, and then initiated a voluntary process that the company rejected without consequence. No subsequent efforts were ever made to ensure La Cabaña bargained in good faith. Pacific Rubiales and its intermediaries repeatedly refused to negotiate with USO over 5 years and engaged in retaliatory actions against workers affiliated with USO when presented with bargaining demands. The Colombian government brokered an initial agreement between Pacific Rubiales and USO to install a negotiating table, then abandoned the process and accepted Pacific Rubiales' claim that because it had signed an agreement with UTEN, it no longer had to negotiate with USO. Even if the UTEN agreement had been a valid collective bargaining agreement, that in itself does not absolve Pacific Rubiales of its responsibility to negotiate with the thousands of workers who had joined USO and were seeking to bargain through that union. Further, multiple complaints detailed the suspect nature of the UTEN agreement, and the GOC never investigated whether the *contracto sindical* between

[201] CFA Digest of Decisions ¶ 343.

[202] International Labor Organization, Convention concerning the Promotion of Collective Bargaining No. 154 *Available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C154.

UTEN and Pacific Rubiales actually constituted legitimate collective bargaining or was simply a sham arrangement that amounts to labor intermediation. The GOC abandoned its responsibility to ensure Pacific Rubiales bargained in good faith after these initial meetings. As a result, in both cases workers are not able to effectively exercise the right to collective bargaining, and the vast majority remain in informal employment. The GOC's practices do not ensure that the right to bargain collectively as stated in the ILO Declaration is maintained in practice, in violation of Article 17.2.1.

3. The GOC has not adopted in its practices the rights to freedom of association and collective bargaining as stated in the ILO Declaration in a manner affecting trade and investment between Colombia and the United States

As discussed above in Sections II.A.2 (a)(xiii), (b)(iii) and II.B.2 (a) (xv), (b)(iii) of this complaint, the GOC's failure to adopt and maintain in its practices the right to freedom of association and effective recognition of collective bargaining as set forth in the ILO Declaration impacts trade and investment between Colombia and the United States. In both the oil and sugar sector, the consistent failure to protect workers from retaliation, enforce bargaining, and ensure that unions can effectively operate artificially lowers the cost of labor by removing any requirement to pay deterrent penalties and inhibiting collective action to raise wages and benefits. This encourages impunity throughout both sectors, as employers are incentivized to ignore labor protections in order to remain competitive.

D. Failure To Adopt and Maintain Rights In Statutes and Regulations Under Article 17.2.1(a)

1. The GOC's failure to effectively prohibit the use of labor intermediation to avoid unions demonstrates that it has not adopted in its statutes and regulations the right to freedom of association

The GOC does not have adequate legal protections to guard against labor intermediation and its interference with workers' ability to organize, thereby failing to maintain freedom of association in its statutes and regulations as required by Article 17.2.1(a). Labor intermediation constitutes a serious impediment to the exercise of freedom of association, a fact recognized and designed to be remedied in the LAP and echoed in the OECD report released this year. Unfortunately, reforms were not effectively crafted or meaningfully implemented, particularly with respect to forms of labor intermediaries beyond cooperatives. Both Article 63 of Law 1429 of 2010 and Decree 2025 aim their remedial measures on cooperatives, including the requirement that these entities be dissolved in cases where they are being used for core permanent functions and various penalties. The primary effect of these laws has simply been for companies to shift to using other legal fictions, such as service agreements and union service contracts, to accomplish the same effect. These renamed entities operate without any response from the GOC. Resolution 321 of 2013, which allows unions to propose formalization agreements, is too weak to be effective. While the law states that that government should attempt to reach a resolution, it does not require the government do so, a major oversight that has allowed officials to ignore proposals or broker inadequate agreements without worker input.

This lack of clarity has resulted in continued use of labor intermediation as a mechanism to stifle the right to freedom of association as defined by the ILO Declaration. Colombia's statutes and regulations are not sufficient to maintain the right to freedom of association as defined by the ILO Declaration, in violation of Article 17.2.1 (a) of the TPA.

E. Failures Under Article 17.4.2

Colombia has failed to ensure that proceedings in its administrative, quasi-judicial, judicial and labor tribunals are transparent and do not entail unwarranted delays, as required by Article 17.4.2. The meaning of unwarranted is not defined in the TPA. Looking to the plain meaning of "unwarranted," in line with Article 31 of the Vienna Convention, it is defined by Merriam-Webster as "not needed by the circumstances or to accomplish an end."[203]

USO's Article 200 case has been pending since 2013. It has been transferred between multiple departments, and none have moved beyond preliminary proceedings. There is no indication of why these transfers keep occurring, or why there were long delays between transfers. In contrast, criminal proceedings brought by the company against USO leadership were swiftly taken up by government prosecutors, resulting in several union leaders being incarcerated for three months. The discrepancy between these cases underlines the continued dysfunction of the Colombian justice system with respect to handling labor rights violations, and raises troubling questions about the commitment of the Colombian government to address the situation. The delay of several years constitutes an "unwarranted" delay in violation of Article 17.4.2 (d).

In addition, the Ministry of Labor's procedures have been marked by repeated delays beyond the 30 days mandated in Colombia's Code of Administrative Procedure. In the Sintrainagro case, it took well over a year from the initial February 2012 complaint to obtain any formal response, which did not occur until mid-2013. In that time, the union filed at least two other complaints attempting to achieve redress. The union's appeal of the dismissal did not receive a response for over four months. In the case of labor intermediation, regional officials stated that the delay in addressing this issue stemmed from a years-long delay from national-level officials, who have not issued a technical ruling. Regional officials noted this technical ruling has been awaited for several years, and has also held up other cases. While it is not clear this ruling is necessary under Colombian law, in practice it has been holding up the resolution of cases for several years.

Both USO and Sintrainagro encountered a general lack of transparency in government proceedings, inconsistent with the TPA and the Colombia Code of Administrative Procedure, which made it difficult to determine the status of cases. The GOC has failed to ensure proceedings in its tribunals are transparent and not subject to unwarranted delay, as required under Article 17.4.2 of the TPA.

[203] *See* Merriam-Webster *Available at* http://www.merriam-webster.com/.

F. Failures Under Article 17.4.3(b)

Colombia has failed to ensure that final decisions on the merits of a case in its administrative, judicial and labor tribunals are made available without undue delay to parties. As discussed above, USO's Article 200 case has been pending for years without justification or explanation, and has been shuffled between various entities in a manner inconsistent with Colombian law. In the Sintrainagro case, regional Ministry of Labor officials claimed that delays resulted from the absence of a technical ruling on intermediation from the national office, which does not appear to have any clear basis in Colombian law. In USO's case regarding freedom of association before the Ministry of Labor, officials waited over a year without explanation before improperly dismissing the claim. No meaningful investigation was ever made into the use of labor intermediation, and the absence of an employment relationship was used as a pretext to ignore all other claims, including retaliation, discrimination and threats. The GOC has failed to ensure that final decisions are issued without undue delay as required under Articles 17.4.3(b) of the TPA.

III. CONCLUSION

The GOC has failed to adopt and maintain in its statutes and regulations, and practices thereunder, the rights as stated in the International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work; has failed to effectively enforce its labor laws through a sustained and recurring course of inaction and action, in a manner that affects trade and investment; and has failed to ensure that proceedings in its administrative, judicial or labor tribunals do not entail unwarranted delays and are made available without undue delay.

The Colombian government was out of compliance the day the TPA took effect, and it has not yet come into compliance. The Labor Chapter was designed to address the unfair competition and worker abuse that results from a failure to enforce fundamental labor rights. Colombia's entrenched failure to adhere to both international standards and its own domestic laws negatively impact U.S. businesses and U.S. workers, as well as taking an unconscionable toll on the working men and women of Colombia who face violence, reprisals and impunity when trying to exercise their rights.

The government of the United States should immediately conduct a thorough, wide-ranging investigation into violations of Chapter 17 in Colombia.

While the list below is not intended to be exhaustive or comprehensive, some critical steps for the GOC to come into compliance with the TPA include:

- Implement effective and time-bound investigation, monitoring, follow-up and reporting mechanisms to ensure that each complaint filed with the Ministry of Labor, Attorney General or other national authority receives a meaningful response and appropriate remedial measures. This includes ensuring that Ministry and other officials fully comply with relevant laws to resolve each case presented. Undue delay in resolving complaints and improper dismissal of meritorious cases creates a climate of impunity and encourages further violations.

- Amend Article 63 of Law 1429 of 2010 and Decree 2025 to clearly prohibit any intermediary arrangement that involves broadly defined core permanent functions and inhibits the exercise of labor rights. The language should explicitly include reference to other common forms of intermediaries, including collective pacts and *contratos sindicales*, but it must be clear that the primary focus is on the effect rather than the form the intermediary adopts. It should be clarified that the obligation of the Ministry of Labor to dissolve cooperatives also applies to other entities designed for the same purpose, and ensure that all penalties apply equally.

- Amend Article 63 of Law 1429 of 2010 and Decree 2025 to increase penalties for labor intermediation, and include oversight mechanisms to ensure that Ministry officials actively pursue and collect these fines. Employers must be subject to heavy fines to both deter and punish this exploitative behavior, and as we have learned from Article 200, the threat of criminal penalties is not effective if there is no real confidence that the laws will be enforced.

- Amend Resolution 321 of 2013 to require Colombian labor officials to broker formalization agreements between workers and employers when worker organizations draw attention to intermediation and propose a route to formalization. All agreements should cover all workers performing core, permanent functions, and the employer's failure to enter into good faith negotiations should incur fines or other penalties to ensure compliance.

- Modify Article 354 of the Labor Code so that the violation of the right of association is punished with sufficiently heavy fines, as recommended by the ILO.

- Empower, staff and fund the Attorney General to investigate and prosecute Article 200 cases in an effective and timely manner. This should include reforming the Criminal Code to list Article 200 as an offense that does not require an official complaint be filed for the Attorney General to investigate and prosecute under Article 74 of Law 906 of 2004. Regulations should clarify that these cases should always be investigated by prosecutors in the ILO subunit of the National Human Rights Unit of the Attorney General's Office, to avoid the confusion and delays currently in the process.

- Implement a labor formalization policy that ensures companies offer direct, long-term contracts with workers who provide core, permanent activities; protects workers and trade union rights to workers performing core permanent activities; and fully guarantees that employers contribute sufficient funds and workers have access to social security, healthcare and occupational health and safety protections.

- Empower, staff and fund the Ministry of Labor to direct government action in all labor matters involving workers' freedom of association and the exercise of the right to collective bargaining and strikes. Neither the anti-riot police nor other public security forces should attack workers who are non-violently exercising labor and trade union rights.

- Increase supervision of labor formalization agreements to require that workers and unions as well as labor inspectors are actively involved in their negotiation and implementation. To limit abuse of formalization agreements, the Minister of Labor should especially monitor the content and implementation of the agreements negotiated with companies that obtained a reduction or remission of a fine for illegal labor intermediation (third-party contracting).

- Reform regulations concerning the right to collective bargaining to promote sectoral-wide collective bargaining through the coordination of the different levels of negotiation, so that trade unions and employers' organizations have a greater possibility to reduce fragmented labor markets in a sector, leading to asymmetries and conflict of regulation and guarantee working conditions. Removing thematic exclusions from collective bargaining, including the ability to negotiate pension rights.

- Reform the definition of essential public services vis-à-vis the right to strike in accordance with the criteria of the supervisory bodies of the ILO.

- Through the Ministry of Labor, maintain a thorough public database tracking each complaint, response and actions by the government. This should include transparent reporting of all inspections, fines and the status of their collection.

- Through the Ministry of Labor, investigate multiple violations of labor standards raised in complaints under a single process, so that inspectors can evaluate the facts and evidence holistically, giving particular attention to anti-union violence. Likewise, when multiple complaints have been filed against a particular employer, they should be consolidated and evaluated holistically.

- Increase the number of labor inspectors, in line with international standards and OECD recommendations, and ensure they undertake preventative inspections, not just respond to complaints.

- In line with OECD recommendations, streamline the administrative process of fines collection; and issue increased penalties if companies fail to comply.

If the Government of Colombia, after consultations with the United States, does not bring its laws, regulations, practices, enforcement methods, and systems of justice into compliance with the obligations of Chapter 17 of the TPA, the U.S. should begin dispute settlement proceedings pursuant to Article 17.7.6.

Respectfully submitted,

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International Director, AFL-CIO

ANNEX

Relevant Provisions of Colombian Law

Constitution of Colombia[204]

Article 39
Los trabajadores y empleadores tienen derecho a constituir sindicatos o asociaciones, sin intervención del Estado. Su reconocimiento jurídico se producirá con la simple inscripción del acta de constitución.

La estructura interna y el funcionamiento de los sindicatos y organizaciones sociales y gremiales se sujetarán al orden legal y a los principios democráticos.

La cancelación o la suspensión de la personería jurídica sólo procede por vía judicial.

Se reconoce a los representantes sindicales el fuero y las demás garantías necesarias para el cumplimiento de su gestión.

No gozan del derecho de asociación sindical los miembros de la Fuerza Pública.

Article 53
El Congreso expedirá el estatuto del trabajo. La ley correspondiente tendrá en cuenta por lo menos los siguientes principios mínimos fundamentales:

Igualdad de oportunidades para los trabajadores; remuneración mínima vital y móvil, proporcional a la cantidad y calidad de trabajo; estabilidad en el empleo; irrenunciabilidad a los beneficios mínimos establecidos en normas laborales; facultades para transigir y conciliar sobre derechos inciertos y discutibles; situación más favorable al trabajador en caso de duda en la aplicación e interpretación de las fuentes formales de derecho; primacía de la realidad sobre formalidades establecidas por los sujetos de las relaciones laborales; garantía a la seguridad social, la capacitación, el adiestramiento y el descanso necesario; protección especial a la mujer, a la maternidad y al trabajador menor de edad.

El estado garantiza el derecho al pago oportuno y al reajuste periódico de las pensiones legales.

Los convenios internacionales del trabajo debidamente ratificados, hacen parte de la legislación interna.

La ley, los contratos, los acuerdos y convenios de trabajo, no pueden menoscabar la libertad, la dignidad humana ni los derechos de los trabajadores.

[204] http://pdba.georgetown.edu/Constitutions/Colombia/col91.html#mozTocId183721

Article 55
Se garantiza el derecho de negociación colectiva para regular las relaciones laborales, con las excepciones que señale la ley. Es deber del Estado promover la concertación y los demás medios para la solución pacífica de los conflictos colectivos de trabajo.

Article 86
Toda persona tendrá acción de tutela para reclamar ante los jueces, en todo momento y lugar, mediante un procedimiento preferente y sumario, por sí misma o por quien actúe a su nombre, la protección inmediata de sus derechos constitucionales fundamentales, cuando quiera que éstos resulten vulnerados o amenazados por la acción o la omisión de cualquier autoridad pública.

La protección consistirá en una orden para que aquel respecto de quien se solicita la tutela, actúe o se abstenga de hacerlo. El fallo, que será de inmediato cumplimiento, podrá impugnarse ante el juez competente y, en todo caso, éste lo remitirá a la Corte Constitucional para su eventual revisión.

Esta acción solo procederá cuando el afectado no disponga de otro medio de defensa judicial, salvo que aquella se utilice como mecanismo transitorio para evitar un perjuicio irremediable.

En ningún caso podrán transcurrir más de diez días entre la solicitud de tutela y su resolución.

La ley establecerá los casos en los que la acción de tutela procede contra particulares encargados de la prestación de un servicio público o cuya conducta afecte grave y directamente el interés colectivo, o respecto de quienes el solicitante se halle en estado de subordinación o indefensión.

Article 93
Los tratados y convenios internacionales ratificados por el Congreso, que reconocen los derechos humanos y que prohíben su limitación en los estados de excepción, prevalecen en el orden interno. Los derechos y deberes consagrados en esta Carta, se interpretarán de conformidad con los tratados internacionales sobre derechos humanos ratificados por Colombia.

El Estado Colombiano puede reconocer la jurisdicción de la Corte Penal Internacional en los términos previstos en el Estatuto de Roma adoptado el 17 de julio de 1998 por la Conferencia de Plenipotenciarios de las Naciones Unidas y, consecuentemente, ratificar este tratado de conformidad con el procedimiento establecido en esta Constitución. La admisión de un tratamiento diferente en materias sustanciales por parte del Estatuto de Roma con respecto a las garantías contenidas en la Constitución tendrá efectos exclusivamente dentro del ámbito de la materia regulada en él.

Colombian Labor Code[205]

Article 17

[205] http://www.secretariasenado.gov.co/senado/basedoc/codigo_sustantivo_trabajo.html

La vigilancia del cumplimiento de las disposiciones sociales está encomendada a las autoridades administrativas del Trabajo.

Article 59
Se prohibe a los empleadores:

1. Deducir, retener o compensar suma alguna del monto de los salarios y prestaciones en dinero que corresponda a los trabajadores, sin autorización previa escrita de éstos para cada caso, o sin mandamiento judicial, con excepción de los siguientes:

a) Respeto de salarios, pueden hacerse deducciones, retenciones o compensaciones en los casos autorizados por los artículos 113, 150, 151, 152 y 400.

b) Las cooperativas pueden ordenar retenciones hasta de un cincuenta por ciento (50%) de salarios y prestaciones, para cubrir sus créditos, en la forma y en los casos en que la ley las autorice.

c) <Literal INEXEQUIBLE>

2. Obligar en cualquier forma a los trabajadores a comprar mercancías o víveres en almacenes o proveedurías que establezca el {empleador}.

3. Exigir o aceptar dinero del trabajador como gratificación para que se le admita en el trabajo o por otro motivo cualquiera que se refiera a las condiciones de éste.

4. Limitar o presionar en cualquier forma a los trabajadores en el ejercicio de su derecho de asociación.

5. Imponer a los trabajadores obligaciones de carácter religioso o político, o dificultarles o impedirles el ejercicio del derecho del sufragio.

6. Hacer, autorizar, o tolerar propaganda política en los sitios de trabajo.

7. Hacer o permitir todo género de rifas, colectas o suscripciones en los mismos sitios.

8. Emplear en las certificaciones de que trata el ordinal 7o. del artículo 57 signos convencionales que tiendan a perjudicar a los interesados, o adoptar el sistema de "lista negra", cualquiera que sea la modalidad que utilicen, para que no se ocupe en otras empresas a los trabajadores que se separen o sean separados del servicio.

9. Ejecutar o autorizar cualquier acto que vulnere o restrinja los derechos de los trabajadores o que ofenda su dignidad.

Article 353

1. De acuerdo con el artículo 39 de la Constitución Política los empleadores y los trabajadores tienen el derecho de asociarse libremente en defensa de sus intereses, formando asociaciones profesionales o sindicatos; estos poseen el derecho de unirse o federarse entre sí.

2. Las asociaciones profesionales o sindicatos deben ajustarse en el ejercicio de sus derechos y cumplimiento de sus deberes, a las normas de este título y están sometidos a la inspección y vigilancia del Gobierno, en cuanto concierne al orden público.

Los trabajadores y empleadores, sin autorización previa, tienen el derecho de constituir las organizaciones que estimen convenientes, así como el de afiliarse a éstas con la sola condición de observar los estatutos de las mismas.

Article 354
1. En los términos del artículo 292 del Código Penal queda prohibido a toda persona atentar contra el derecho de asociación sindical.

2. Toda persona que atente en cualquier forma contra el derecho de asociación sindical será castigada cada vez con una multa equivalente al monto de cinco (5) a cien (100) veces el salario mínimo mensual más alto vigente, que le será impuesta por el respectivo funcionario administrativo del trabajo. Sin perjuicio de las sanciones penales a que haya lugar.

Considéranse como actos atentatorios contra el derecho de asociación sindical, por parte del empleador:

a) Obstruir o dificultar la afiliación de su personal a una organización sindical de las protegidas por la ley, mediante dádivas o promesas, o condicionar a esa circunstancia la obtención o conservación del empleo o el reconocimiento de mejoras o beneficios;

b) Despedir, suspender o modificar las condiciones de trabajo de los trabajadores en razón de sus actividades encaminadas a la fundación de las organizaciones sindicales;

c) Negarse a negociar con las organizaciones sindicales que hubieren presentado sus peticiones de acuerdo con los procedimientos legales;

d) Despedir, suspender o modificar las condiciones de trabajo de su personal sindicalizado, con el objeto de impedir o difundir el ejercicio del derecho de asociación, y

e) Adoptar medidas de represión contra los trabajadores por haber acusado, testimoniado o intervenido en las investigaciones administrativas tendientes a comprobar la violación de esta norma.

Article 433
1. El empleador o la representante, están en la obligación de recibir a los delegados de los trabajadores dentro de las veinticuatro horas siguientes a la presentación oportuna del pliego de peticiones para iniciar conversaciones. Si la persona a quién se presentare el pliego considerare que no está autorizada para resolver sobre él debe hacerse autorizar o dar traslado al

{empleador} dentro de las veinticuatro horas siguientes a la presentación del pliego, avisándolo así a los trabajadores. En todo caso, la iniciación de las conversaciones en la etapa de arreglo directo no puede diferirse por más de cinco (5) días hábiles a partir de la presentación del pliego.

2. El empleador que se niegue o eluda iniciar las conversaciones de arreglo directo dentro del término señalado será sancionado por las autoridades del trabajo con multas equivalentes al monto de cinco (5) a diez (10) veces el salario mínimo mensual más alto por cada día de mora, a favor del Servicio Nacional de Aprendizaje SENA. Para interponer los recursos legales contra las resoluciones de multa, el interesado deberá consignar previamente su valor a órdenes de dicho establecimiento.

Article 444
Concluida la etapa de arreglo directo sin que las partes hubieren logrado un acuerdo total sobre el diferendo laboral, los trabajadores podrán optar por la declaratoria de huelga o por someter sus diferencias a la decisión de un Tribunal de Arbitramento.

La huelga o la solicitud de arbitramento serán decididas dentro de los diez (10) días hábiles siguientes a la terminación de la etapa de arreglo directo, mediante votación secreta, personal e indelegable, por la mayoría absoluta de los trabajadores de la empresa, o de la asamblea general de los afiliados al sindicato o sindicatos que agrupen más de la mitad de aquellos trabajadores.

Para este efecto, si los afiliados al sindicato o sindicatos mayoritarios o los demás trabajadores de la empresa, laboran en más de un municipio, se celebrarán asambleas en cada uno de ellos, en las cuales se ejercerá la votación en la forma prevista en este artículo y, el resultado final de ésta lo constituirá la sumatoria de los votos emitidos en cada una de las asambleas.

Antes de celebrarse la asamblea o asambleas, las organizaciones sindicales interesadas o los trabajadores, podrán dar aviso a las autoridades del trabajo sobre la celebración de las mismas, con el único fin de que puedan presenciar y comprobar la votación.

Article 445
1. La cesación colectiva del trabajo, cuando los trabajadores optaren por la huelga, sólo podrá efectuarse transcurridos dos (2) días hábiles a su declaración y no más de diez (10) días hábiles después.

2. Durante el desarrollo de la huelga, la mayoría de los trabajadores de la empresa o la asamblea general del sindicato o sindicatos que agrupen más de la mitad de aquellos trabajadores, podrán determinar someter el diferendo a la decisión de un Tribunal de Arbitramento.

3. Dentro del término señalado en este artículo las partes si así lo acordaren, podrán adelantar negociaciones directamente o con la intervención del Ministerio de Trabajo y

Article 448
1. Durante el desarrollo de la huelga, las autoridades policivas tienen a su cargo la vigilancia del curso pacífico del movimiento y ejercerán de modo permanente la acción que les corresponda, a fin de evitar que los huelguistas, los empleadores, o cualesquiera personas en conexión con ellos

excedan las finalidades jurídicas de la huelga, o intenten aprovecharla para promover desórdenes o cometer infracciones o delitos.

2. Mientras la mayoría de los trabajadores de la empresa persista en la huelga, las autoridades garantizarán el ejercicio de este derecho y no autorizarán ni patrocinarán el ingreso al trabajo de grupos minoritarios de trabajadores aunque estos manifiesten su deseo de hacerlo.

3. Declarada la huelga, el sindicato o sindicatos que agrupen la mayoría de los trabajadores de la empresa o, en defecto de estos, de los trabajadores en asamblea general, podrán someter a votación la totalidad de los trabajadores de la empresa, si desean o no, sujetar las diferencias persistentes a fallo arbitral. Si la mayoría absoluta de ellos optare por el tribunal, no se suspenderá el trabajo o se reanudará dentro de un término máximo de tres (3) días hábiles de hallarse suspendido.

4. Cuando una huelga se prolongue por sesenta (60) días calendario, sin que las partes encuentren fórmula de solución al conflicto que dio origen a la misma, el empleador y los trabajadores durante los tres (3) días hábiles siguientes, podrán convenir cualquier mecanismo de composición, conciliación o arbitraje para poner término a las diferencias.

Si en este lapso las partes no pudieren convenir un arreglo o establecer un mecanismo alternativo de composición para la solución del conflicto que les distancia, de oficio o a petición de parte, intervendrá una subcomisión de la Comisión de Concertación de Políticas Salariales y Laborales, al tenor de lo dispuesto en el artículo 9o de la Ley 278 de 1996.

<Sobre el texto en letra itálica ver las Notas del Editor en que se destaca el condicionamiento de exequibilidad de la modificación introducida por el Numeral 4o. del Artículo 63 de la Ley 50 de 1990> Esta subcomisión ejercerá sus buenos oficios durante un término máximo de cinco (5) días hábiles contados a partir del día hábil siguiente al vencimiento del término de los tres (3) días hábiles de que trate este artículo. Dicho término será perentorio y correrá aún cuando la comisión no intervenga. Si vencidos los cinco (5) días hábiles no es posible llegar a una solución definitiva, ambas partes solicitarán al Ministerio de la Protección Social la convocatoria del tribunal de arbitramento. Efectuada la convocatoria del Tribunal de Arbitramento los trabajadores tendrán la obligación de reanudar el trabajo dentro de un término máximo de tres (3) días hábiles.

Sin perjuicio de lo anterior la comisión permanente de concertación de políticas salariales y laborales, podrá ejercer la función indicada en el artículo 9o de la Ley 278 de 1996.

PARÁGRAFO 1o. La Comisión Nacional de Concertación de Políticas Laborales y Salariales designará tres (3) de sus miembros (uno del Gobierno, uno de los trabajadores y uno de los empleadores) quienes integrarán la subcomisión encargada de intervenir para facilitar la solución de los conflictos laborales. La labor de estas personas será ad honorem.

PARÁGRAFO 2o. <Parágrafo INEXEQUIBLE>

Article 485

La vigilancia y el control del cumplimiento de las normas de éste Código y demás disposiciones sociales se ejercerán por el Ministerio del Trabajo en la forma como el Gobierno, o el mismo Ministerio, lo determinen.

Article 486

1. Los funcionarios del Ministerio de Trabajo podrán hacer comparecer a sus respectivos despachos a los empleadores, para exigirles las informaciones pertinentes a su misión, la exhibición de libros, registros, planillas y demás documentos, la obtención de copias o extractos de los mismos. Así mismo, podrán entrar sin previo aviso, y en cualquier momento mediante su identificación como tales, en toda empresa con el mismo fin y ordenar las medidas preventivas que consideren necesarias, asesorándose de peritos como lo crean conveniente para impedir que se violen las disposiciones relativas a las condiciones de trabajo y a la protección de los trabajadores en el ejercicio de su profesión y del derecho de libre asociación sindical. Tales medidas tendrán aplicación inmediata sin perjuicio de los recursos y acciones legales consignadas en ellos. Dichos funcionarios no quedan facultados, sin embargo, para declarar derechos individuales ni definir controversias cuya decisión esté atribuida a los jueces, aunque sí para actuar en esos casos como conciliadores.

Los funcionarios del Ministerio del Trabajo y Seguridad Social tendrán las mismas facultades previstas en el presente numeral respecto de trabajadores, directivos o afiliados a las organizaciones sindicales, siempre y cuando medie solicitud de parte del sindicato y/o de las organizaciones de segundo y tercer grado a las cuales se encuentra afiliada la organización sindical.

2. Los funcionarios del Ministerio del Trabajo y Seguridad Social que indique el Gobierno, tendrán el carácter de autoridades de policía para lo relacionado con la vigilancia y control de que trata el numeral anterior y están facultados para imponer cada vez multas equivalentes al monto de uno (1) a cinco mil (5.000) veces el salario mínimo mensual vigente según la gravedad de la infracción y mientras esta subsista, sin perjuicio de las demás sanciones contempladas en la normatividad vigente. Esta multa se destinará al Servicio Nacional de Aprendizaje, SENA.

La imposición de multas, de otras sanciones o de otras medidas propias de su función como autoridades de policía laboral por parte de los funcionarios del Ministerio del Trabajo que cumplan funciones de inspección, vigilancia y control, no implican en ningún caso, la declaratoria de derechos individuales o definición de controversias.

3. Las resoluciones de multas que impongan los funcionarios del Ministerio del Trabajo prestarán mérito ejecutivo. De estas ejecuciones conocerán los jueces del trabajo conforme al procedimiento especial de que trata el capítulo 16 del Código de Procedimiento del Trabajo.

Colombian Penal Code[206]

Article 200

[206] http://www.cepal.org/oig/noticias/noticias/5/50515/2000_Codigopenal_Colombia.pdf

El que impida o perturbe una reunión lícita o el ejercicio de los derechos que conceden las leyes laborales o tome represalias con motivo de huelga, reunión o asociación legítimas, incurrirá en pena de prisión de uno (1) a dos (2) años y multa de cien (100) a trescientos (300) salarios mínimos legales mensuales vigentes.
En la misma pena incurrirá el que celebre pactos colectivos en los que, en su conjunto, se otorguen mejores condiciones a los trabajadores no sindicalizados, respecto de aquellas condiciones convenidas en convenciones colectivas con los trabajadores sindicalizados de una misma empresa. La pena de prisión será de tres (3) a cinco (5) años y multa de trescientos (300) a quinientos (500) salarios mínimos legales mensuales vigentes si la conducta descrita en el inciso primero se cometiere:

1. Colocando al empleado en situación de indefensión o que ponga en peligro su integridad personal.

2. La conducta se cometa en persona discapacitada, que padezca enfermedad grave o sobre mujer embarazada.

3. Mediante la amenaza de causar la muerte, lesiones personales, daño en bien ajeno o al trabajador o a sus ascendientes, descendientes, cónyuge, compañero o compañera permanente, hermano, adoptante o adoptivo, o pariente hasta el segundo grado de afinidad.

4. Mediante engaño sobre el trabajador.

Law 1429 of 2010[207]

Article 63
El personal requerido en toda institución y/o empresa pública y/o privada para el desarrollo de las actividades misionales permanentes no podrá estar vinculado a través de Cooperativas de Servicio de Trabajo Asociado que hagan intermediación laboral o bajo ninguna otra modalidad de vinculación que afecte los derechos constitucionales, legales y prestacionales consagrados en las normas laborales vigentes.

Sin perjuicio de los derechos mínimos irrenunciables previstos en el artículo tercero de la Ley 1233 de 2008, las Precooperativas y Cooperativas de Trabajo Asociado, cuando en casos excepcionales previstos por la ley tengan trabajadores, retribuirán a estos y a los trabajadores asociados por las labores realizadas, de conformidad con lo establecido en el Código Sustantivo del Trabajo.

El Ministerio de la Protección Social a través de las Direcciones Territoriales, impondrá multas hasta de cinco mil (5.000) salarios mínimos legales mensuales vigentes, a las instituciones públicas y/o empresas privadas que no cumplan con las disposiciones descritas. Serán objeto de disolución y liquidación las Precooperativas y Cooperativas que incurran en falta al incumplir lo establecido en la presente ley. El Servidor Público que contrate con Cooperativas de Trabajo

[207] http://www.supersociedades.gov.co/Web/Leyes/LEY%201429%20DE%202010.html

Asociado que hagan intermediación laboral para el desarrollo de actividades misionales permanentes incurrirá en falta grave.

Decree 2025 of 2011[208]

Artículo 1
Para los efectos de los incisos 1° y 3° del artículo 63 de la Ley 1429 de 2010, cuando se hace mención a intermediación laboral, se entenderá como el envío de trabajadores en misión para prestar servicios a empresas o instituciones.

Esta actividad es propia de las empresas de servicios temporales según el artículo 71 de la Ley 50 de 1990 y el Decreto 4369 de 2006. Por lo tanto esta actividad no está permitida a las cooperativas y precooperativas de trabajo asociado.

Para los mismos efectos, se entiende por actividad misional permanente aquellas actividades o funciones directamente relacionadas con la producción del bien o servicios característicos de la empresa.

Para los efectos del presente decreto, cuando se hace mención al tercero contratante o al tercero que contrate, se entenderá como la institución y/o empresa pública y/o privada usuaria final que contrata a personal directa o indirectamente para la prestación de servicios.

De igual manera, cuando se hace mención a la contratación, se entenderá como la contratación directa o indirecta.

Parágrafo. En el caso de las sociedades por acciones simplificadas -SAS-, enunciadas en el artículo 3° de la Ley 1258 de 2008, actividad permanente será cualquiera que esta desarrolle.

Artículo 2
A partir de la entrada en vigencia del artículo 63 de la Ley 1429 de 2010, las instituciones o empresas públicas y/o privadas no podrán contratar procesos o actividades misionales permanentes con Cooperativas o Precooperativas de Trabajo Asociado.

Artículo 4
Cuando se establezca que una Cooperativa o Precooperativa de Trabajo Asociado ha incurrido en intermediación laboral, o en una o más de las conductas descritas en el artículo anterior, se impondrán sanciones consistentes en multas hasta de cinco mil (5.000) smlmv, a través de las Direcciones Territoriales del Ministerio de la Protección Social, de conformidad con lo previsto en el artículo 63 de la Ley 1429 de 2010. Entrará a regir una vez sea sancionada y promulgada la Ley del Plan de Desarrollo Económico 2010-2014 "Prosperidad para Todos".

[208] http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=43032

Además de las sanciones anteriores, las cooperativas o precooperativas de trabajo asociado que incurran en estas prácticas quedarán incursas en causal de disolución y liquidación. La Superintendencia de la Economía Solidaria y las demás Superintendencias, para el caso de las cooperativas especializadas, cancelarán la personería jurídica.

Al tercero que contrate con una Cooperativa o Precooperativa de Trabajo Asociado que incurra en intermediación laboral o que esté involucrado en una o más de las conductas descritas en el artículo anterior o que contrate procesos o actividades misionales permanentes, se le impondrá una multa hasta de cinco mil (5.000) smlmv, a través de las Direcciones Territoriales del Ministerio de la Protección Social. Lo anterior, sin perjuicio de lo señalado en el numeral 4 del artículo 7° de la Ley 1233 de 2008, con base en el cual el inspector de trabajo reconocerá el contrato de trabajo realidad entre el tercero contratante y los trabajadores.

Ningún trabajador podrá contratarse sin los derechos y las garantías laborales establecidas en la Constitución Política y en la Ley, incluidos los trabajadores asociados a las (Sic) la Ley 149 de 2010.

Cooperativas y Precooperativas de Trabajo Asociado. Si adelantada la correspondiente investigación, el inspector de Trabajo, en ejercicio de sus competencias administrativas, concluye que el tercero contrató con una cooperativa o precooperativa de trabajo asociado incurriendo en intermediación laboral o que concurren cualquiera de los otros presupuestos de hecho y de derecho para que se configure un contrato de trabajo realidad, así deberá advertirlo, sin perjuicio de las sanciones establecidas en el inciso anterior, y de las facultades judiciales propias de la jurisdicción ordinaria laboral.

Resolution 321 of 2013[209]

Article 2
Las condiciones y requisitos para la realización de los Acuerdos de Formalización Laboral son:

1. Deben ser impulsados por el Director Territorial, de oficio o a petición del empleador, las organizaciones sindicales que hagan presencia en la empresa o los trabajadores.

2. El modelo de formalización laboral a implementarse en la empresa o entidad, deberá ser socializado previamente por parte del empleador con los trabajadores a formalizar, de lo cual se dejará evidencia que hará parte integral del respectivo Acuerdo de Formalización Laboral.

3. El documento constará por escrito y debe ser firmado por el Director Territorial y uno o varios empleadores con la debida representación legal.

4. La suscripción del Acuerdo de Formalización debe contar con el visto bueno previo del Despacho del Viceministro de Relaciones Laborales e Inspección.

[209] http://www.icbf.gov.co/cargues/avance/docs/resolucion_mtra_0321_2013.htm

5. Deben contener compromisos concretos en términos de acciones precisas y evaluables, cuyo cumplimiento se pueda constatar mediante la simple verificación de la Dirección Territorial respectiva, de la Dirección de Inspección, Vigilancia, Control y Gestión Territorial o del Despacho del Viceministro de Relaciones Laborales e Inspección.

6. Deben contener términos razonables y exactos de tiempo para su cumplimiento y verificación.

7. Se pueden celebrar durante el trámite de una actuación administrativa sancionatoria o en forma previa o posterior a la misma.

8. El documento contentivo del Acuerdo de Formalización Laboral establecerá como mínimo:

a) La relación completa de los trabajadores que serán contratados bajo el amparo del Acuerdo de Formalización Laboral y que se encuentran vinculados a las actividades de la empresa mediante formas que afecten los derechos constitucionales, legales y prestacionales consagrados en las normas laborales vigentes;

b) Indicación de la forma y duración de los contratos laborales a celebrarse;

c) Fecha de contratación de los trabajadores a formalizar;

d) Compromiso de no incurrir en las conductas prohibidas por la Ley 1429 de 2010 y los decretos que la reglamenten;

e) El compromiso de constituir pólizas y/o garantías eficaces para el cumplimiento de la obligación de pago de salarios, prestaciones e indemnizaciones a favor de los trabajadores de conformidad con la ley;

f) El compromiso de no vincular trabajadores para el desarrollo de actividades misionales permanentes a través de Cooperativas, Precooperativas de Trabajo Asociado u otra forma de tercerización laboral prohibida por las normas laborales o violatoria de los derechos de los trabajadores;

g) La manifestación expresa de que el no cumplimiento por parte del empleador de cualquiera de los compromisos establecidos en el Acuerdo de Formalización, dará lugar, de oficio o a petición de cualquier particular que evidencie tal situación, a la aplicación del procedimiento administrativo sancionatorio previsto en la Ley 1437 de 2011, y demás normas que regulan la materia, de conformidad con lo dispuesto en el parágrafo del artículo 16 de la Ley 1610 de 2013.