

UNITED STATES-COLOMBIA TRADE PROMOTION AGREEMENT

PUBLIC REPORT OF REVIEW OF
U.S. SUBMISSION 2016-02 (COLOMBIA)



OFFICE OF TRADE AND LABOR AFFAIRS
BUREAU OF INTERNATIONAL LABOR AFFAIRS
U.S. DEPARTMENT OF LABOR

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**PUBLIC REPORT OF REVIEW OF
U. S. SUBMISSION 2016-02 (COLOMBIA)**

Executive Summary

Purpose of the Report

This report responds to U.S. Submission 2016-02 (Colombia), filed with the Office of Trade and Labor Affairs (OTLA) of the U.S. Department of Labor's Bureau of International Labor Affairs on May 16, 2016, by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and five Colombian workers' organizations pursuant to Article 17.5 of the United States-Colombia Trade Promotion Agreement (CTPA). The Submission alleges violations of the Labor Chapter of the CTPA, which entered into force on May 15, 2012. On July 15, 2016, the OTLA accepted the Submission for review, after having considered the factors articulated in the OTLA's Procedural Guidelines. Under the Procedural Guidelines, the OTLA shall issue a public report within 180 days of the acceptance of a submission for review, unless circumstances as determined by the OTLA require an extension of time.

The OTLA conducted its review to gather information about and publicly report on the issues raised by the Submission. During the review period, the OTLA consulted with the Office of the U.S. Trade Representative (USTR) and the U.S. Department of State (State Department).

Summary of the Allegations Presented in U.S. Submission 2016-02 (Colombia)

U.S. Submission 2016-02 (Colombia) alleges that the Government of Colombia (GOC) has failed to effectively enforce its labor laws related to the rights to freedom of association and collective bargaining; has failed to adopt and maintain in its statutes, regulations, and practices, the fundamental rights to freedom of association and collective bargaining; and has failed to comply with the procedural guarantees enumerated in the labor chapter. It provides two illustrative case studies from the petroleum and sugar sectors.

Findings

Labor Law Inspection and Enforcement

The OTLA's review identified significant steps that the Ministry of Labor (MOL) has taken to strengthen its labor law inspection system as well as challenges to the MOL's capacity to conduct inspections in rural areas, train and retain qualified staff, and effectively use its limited resources. The OTLA also identified shortcomings related to the capacity of the Labor Inspectorate, the inspection process, and the collection of fines. As a result, the OTLA has significant concerns about the system in place to protect the rights to freedom of association and collective bargaining in Colombia.

Specifically, the OTLA has concerns about (1) the lack of capacity of the Labor Inspectorate, in particular with regard to inspectors' difficulty traveling to rural areas, high staff turnover, lack of a consistent national strategy, and failure to implement a national case management system; (2) delays in the MOL's inspection process; and (3) delays and lack of systematic collection of

certain fines related to the rights to freedom of association and collective bargaining. The OTLA's review also raised questions regarding the imposition and application of fines. These issues adversely affect the GOC's enforcement of labor laws related to the rights to freedom of association and collective bargaining.

Subcontracting

The OTLA's review of the Submission included an examination of subcontracting regimes, including the declining use of associated work cooperatives (CTAs) and the rise of union contracts and simplified stock companies (SASs)). The review also examined the GOC's efforts to combat abusive subcontracting that can undermine workers' rights, including efforts to apply Article 63 of Law 1429 of 2010, the negotiation of formalization agreements for the hiring of workers in unlawful subcontracting relationships, and the adoption and implementation of new decrees further regulating the use of subcontracting. Despite the significant steps the GOC has taken to combat abusive subcontracting, the OTLA has significant concerns that the MOL is not taking sufficient action to implement the new decrees or to otherwise enforce prohibitions on abusive subcontracting that may undermine the rights to freedom of association and collective bargaining.

Collective Pacts

The review also included an examination of collective pacts that undermine workers' rights. The OTLA recognizes the efforts of the MOL to prioritize and investigate the unlawful use of collective pacts. Nevertheless, the OTLA found that collective pacts in Colombia have sometimes been used to undermine the rights to freedom of association and collective bargaining and has ongoing concerns regarding the GOC's enforcement of the Labor Code's prohibition against such practices.

Lack of Prosecutions in Cases of Threats and Violence against Unionists

The review included an examination of cases of threats and violence against unionists. The OTLA found that although Colombian law prohibits anti-union threats and violence and although union-related homicides have declined since 2011, in practice, the system in place in Colombia to investigate and prosecute cases of anti-union threats and violence faces serious structural challenges.

The history of and continued high rate of impunity in cases of threats and violence against unionists undermines the right to freedom of association and raises concerns about the adequacy of investigation and prosecution for violence against trade unionists in Colombia.

Enforcement of Criminal Code Article 200

The review included an examination of the enforcement of Criminal Code Article 200, which provides fines and jail time for employers who undermine the rights to freedom of association and collective bargaining. Currently, there is a significant backlog of Article 200 cases, which could take years to address. Additionally, the OTLA found no evidence of any convictions under Article 200, although 82 cases have been successfully conciliated. As a result, the OTLA has ongoing concerns about the GOC's enforcement of Article 200.

Recommendations and Next Steps

The OTLA will continue to monitor the issues raised by the Submission, including any progress that the GOC may make with respect to addressing the concerns identified in this report. The OTLA offers the following recommendations to the GOC to help guide subsequent engagement between the U.S. government and the GOC aimed at addressing such concerns:

1. Improve the labor law inspection system to ensure inspections comply with legal procedures and timelines and are carried out in accordance with a national inspection strategy targeting at-risk sectors;
2. Improve fine application and collection to ensure that employers who violate labor laws are sanctioned and that fines are collected in a timely manner;
3. Take additional effective measures to combat abusive subcontracting and collective pacts, including improving application of existing laws and adopting and implementing new legal instruments where necessary; and
4. Improve the investigation and prosecution of cases of violence and threats against unionists, prioritizing recent cases, and ensure the swift resolution of cases under Criminal Code Article 200.

The OTLA recommends to the Secretary of Labor that the U.S. government initiate consultations through the contact points designated in the CTPA Labor Chapter under Article 17.5. The OTLA, in coordination with USTR and the State Department, will meet with the GOC as soon as possible to begin contact point consultations to discuss the questions and concerns identified in this review and determine the next steps for implementing the above recommendations, or similar measures; the OTLA will seek the input of relevant civil society stakeholders regarding the contact point consultations.

The OTLA, in consultation with USTR and the State Department, will use progress towards implementing these recommendations, or similar measures, to determine appropriate next steps in engagement with the GOC and will assess any such progress by the GOC within nine months and thereafter, as appropriate.

Table of Contents

Executive Summary	i
Findings	i
I. Introduction	1
II. Engagement under the Labor Action Plan	3
III. Analysis of Colombian Labor Law and Practice	4
A. Labor Law Inspection and Enforcement System.....	5
i. The Rights to Freedom of Association and Collective Bargaining in Colombia	5
ii. Overview of the Labor Inspectorate	6
iii. Inspection Procedures	9
iv. The Imposition and Application of Fines	13
v. Fine Collection.....	15
B. Topic-Specific Enforcement Issues	17
i. Subcontracting	17
ii. Collective Pacts.....	26
C. Lack of Prosecutions in Cases of Threats and Violence against Unionists.....	28
D. Enforcement of Criminal Code Article 200	32
IV. Findings	33
V. Recommendations and Next Steps.....	34

I. Introduction

The United States-Colombia Trade Promotion Agreement (CTPA) entered into force on May 15, 2012.¹ The CTPA Labor Chapter (Chapter 17) states that each Party shall designate an office within its labor ministry or equivalent entity to serve as a contact point with the other Party and with the public.² For the United States, the U.S. Department of Labor (USDOL)'s Office of Trade and Labor Affairs (OTLA) was designated as this contact point in a *Federal Register* notice published on December 21, 2006.³ Under the CTPA Labor Chapter, each Party's contact point provides for the submission, receipt, and consideration of communications from persons of a Party on matters related to the Chapter and reviews such communications in accordance with domestic procedures.⁴ The same *Federal Register* notice that designated the OTLA as contact point also set out the Procedural Guidelines that the OTLA follows for the receipt and review of public submissions.⁵

On May 16, 2016, the OTLA received a public submission under the CTPA Labor Chapter from the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and five Colombian workers' organizations.⁶ U.S. Submission 2016-02 (Colombia) ("the Submission") alleges that the Government of Colombia (GOC) has failed to fulfill its obligations under the Labor Chapter of the CTPA, particularly by: failing to adopt and maintain in Colombian labor laws and practices the rights as stated in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)*; waiving or derogating from Colombian labor laws; failing to effectively enforce Colombian labor laws; and failing to ensure access to and transparency of administrative, judicial, or labor tribunals. The Submission provides information on two specific cases, one in the petroleum sector and one in the sugar sector.

Article 17.2.1 of the CTPA states in part that "[e]ach party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)* (ILO Declaration): (a) freedom of association; [and] (b) the effective recognition of the right to collective bargaining"⁷ Article 17.2.2 of the CTPA requires that "[n]either party shall waive or otherwise derogate from . . . its statutes or regulations implementing [Article 17.2.1] in a manner affecting trade or investment between the Parties."⁸ Article 17.3.1(a) of the CTPA states that "[a] Party shall not fail 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

¹ Office of the United States Trade Representative [hereinafter "USTR"], United States-Colombia Trade Promotion Agreement, available at <https://ustr.gov/trade-agreements/free-trade-agreements/colombia-tpa>.

² United States-Colombia Trade Promotion Agreement [hereinafter "CTPA"], Article 17.5.5.

³ 71 Fed. Reg. 76691 (Dec. 21, 2006), <http://www.dol.gov/ilab/programs/otla/2006021837.pdf>.

⁴ CTPA, Articles 17.5.5(c) and 17.5.6.

⁵ 71 Fed. Reg. 76691 (Dec. 21, 2006).

⁶ American Federation of Labor and Congress of Industrial Organizations [hereinafter "AFL-CIO"] and five Colombian workers' organizations, Public Submission to the Office of Trade and Labor Affairs (OTLA) under Chapters 17 (Labor) and 21 (Dispute Settlement) of the Colombia-United States Trade Promotion Agreement, May 16, 2016,

<https://www.dol.gov/sites/default/files/documents/ilab/Colombia%20Final%20Word%20version%20%2800000002%29.pdf> [hereinafter "U.S. Submission 2016-02 (Colombia)"].

⁷ CTPA, Article 17.2.1.

⁸ *Ibid.* at Article 17.2.2.

affecting trade or investment between the Parties, after the date of entry into force of this Agreement.”⁹ Article 17.4.2 of the CTPA states that “[e]ach party shall ensure that proceedings before [administrative, quasi-judicial, judicial, or labor] tribunals for the enforcement of its labor laws are fair, equitable, and transparent and, to this end, each Party shall ensure that: . . . (d) such proceedings do not entail unreasonable charges, or time limits, or unwarranted delays.”¹⁰ Article 17.4.3(b) states that “[e]ach Party shall provide that final decisions on the merits of the case in . . . proceedings [before administrative, quasi-judicial, judicial, or labor tribunals] are: . . . (b) made available without undue delay to the parties to the proceedings and, consistent with its law, to the public”¹¹ Article 17.8 defines “labor laws” as “a Party’s statutes and regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights: (a) freedom of association; [and] (b) the effective recognition of the right to collective bargaining”¹²

On July 15, 2016, the OTLA accepted for review U.S. Submission 2016-02 (Colombia) after having considered the factors articulated in the Procedural Guidelines.¹³ Under the OTLA Procedural Guidelines, the OTLA shall issue a public report within 180 days of the acceptance of a submission for review, unless circumstances as determined by the OTLA require an extension of time.¹⁴

The OTLA conducted its review from July 2016 to January 2017 to gather information about and publicly report on the issues raised by the Submission. The OTLA relied upon information gathered between July and January, but also on information that has been collected through years of engagement between the U.S. government (USG) and Colombia, including information gathered by the USDOL’s labor attaché, who was in place at the U.S. Embassy in Bogota from April 2015 to November 2016.

Throughout the review process, the OTLA consulted with the Office of the U.S. Trade Representative (USTR) and the Department of State (State Department). The OTLA carefully reviewed information provided by the submitters, the GOC, and others with direct knowledge of the relevant issues.

This report begins with a summary of the USG’s engagement with the GOC on labor issues both preceding and following the CTPA’s entry into force to provide context and background (Section II). Section III presents an analysis of the Colombian labor law inspection and enforcement system as it relates to allegations contained in the Submission, specifically Colombia’s alleged failure to effectively enforce laws related to the rights to freedom of association and collective bargaining, and to adopt and maintain those rights in law and practice. It starts with a brief description of legal protections for the rights to freedom of association and collective bargaining, and the exercise of those rights in Colombia. It then provides an overview of the Labor Inspectorate and an examination of Colombia’s labor inspection and enforcement system,

⁹ CTPA at Article 17.3.1(a).

¹⁰ *Ibid.* at Article 17.4.2.

¹¹ *Ibid.* at Article 17.4.3(b).

¹² *Ibid.* at Article 17.8.

¹³ The decision to accept the Submission was published in a Federal Register notice on July 18, 2016. 81 Fed. Reg. 46713 (July 18, 2016).

¹⁴ 71 Fed. Reg. 76691 (Dec. 21, 2006).

including administrative labor inspection and investigation procedures, the application of fines under Colombian law, and fine collection. Subsequently, the Section analyzes allegations of failures of effective enforcement pertaining to two specific issues: abusive subcontracting and the misuse of collective pacts. Section III ends with a review of the allegations pertaining to a lack of prosecutions in cases of threats and violence against unionists and the challenges to enforcement of Colombian Criminal Code Article 200, which establishes criminal sanctions against employers who undermine workers' the rights to freedom of association and collective bargaining. The report's findings are followed by recommendations for the GOC and next steps for the USG in Sections IV - V.

II. Engagement under the Labor Action Plan

In the context of congressional consideration of the CTPA, the Obama Administration negotiated with the GOC an action plan to address long-standing labor issues that previously had seemed intractable. In April 2011, the two countries launched the Colombian Action Plan Related to Labor Rights (Action Plan), which contains specific commitments by the GOC to address concerns related to violence against Colombian labor union members and activists, impunity for the perpetrators of such violence, and enforcement of protections of workers' rights.¹⁵ These commitments include: re-establishing a stand-alone Ministry of Labor (MOL); hiring 480 new labor inspectors over a four-year period, including at least 100 inspectors in both 2011 and 2012; reforming the Criminal Code by establishing criminal penalties for employers who undermine the right to organize and bargain collectively; prioritizing the sectors of palm oil, sugar, mines, ports, and flowers for labor inspections; issuing implementing regulations for the 2010 law on subcontracting forms that undermine workers' rights; broadening the scope of the protection program for threatened unionists and activists; and assigning additional judicial police investigators to support prosecutors responsible for investigating criminal cases involving union members and labor activists.¹⁶

Since the launch of the Action Plan, USDOL, USTR, and the State Department have coordinated closely with GOC authorities on fulfilling the concrete commitments made in the Action Plan and, more broadly, on achieving its underlying goals and addressing remaining challenges.¹⁷ Representatives from the USG routinely have traveled to Colombia since the Action Plan was launched for direct meetings on topics covered by the Action Plan, and GOC officials routinely have traveled to the United States and met with officials at USDOL, USTR, and the State Department. Meetings between the two governments on labor issues also regularly occur on the sidelines of multilateral conferences, such as the annual International Labor Conference and the biennial Inter-American Conference of Ministers of Labor. In June 2013, the two governments held a Labor Affairs Council meeting, as required under Chapter 17 of the CTPA.¹⁸ The USG

¹⁵ Colombian Action Plan Related to Labor Rights, April 7, 2011, <https://www.dol.gov/ilab/reports/pdf/20110407.pdf>.

¹⁶ *Ibid.*

¹⁷ USTR and U.S. Department of Labor [hereinafter "USDOL"], The Colombian Labor Action Plan: A Five Year Update, April 11, 2016, <https://ustr.gov/sites/default/files/2016-Colombia-Action-Plan-Report.pdf>.

¹⁸ USDOL, Joint Statement of the Labor Affairs Council of the United States-Colombia Trade Promotion Agreement, June 5, 2013, https://www.dol.gov/_Sec/media/speeches/20130605_US-Colombia.htm.

and the GOC also have engaged with stakeholders in both countries, including worker and business representatives, non-governmental organizations (NGOs), and members of congress.

Bilateral, government-to-government engagement between the USG and GOC has been complemented by the placement of the aforementioned labor attaché in the U.S. Embassy in Bogota in 2015, as well as by more than USD 25 million in technical assistance projects funded by USDOL, which focus on helping the GOC address key areas of concern and challenges that remain under the Action Plan.¹⁹ Other USG agencies have also contributed technical assistance funds, including the State Department's USD 500,000-project to strengthen the Afro-Colombian Labor Council, and the U.S. Agency for International Development (USAID)'s USD 4 million project on trade union capacity building. Colombia is also a focus country of USAID's Global Labor Program through which the Solidarity Center receives funding to promote workers' rights in the port town of Buenaventura.²⁰

This report draws on information gathered through the OTLA's extensive engagement with the GOC since the launch of the Action Plan. In addition, the OTLA carefully reviewed all information provided by the submitters, the GOC, and others with direct knowledge of the relevant issues.²¹ The OTLA, along with representatives of USTR, undertook a fact finding mission in Colombia from October 27-28, 2016, to gather additional information on the issues raised by the Submission, including through meetings with the GOC, the submitters, workers' organizations, employers, and other relevant stakeholders.

III. Analysis of Colombian Labor Law and Practice

The following section presents the OTLA's analysis of the Submission's allegations with respect to the rights to freedom of association and collective bargaining. Section A presents the OTLA's analysis of the labor law inspection and enforcement system, including a discussion of the rights to freedom of association and collective bargaining in Colombia, an overview of the Labor Inspectorate, which is the MOL's administrative enforcement body; administrative labor inspection and investigation procedures; the application of fines; and fine collection. Section B

¹⁹ Since 2012, USDOL has managed three technical assistance projects to help the GOC and Colombian workers meet labor law and enforcement challenges. The International Labor Organization [hereinafter "ILO"] implements a USD 10.3 million, four-and-a-half-year technical assistance project focused primarily on strengthening the overall capacity of the Colombian Ministry of Labor. *Somos Tesoro*, implemented by Pact, Inc., is a USD 9 million, four-year project that works to reduce child labor and promote safe work conditions in the non-formal mining sector. USDOL also funds a USD 2.1 million, four-year project with Colombia's National Union School (*Escuela Nacional Sindical*), to run "workers' rights centers" in four Colombian cities that provide free legal advice to workers to raise awareness of their rights under Colombian labor laws and improve their ability to exercise and claim those rights.

²⁰ Connell, Tula, "Solidarity Center Marks Launch of Global Labor Program," June 8, 2016, <http://www.solidaritycenter.org/solidarity-center-global-labor-program-2/>. The Solidarity Center is a U.S.-based international worker rights organization allied with the AFL-CIO.

²¹ This information includes the 106-page document received by the OTLA on October 31, 2016, from the Ministry of Labor entitled, "Information on the Public Statement Presented to the Office of Trade and Labor Affairs (OTLA) regarding Chapters 17 (Labor Affairs) and 21 (Dispute Resolution) of the Trade Promotion Agreement between the Republic of Colombia and the United States of America" (Información Sobre Alegato Público Presentado Ante La Oficina De Comercio y Asuntos Laborales (En Inglés, OTLA) Sobre Los Capítulos 17 (Asuntos Laborales) Y 21 (Solución De Controversias) Del Acuerdo De Promoción Comercial Entre La República De Colombia y Estados Unidos De América) [hereinafter "Government of Colombia, Response to the OTLA"], October 31, 2016."

discusses progress and challenges of subcontracting, including union contracts and simplified stock companies, and collective pacts as they relate to the rights to freedom of association and collective bargaining. Sections C and D address the application of criminal laws that relate to the rights to freedom of association and collective bargaining in Colombia with respect to violence and threats against unionists and the enforcement of Article 200 of the Criminal Code.

A. Labor Law Inspection and Enforcement System

i. The Rights to Freedom of Association and Collective Bargaining in Colombia

The Submission alleges the GOC did not effectively enforce laws related to the rights to freedom of association and collective bargaining.²²

The fundamental rights to freedom of association and collective bargaining are enshrined in Colombian law, from the Constitution to inspection procedures.²³ There is a robust legal framework that protects workers' rights to freedom of association and collective bargaining, without employer interference and without reprisal.²⁴ Specific legal protections are discussed throughout this report, as they relate to particular issues. Additionally, Colombia has ratified International Labor Organization (ILO) Conventions 87, 98, and 154 on the rights to freedom of association and collective bargaining and has incorporated them into domestic law.²⁵

Unions and labor rights NGOs have asserted that the GOC is unable or unwilling to enforce laws related to freedom of association, however, and alleged a climate of anti-union sentiment in the country.²⁶ Similarly, the Organization for Economic Cooperation and Development (OECD) has noted, "In addition to violence against trade union leaders and members, freedom of association is hindered by frequent harassment and various types of pressure from employers on workers who want to form or join a trade union. These acts occur despite detailed proscriptions in the Labor Code outlawing any such violations of the right of association."²⁷ The OECD noted further that "[h]igh informality and a strong reliance on non-standard contracts have weakened the bargaining power of workers in Colombia."²⁸

The ILO's Committee on Freedom of Association (CFA) is currently examining 19 active cases in which workers allege the GOC has failed to address violations of their right to form and join

²² U.S. Submission 2016-02 (Colombia), pages 21-23; 38-41.

²³ Political Constitution of the Republic of Colombia, Articles 38-39, 53; Law 26 of 1976; Law 524 of 1999.

²⁴ See, e.g., Substantive Labor Code, Articles 39, 59, 353, 354, 433, 444, and 448.

²⁵ Political Constitution of the Republic of Colombia, Article 53; Law 26 of 1976; Law 524 of 1999.

²⁶ See, e.g., Escuela Nacional Sindical, "TLC, Plan de Acción Laboral y derechos de los trabajadores en Colombia: Cinco años esperando cambios reales," May 17, 2016, <http://ail.ens.org.co/informe-especial/tlc-plan-accion-laboral-derechos-los-trabajadores-colombia>; AFL-CIO, "Making the Colombia Labor Action Plan Work for Workers," April 2014, http://www.aflcio.org/content/download/123141/3414471/version/1/file/April2014_ColombiaReport.pdf; Escuela Nacional Sindical, "Centrales sindicales hacen balance de los 5 años del Plan de Acción Laboral Obama-Santos," April 9, 2016, <http://ail.ens.org.co/informe-especial/centrales-sindicales-hacen-balance-los-5-anos-del-plan-accion-laboral-obama-santos/>.

²⁷ OECD, OECD Reviews of Labour Market and Social Policies: Colombia 2016, 2016, page 111.

²⁸ *Ibid.* at page 97.

unions, and there are another 20 cases about which the CFA has requested to be kept informed.²⁹ The CFA has longstanding recommendations that the GOC “conduct . . . exhaustive investigation[s]” into anti-union discrimination,³⁰ “expedite substantially the processing . . . [of] complaints relating to trade union rights,”³¹ “ensure full compensation for [illegally] dismissed workers,”³² “take the necessary measures . . . to reinstating . . . trade union officials,”³³ and “apply the penalties provided for in legislation.”³⁴ The ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEACR) recently examined the use of “collective accords [collective pacts]” and found that “collective accords with non-unionized workers should only be possible in the absence of trade unions.”³⁵

These issues are an important part of the context for the OTLA’s analysis of Colombian enforcement of labor laws governing the rights to freedom of association and collective bargaining.

ii. Overview of the Labor Inspectorate

The Submission alleges that the GOC failed to “meaningfully exercise its responsibility to conduct detailed inspections.”³⁶ The submitters further note, “[t]he Ministry of Labor has hired numerous inspectors, but over 85 [percent] are temporary hires, and few inspectors visit workplaces or perform more than paperwork administrative reviews of compliance.”³⁷ This section provides an overview of the MOL’s Labor Inspectorate and its capacity and procedures for conducting labor law inspections and investigations.

Colombia’s labor inspectors are housed within the MOL’s Office of Inspection, Monitoring, Control, and Territorial Management (*Inspección, Vigilancia, Control y Gestión Territorial—IVC*), under the Director of Inspections and the Vice Minister for Labor Relations and Inspections.³⁸ Inspectors are present in all 35 regional and special administrative offices of the

²⁹ International Labor Organization, NORMLEX Colombia Country Profile,

http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:102595.

³⁰ International Labor Organization, Governing Body, Committee on Freedom of Association, 376th Report, Case No. 3027, October 2015, paragraph 300,

http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3254206.

³¹ International Labor Organization, Governing Body, Committee on Freedom of Association, 378th Report, Case No. 3114, June 2016, paragraph 198,

http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3282131.

³² International Labor Organization Governing Body, Committee on Freedom of Association, 350th Report, Case No. 1962, June 2008, paragraph 44,

http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2904653.

³³ International Labor Organization, Governing Body, Committee on Freedom of Association, 373rd Report, Case No. 3020, June 2008, paragraph 229,

http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3189040.

³⁴ International Labor Organization, Governing Body, Committee on Freedom of Association, 365th Report, Case No. 2852, November 2012, paragraph 429,

http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3087097.

³⁵ International Labor Organization, International Labor Conference, 103rd Session, Report of the Committee of Experts on the Application of Conventions and Recommendations, June 2014, pages 84-85,

http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3142153:NO.

³⁶ U.S. Submission 2016-02 (Colombia), page 40.

³⁷ *Ibid.* at page 6.

³⁸ Government of Colombia, Public Service Administration Department, Decree 4108 of 2011, Article 5.

MOL, as well as in various municipal offices.³⁹ According to the MOL, there are 904 inspector positions nationwide. This number reflects Colombia's commitment in the Action Plan to add 480 inspectors to the Labor Inspectorate, more than doubling the number of inspector positions since the Action Plan was announced.⁴⁰ Of those 904 positions, 819 are currently filled.⁴¹ Inspectors are responsible for conciliations and customer service, in addition to inspections.⁴² Because of this division of labor, not all inspectors carry out inspections. The GOC reports that as of October 2016, there are 537 inspectors who exclusively undertake administrative investigations.⁴³

Despite the increase in the number of inspectors in recent years, there are significant systemic challenges that may hinder Colombia's enforcement of labor laws including those related to the rights to freedom of association and collective bargaining. The law provides that Colombia's labor inspectors will carry out inspections throughout the entire country, including in both urban and rural areas.⁴⁴ Rural areas comprise 94 percent of Colombia's territory and account for 32 percent of the country's population.⁴⁵ In practice, however, it is difficult for inspectors to travel to rural areas, and it is the OTLA's understanding that rural inspections are infrequent.⁴⁶ The MOL has limited resources to provide inspectors with transportation and per diem allowances to conduct inspections in rural areas.⁴⁷ Despite recent inspections in the primarily rural sectors of palm, sugar, and mines—priority sectors under the Action Plan—certain allegations have not been resolved.⁴⁸ Minister of Labor Clara López has indicated that one of her priorities is to create a mobile labor inspection unit that will focus on rural areas, but to date, the MOL has not constituted the unit.⁴⁹

The MOL has high turnover of its inspection staff.⁵⁰ Of the 819 current inspectors, the MOL reports 105 of them are permanent civil service employees.⁵¹ The rest are provisional employees

³⁹ Government of Colombia, Ministry of Labor, Resolution 2143 of 2014; Government of Colombia, Response to the OTLA, October 31, 2016.

⁴⁰ Colombian Action Plan Related to Labor Rights, April 7, 2011, <https://www.dol.gov/ilab/reports/pdf/20110407.pdf>.

⁴¹ Government of Colombia Official, e-mail to the OTLA, January 3, 2017.

⁴² Government of Colombia, Public Service Administration Department, Decree 4108 of 2011, Article 30; Government of Colombia, Ministry of Labor, Resolution 2143 of 2014.

⁴³ Government of Colombia, Response to the OTLA, October 31, 2016. This figure is much higher than figures the Escuela Nacional Sindical reported in May 2016, when they found that only 321 inspectors were assigned to duties related to prevention, inspection, and control. Escuela Nacional Sindical, "TLC, Plan de Acción Laboral y derechos de los trabajadores en Colombia: Cinco años esperando cambios reales," May 17, 2016, page 5. The International Labor Organization [hereinafter "ILO"] recommends one inspector per 20,000 workers in transition economies. ILO, *Strategies and Practice for Labour Inspection* (GB.297/ESP/3), Geneva, Committee on Employment and Social Policy, 2006, <http://www.ilo.org/public/english/standards/relm/gb/docs/gb297/pdf/esp-3.pdf>. According to Colombia's National Statistics Directorate (DANE), Colombia had an economically active population of 25 million in October 2016, which would mean the country should have approximately 1,250 labor inspectors.

⁴⁴ Law 1610 of 2013, Article 1, stating that "[I]os Inspectores de Trabajo y Seguridad Social ejercerán sus funciones de inspección, vigilancia y control en todo el territorio nacional."

⁴⁵ *Semana.com*, "Así es la Colombia Rural," March 17, 2012, <http://www.semana.com/especiales/pilares-tierra/asi-es-la-colombia-rural.html>.

⁴⁶ OTLA interview with U.S. Embassy Official, December 22, 2016.

⁴⁷ U.S. Government Officials meeting with Vice Minister Barragán, October 27, 2016.

⁴⁸ OTLA interview with U.S. Embassy Official, December 22, 2016.

⁴⁹ Government of Colombia Official, e-mail to the OTLA, January 3, 2017.

⁵⁰ OTLA interview with U.S. Embassy Official, December 22, 2016.

who enjoy many of the same protections as permanent civil service employees but face obstacles to becoming permanent employees.⁵²

The ILO has been training labor inspectors on inspection procedures since 2013; however, it has seen a 50 percent turnover rate of the inspectors it has trained in the past three years, undermining the utility of the training for improving labor law enforcement, generally.⁵³ High turnover may result in a large number of staff with limited experience applying labor laws and following applicable due process requirements.⁵⁴ This can lead to mistakes that undermine the MOL's ability to follow through on identified violations. For example, before imposing any sanctions on an employer, Colombian law requires that the employer receive a notification setting out the allegations and, within 30 work days, a definitive "administrative act" containing analysis of relevant evidence and a final decision on the sanction.⁵⁵ Inspectors' failure to follow these and other procedural requirements for inspections and notification could result in fines being overturned on appeal due to process violations.⁵⁶ High turnover may also contribute to delays in completing investigations, such that the investigations may exceed the time limits established by law and regulation.⁵⁷

The MOL does not seem to follow a strategic national inspection strategy, which could help guide its enforcement work by ensuring allocation of scarce resources to areas where violations are known to occur.⁵⁸ Minister López is the third minister to head the MOL since its re-establishment in October 2011, and with each new minister, any effort to develop a national inspection strategy has been either abandoned or revisited, hindering certain investigations on critical issues such as subcontracting.⁵⁹

In addition, the MOL is only now implementing an electronic case management system for the labor inspectors, which has been in development since 2011 and which MOL officials have identified "as the current 'most pressing need' to increase the labor inspectorate's effectiveness

⁵¹ Government of Colombia Official, e-mail to the OTLA, January 3, 2017.

⁵² Various rulings by Colombia's Constitutional Court provide "relative labor stability" to individuals working for the government in a provisional status. *See, e.g.*, Sentencia SU054/15, Sentencia T-221/14, Sentencia T-007/08, and Sentencia T-716/13. The only way an inspector can become a permanent civil service employee is if he/she passes the inspector-specific exam offered by the civil service commission through a publicly-advertised testing process (*concurso*). Law 909 of 2004, Title V. The last time such a process was held for labor inspectors was prior to the Labor Action Plan. A testing process was announced for 2016 but was put on hold until 2017 due to funding constraints. Each permanent post reportedly costs the GOC approximately 8 million Colombian Pesos (COP) (USD 2,768) to fill, and the overall process, from announcing the test to hiring those who pass, takes two years. Caracol Radio, "No habrá masacre laboral, ni concurso para proveer cargos: Mintrabajo," August 5, 2016, http://caracol.com.co/radio/2016/08/05/nacional/1470353005_033516.html. All conversions from Colombian Pesos (COP) to U.S. Dollars (USD) are based on the Treasury rate of Exchange valid on September 30, 2016 of 2890.11 COP to one USD.

⁵³ OTLA interview with U.S. Embassy Official, December 22, 2016.

⁵⁴ U.S. Government Official meeting with Enrique Borda, Vice Minister of Labor Relations and Inspection, March 10, 2016.

⁵⁵ Law 1437 of 2011, Articles 47-49.

⁵⁶ OTLA interview with U.S. Embassy Official, December 22, 2016.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

and efficiency.”⁶⁰ Inspectors have had to keep paper copies of complaints and investigations in their offices around the country and to respond to central office data requests by inputting data into Excel spreadsheets, which has made it difficult for the MOL to gather statistics and track ongoing investigations.⁶¹ The ILO has digitized inspections files in specific cases since 2011, added those cases to the electronic system, and trained all labor inspectors on the system.⁶² The MOL began using the system in two of its regional offices on November 30, 2016, and has a plan to roll-out use in the remaining offices between January and June 2017.⁶³

These issues have made it difficult for the MOL to conduct inspections in rural areas, train and retain professional qualified staff, and effectively use limited resources, and thus have had an adverse effect on the MOL’s inspection capacity related to the rights to freedom of association and collective bargaining.

iii. Inspection Procedures

The Submission alleges the GOC has failed to effectively enforce Articles 3 and 49 of Law 1437 of 2011, the “Procedural and Contentious Administrative Code” (CPACA), which lay out administrative procedures for government agencies.⁶⁴

The CPACA applies to all entities of “Public Power” and individuals carrying out administrative functions, including the MOL in its administrative sanctioning procedures.⁶⁵ Article 3 establishes that administrative authorities should operate according to principles of effectiveness, procedural economy, and speed; and Article 49 sets a 30-day deadline for officials to finalize the relevant definitive administrative act (in the case of labor investigations, the act either identifies a violation and its corresponding sanction or closes the case if no violation is found), after an investigation is complete and the allegations are presented to the investigated party.⁶⁶

⁶⁰ Management Systems International, Promoting Compliance with International Labor Standards in Colombia: Independent Mid-Term Evaluation, Joint Evaluation Report for ILO and USDOL, January 30, 2015, pages 8, 10, 22, https://www.dol.gov/ilab/projects/summaries/Colombia_MidTerm_Eval_Report_F.pdf.

⁶¹ OTLA interview with U.S. Embassy Official, December 22, 2016.

⁶² *Ibid.* The digitized files are all of those between January 1, 2011, and May 31, 2016, that are either open/ongoing or closed with a sanction.

⁶³ Government of Colombia, Ministry of Labor, Timeline for implementation of the information system, November 25, 2016.

⁶⁴ U.S. Submission 2016-02 (Colombia), page 42.

⁶⁵ Law 1437 of 2011, Articles 2 and 47.

⁶⁶ Law 1437 of 2011, Articles 3 and 49. In particular, in the original Spanish text, Article 3 requires that administrative authorities “[e]n virtud del principio de eficacia, . . . removerán de oficio los obstáculos puramente formales, evitarán decisiones inhibitorias, dilaciones o retardos y sanearán . . . en procura de la efectividad del derecho material objeto de la actuación administrativa,” “[e]n virtud del principio de economía, . . . deberán proceder con austeridad y eficiencia, optimizar el uso del tiempo y de los demás recursos,” and “[e]n virtud del principio de celeridad, . . . impulsarán oficiosamente los procedimientos . . . a efectos de que los procedimientos se adelanten con diligencia, dentro de los términos legales y sin dilaciones injustificadas.” The Spanish text of Article 49 states that “[e]l funcionario competente proferirá el acto administrativo definitivo dentro de los treinta (30) días siguientes a la presentación de los alegatos.” The Submitters allege that the CPACA requires the MOL to issue a final administrative act within 30 days of receiving a complaint. However, this does not comport with the MOL’s or the OTLA’s understanding of the CPACA’s requirement.

In the labor context, procedures for inspections are defined by applicable law, including the CPACA, which lays out the general procedure for assessing administrative sanctions, and Law 1610 of 2013, which, among other things, assigns specific timeframes for labor inspectors to carry out parts of the administrative sanction procedure detailed in the CPACA, as well as MOL procedural manuals.⁶⁷ The seven-step procedure for a labor inspection that could result in an administrative sanction (*investigación administrativa sancionatoria*) is as follows:

Step 1—Preliminary Review. Inspectors have up to 40 work days from the time they register a complaint or take on a case to conduct a preliminary review. The review allows labor inspectors to look into the merits of the allegations to determine whether the case warrants a full investigation. Step 1 is not mandatory, but it is rare for an inspector to opt out of undertaking a preliminary review.

Step 2—Notify investigated party of merit to open a case. Once an inspector determines that there is enough merit to open an investigation into allegations or suspicions of labor law violations, the inspector notifies the enterprise of the opening of the case. This usually occurs within four work days of the preliminary review.

Step 3—Notify investigated party of charges formulated. Inspectors have 30 work days from the time they notify an investigated party of the opening of a case to present to that party initial allegations of any violations found.

Step 4—Investigated party's presentation of defense and request for proof. Within 15 work days from the presentation of the initial allegations of violations, the investigated party can present its defense and/or request the evidence an inspector has of the alleged violation(s).

Step 5—Collection of additional evidence by inspectors. If necessary, an inspector can collect evidence to support the original allegations of violations for up to 10 work days after the investigated party presents its defense.

Step 6—Communication of allegations to the investigated party. After collecting the evidence, the inspector has three work days to present, in writing, any allegations of violations.⁶⁸

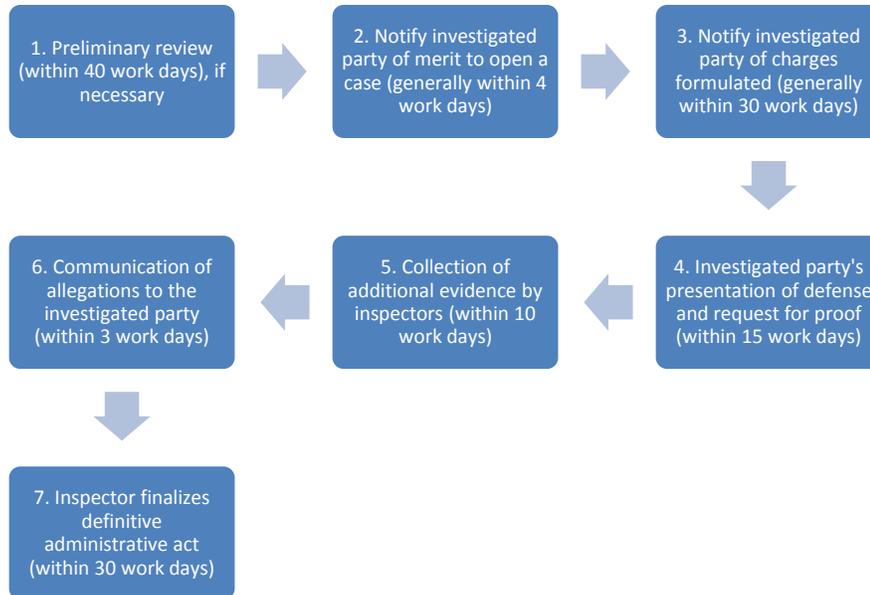
Step 7—Inspector finalizes definitive administrative act. The inspector has up to 30 work days after presenting the allegations of violations to the investigated party to draw up the definitive administrative act laying out the violations and imposing any applicable sanctions. For the purposes of administrative investigations into labor law violations, these definitive administrative acts are called “administrative sanctioning resolutions” (*resoluciones administrativas sancionatorias*).

⁶⁷ Law 1610 of 2013, Article 10. Two procedural manuals exist that help elucidate inspection procedures: Manual IVC-PD-01 of December 11, 2015 on preliminary review and Manual IVC-PD-02 of December 11, 2015 on the administrative sanction procedure, <http://mintrabajo.gov.co/modelo-integrado-de-planeacion-y-gestion/documentos-sig.html>.

⁶⁸ Law 1610 of 2013, Article 10 provides 10 work days from when the investigated party presents its defense to the initial charges for collection of additional evidence by the labor inspectors, and three work days after the collection of that evidence for the presentation to the investigated party of the continued and/or updated allegations of labor law violations.

The diagram below lays out the steps and the number of work days associated with each step.

Diagram 1: Steps in an Administrative Sanctioning Investigation



Given these steps, an investigation that ends in an administrative sanction should take no more than approximately 132 work days (about six and one-half months).

In practice, few complaints are resolved within the six and one-half months outlined above.⁶⁹ The OTLA’s review revealed that in cases involving violations of health and safety, payment of wages or pensions, or other “routine” cases, where the standards leave little or no room for interpretation, inspectors generally issue definitive administrative acts within six to eight months of opening investigations.⁷⁰ In more complex cases, such as those related to allegations of anti-union discrimination and other violations of workers’ rights to freedom of association and collective bargaining, or in cases involving allegations of violations of new laws and regulations, cases can take much longer.⁷¹

Several requests for inspections and complaints of violations submitted to the MOL remain in the preliminary investigation phase (Step 1) for far longer than the allotted 40 work days. For example, in November 2015, complainants submitted 11 cases on the misuse of collective pacts to the MOL; however, as of September 2016, seven remain in the preliminary investigation phase.⁷² An additional three complaints, submitted in December 2014, also remain in the

⁶⁹ U.S. Government Official meeting with Colombian Labor Law Expert, October 24, 2016; U.S. Government Official meeting with MOL Official, March 10, 2016.

⁷⁰ U.S. Government Official meeting with Colombian Labor Law Expert, October 24, 2016.

⁷¹ *Ibid.*; Escuela Nacional Sindical, “TLC, Plan de Acción Laboral y derechos de los trabajadores en Colombia: Cinco años esperando cambios reales,” May 17, 2016; Gonzalez Arroyo, Michele, Promoting Compliance with International Labor Standards in Colombia: Independent Final Evaluation, December 30, 2016.

⁷² OTLA interview with U.S. Embassy Official, December 22, 2016.

preliminary investigation phase, as of September 2016.⁷³ In numerous investigations of complaints, inspectors have issued definitive administrative acts between one and three years after the complaints were first registered with the ministry, significantly exceeding the six-and-one-half months it should normally take for such action.⁷⁴ The Submission contains two such examples. In February 2012, the *Unión Sindical Obrera de la Industria del Petróleo* (USO) submitted a complaint to the MOL containing allegations of various anti-union actions by Pacific Rubiales.⁷⁵ The MOL issued its definitive administrative act over a year later, in April 2013.⁷⁶ Similarly, the *Sindicato Nacional de Trabajadores de la Industria Agropecuaria* (Sintrainagro) submitted a complaint to the MOL in December 2012, alleging anti-union conduct and requesting an inspection.⁷⁷ The MOL issued its definitive administrative act nearly a year later, in November 2013.⁷⁸ Other cases have also taken far longer than the approximately six-and-one-half-month process outlined above. In September 2016, the MOL issued definitive administrative acts in two long-standing cases alleging abusive subcontracting, both of which stemmed from complaints submitted to the MOL in 2013.⁷⁹

Additionally, the statute of limitations for applying administrative sanctions is three years from the date of the alleged violation.⁸⁰ Therefore, the absolute maximum amount of time for an inspector to open a case, carry out an investigation, make a determination to sanction the employer, and inform the employer of the sanction, is three years from the date of the alleged violation. In practice, in some instances, the cases are not resolved within the three year statute of limitations for applying administrative sanctions.⁸¹ This makes the investigations moot, and the MOL must initiate new investigations to address the violations if they persist.⁸²

Although there is no clear guidance on the CPACA's requirement that the MOL's investigations operate with the principles of "efficiency" and "speed," other timeframes within the administrative sanctioning investigation procedure are firm.⁸³ Repeated reports of the MOL exceeding those timeframes raise concerns with respect to the efficacy of the GOC's inspection procedures.⁸⁴

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Unión Sindical Obrera de la Industria Petrolera, Complaint to Ministry of Labor, February 2, 2012.

⁷⁶ Government of Colombia, Ministry of Labor, Resolution 00000483 of 2013, April 19, 2013.

⁷⁷ U.S. Submission 2016-02 (Colombia), page 30; Sindicato Nacional de Trabajadores de la Industria Agropecuaria, Complaint to the Ministry of Labor, December 28, 2012.

⁷⁸ U.S. Submission 2016-02 (Colombia), page 37; Government of Colombia, Ministry of Labor, Resolution 157 of 2013, November 12, 2013.

⁷⁹ Government of Colombia, Ministry of Labor, Resolution 3831 of 2016, September 23, 2016; Government of Colombia, Ministry of Labor, Resolution 3826 of 2016, September 23, 2016.

⁸⁰ Law 1437 of 2011, Article 52.

⁸¹ *See, e.g.*, Government of Colombia, Ministry of Labor, Resolution 3826 of 2016, September 23, 2016. The original investigation was initiated on September 13, 2013. This resolution is currently under appeal.

⁸² Law 1437 of 2011, Article 52.

⁸³ Law 1437 of 2011; Government of Colombia, Ministry of Labor, Administración del SIG: Manual de Procedimientos y Operaciones, June 27, 2014, http://www.mintrabajo.gov.co/component/docman/doc_download/2772-manual-de-procedimientos-y-operaciones.html; Law 1610 of 2013.

⁸⁴ Escuela Nacional Sindical, "TLC, Plan de Acción Laboral y derechos de los trabajadores en Colombia: Cinco años esperando cambios reales," May 17, 2016; Escuela Nacional Sindical, "Los grandes retos de Colombia por el Trabajo Decente," October 7, 2015; Confederación de Trabajadores de Colombia (CTC) and Central Unitaria de

iv. The Imposition and Application of Fines

The Submission alleges the GOC failed to effectively enforce Article 486 of the Colombian Labor Code,⁸⁵ which empowers the MOL inspectors to impose fines.

Article 486 of the Labor Code states that inspectors “have the nature of police authorities . . . , and they are empowered to impose fines equal to the amount of one (1) to five thousand (5,000) times the minimum monthly salary in force, according to the seriousness of the violation and while it persists.”⁸⁶ The upper boundary in this provision resulted from a modification to the Labor Code in 2013 intended to make fines for labor law violations more dissuasive.⁸⁷ The law also provides labor inspectors with criteria for the gradation of fines in order to promote consistent fine application across the country.⁸⁸ Colombia’s minimum monthly wage in 2016 was COP 689,454 or approximately USD 239.⁸⁹ Therefore, the maximum fine a labor inspector could impose in 2016 was USD 1.19 million. After a fine has been imposed by labor inspectors, it can be appealed through up to three administrative levels.⁹⁰ If it is upheld in the face of those appeals (or if appeal is not sought at any stage) it is then “applied” and must be paid.⁹¹

Despite the authority of labor inspectors to impose fines, some Colombian and international labor groups, including the submitters, have expressed concerns that the MOL has undertaken fewer administrative investigations, imposed fewer fines, and applied fewer fines in recent years, even though the number of inspectors has increased markedly.⁹² For example, the OTLA has received reports that some inspection offices have not imposed any sanctions since 2011.⁹³ A chart summarizing the number of inspectors, administrative investigations, and fines applied from 2010-2016 is below.

Trabajadores (CUT), “Tres años de incumplimiento del Plan de Acción Obama Santos: Informe sobre los tres primeros años de implementación del Plan de Acción Laboral,” April 2014.

⁸⁵ U.S. Submission 2016-02 (Colombia), pages 21 and 40.

⁸⁶ Substantive Labor Code, Article 486.

⁸⁷ Prior to Law 1610 of 2013, Article 486 of the Substantive Labor Code provided fines for one to one hundred times the minimum monthly salary in force, so this represents a significant increase.

⁸⁸ Law 1610 of 2013, Article 12. The ILO has also produced a guide on the gradation of sanctions, which has been incorporated in the Labor Inspector Manual.

⁸⁹ Government of Colombia, Decree 2552 of 2015, Article 1.

⁹⁰ According to Law 1437 of 2011 and Ministry of Labor Resolution 2143 of 2014, administrative fines have up to three levels of appeals. The Regional Director is the first line of appeal, the Director of Inspections is the second. The Council of State is the third and final line of appeal.

⁹¹ The OTLA is using “applied” for “*ejecutoriada*,” which means the fine has gone through any applicable appeals and is ready for collection by the appropriate entity. Before being “*ejecutoriada*,” fines are considered only as “imposed” (*impuesta*).

⁹² See, e.g., AFL-CIO, “Making the Colombia Labor Action Plan Work for Workers,” April 2014.

http://www.aflcio.org/content/download/123141/3414471/version/1/file/April2014_ColombiaReport.pdf; Escuela Nacional Sindical, “TLC, Plan de Acción Laboral y derechos de los trabajadores en Colombia: Cinco años esperando cambios reales,” May 17, 2016.

⁹³ OTLA interview with U.S. Embassy Official, December 22, 2016.

Chart 1: Administrative Investigations of Labor Law Violations 2010-2016

Year	Number of Inspectors	Preliminary Review ⁹⁴	Administrative Investigations	Visits to worksites	Fines Applied ⁹⁵ (<i>ejecutoriada</i>)
2010	423	N/A	24,631	9,066	1,749
2011	410	N/A	12,536	9,609	3,311
2012	462	8,239	17,346	10,006	2,295
2013	564	15,588	5,988	1,489	1,694
2014	703	16,546	4,182	1,250	1,376
2015	826	21,055	3,713	1,063	1,291
2016 (through October)	819	16,048	3,099	1,087	1,304

Source: Government of Colombia Official, e-mail to the OTLA, January 3, 2017.

The data indicate that the numbers of administrative investigations and fines applied was falling while the number of inspectors is increasing. Preliminary data for 2016, however, may indicate that trend is reversing.⁹⁶ Nevertheless, the OTLA does not have nation-wide data on the number of fines imposed, as opposed to those applied, thereby preventing a full understanding of any potential relationship between administrative investigations and fines.

Despite the decrease in the numbers of administrative investigations and fines applied from 2012 to 2015, the number of incoming calls to the MOL's public hotline has risen steadily each year, and data from other sources around the country indicate that hundreds of claims of violations of rights have been filed with the Ministry each year for the past three years.⁹⁷

There are a number of possible reasons why the decrease in the number of applied fines may not be a result of decreasing violations. It is possible that the number of administrative investigations was falling because of the administrative procedure changes made in the 2012 CPACA, allowing for a period of preliminary review before a full investigation. In the context of administrative investigations for labor law violations, the period for preliminary review (*averiguación preliminar*) provides inspectors with up to 40 work days to determine whether there is merit to open a more labor-intensive administrative investigation, generally based on the information received in a complaint.⁹⁸ It is possible that providing for a preliminary review

⁹⁴ Preliminary Review was not an option before the entry-into-force of the new CPACA laid out in Law 1437 of 2011.

⁹⁵ Not all fines included in these numbers are destined for SENA—some go to the Labor Risk Fund (*Fondo de Riesgos*) and some to the Pension Solidarity Fund (*Fondo de Solidaridad Pensional*). In addition, fines finalized in one year may have been imposed in a prior year.

⁹⁶ Government of Colombia, Update to Response to OTLA, December 16, 2016.

⁹⁷ OTLA interview with U.S. Embassy Official, December 22, 2016.

⁹⁸ While Article 47 of the CPACA provides for a period of preliminary review, it is silent as to the length of this period. The 40-day deadline has therefore been set informally by the MOL's Office of Inspection, Monitoring, Control, and Territorial Management. U.S. Government Official discussion with Colombian Labor Law Expert. October 24, 2016. Note that because the CPACA came into force on July 2, 2012, administrative investigations started before that date were governed by the previous administrative code, which did not provide for preliminary review; any inquiry into allegations of labor law violations had to be carried out through an investigation.

contributed to the reduction in investigations after 2012, but it would not explain the fact that the numbers of administrative investigations continued to fall from 2013 to 2015.

Another reason the number of administrative investigations, and the resulting application of fines, has been decreasing could be the trend of inspectors shifting from undertaking administrative investigations (*investigaciones administrativas sancionatorias*—the procedure for which is discussed above) to “preventive inspections” (*inspecciones preventivas*) in which inspectors simply notify employers of their legal obligations to comply with the law and usually prescribe an “improvement plan” (*acuerdo de mejora*). The MOL reports that between January and April 2016, inspectors carried out 611 administrative investigations and 399 preventive inspections.⁹⁹

It is also possible that the rate of applied fines has been falling because imposed fines are overturned on appeal. As discussed previously, due in part to significant turnover, the MOL inspectors may make technical errors in their work that experienced, trained inspectors might not make. Consequently, many cases that ended with imposed fines have been overturned due to errors. For example, in a review of investigations since 2011 in one regional MOL office, of instance in which fines were imposed by labor inspectors, only 214 fines of 1,008 were upheld through the administrative appeals process. That is, in the past five years, only 21 percent of fines that the inspectors in that office imposed were upheld on administrative appeal.¹⁰⁰

The OTLA will continue to monitor the number of administrative investigations conducted and fines applied. The numbers provided to date raise questions as to the enforcement of labor laws, including Article 486 of the Labor Code.

v. Fine Collection

The Submission alleges the GOC has failed to effectively collect fines.¹⁰¹ Specifically, even “when fines are applied, few are actually collected.”¹⁰²

Article 98 of the CPACA stipulates that public entities must collect the fines applied in their favor.¹⁰³ If a fine imposed by labor inspectors is upheld through any applicable administrative appeal, collection may be carried out by one of a number of different government entities, depending on the violation for which the fine was imposed. The *Fondo de Riesgos Laborales* (Labor Risk Fund) collects fines applied for violations of workplace health and safety norms.¹⁰⁴ The *Fondo de Solidaridad Pensional* (Pension Solidarity Fund) collects fines imposed for violations related to pensions.¹⁰⁵ The *Servicio Nacional de Aprendizaje* (SENA, the National

⁹⁹ Government of Colombia Official, e-mail to the OTLA, January 3, 2017. Formalization agreements may also have had a minor effect on the lower number of applied fines throughout this period. The MOL reports that as of September 30, 2016, 26 formalization agreements put fines into abeyance and another 62 agreements halted pending administrative investigations. Therefore, it’s possible that without those agreements, there would be another 88 applied fines spread across various years. Government of Colombia, Response to the OTLA, October 31, 2016.

¹⁰⁰ OTLA interview with U.S. Embassy Official, December 22, 2016.

¹⁰¹ U.S. Submission 2016-02 (Colombia), pages 21, 40, 41.

¹⁰² U.S. Submission 2016-02 (Colombia), page 6.

¹⁰³ Law 1437 of 2011, Article 98.

¹⁰⁴ Law 1562 of 2012.

¹⁰⁵ Law 100 of 1993, Article 27.

Training Agency) collects the fines imposed for all other violations of labor law, including violations of the rights to freedom of association and collective bargaining.¹⁰⁶ All three entities are connected (*adscritos*) to the MOL but have varying levels of administrative and financial independence.¹⁰⁷

This section focuses on the fine collection undertaken by SENA. SENA's regional offices undertake fine collection for those fines imposed within their geographical jurisdiction.¹⁰⁸ A total of 90 SENA employees around the country are assigned cases of debts owed for labor law violations.¹⁰⁹

Collection of monetary fines for labor law violations consists of two phases: persuasive collection (*cobro persuasivo*) and coercive collection (*cobro coactivo*).¹¹⁰ Officials in SENA's regional offices undertake persuasive collection, which includes directly asking the debtor to agree to a payment plan. According to SENA, 50 percent of collected fines are collected through persuasive collection.¹¹¹

Coercive collection is more labor-intensive. Once a debtor passes to this phase—which can happen when a SENA official cannot locate the debtor via traditional channels or when the debtor refuses to agree to a payment plan under persuasive collection—the official can use various government databases to locate the debtor and identify, embargo, and eventually auction the debtor's assets. In order to improve fine collection, in February 2016, SENA subcontracted this labor-intensive part of the collections process to *Central de Inversiones, S.A. (CISA)*—a publicly owned, for-profit agency connected to the Ministry of Finance and specializing in collecting debts owed the GOC.¹¹²

Nevertheless, SENA retains the legal responsibility for collecting fines.¹¹³ As a result, a SENA employee must sign off on all embargoes or other similar actions taken against debtors, including by CISA. Under Colombian law, SENA employees can be held personally liable for official documents they sign and, therefore, can be criminally prosecuted for “damage” their actions cause the State.¹¹⁴ Reports indicate that SENA employees, therefore, feel obligated to re-do CISA investigations into the debtors' assets.¹¹⁵ This could significantly delay and add redundancy to the fine collection process and undermine the primary goal of subcontracting coercive collection to CISA: improving the rate of fine collection by making the process more

¹⁰⁶ Law 119 de 1994, Article 30.

¹⁰⁷ See Decree 1295 of 1994, Article 87 (regarding the Labor Risk Fund); Law 100 of 1993, Article 25 (regarding the Pension Solidarity Fund); Law 119 of 1994, Article 1 (regarding SENA).

¹⁰⁸ Government of Colombia, SENA, Resolution 1235 of 2014.

¹⁰⁹ Government of Colombia Official, e-mail to the OTLA, January 3, 2017.

¹¹⁰ Law 1437 of 2011; Government of Colombia, SENA, Resolution 1235 of 2014.

¹¹¹ Government of Colombia Official, e-mail to the OTLA, January 3, 2017.

¹¹² Law 795 of 2003, Article 91; Inter-Administrative Contract No. 690 between National Training Agency (SENA) and CISA (*Central de Inversiones, S.A.*), February 17, 2016.

¹¹³ Law 1066 de 2006; Government of Colombia, SENA, Resolution 1235 of 2014, Article 15(1) (assigning coercive collection duties to SENA with respect to “fines imposed by the [MOL] for the benefit of SENA”); Government of Colombia Official, e-mail to the OTLA, January 3, 2017 (clarifying that in practice, SENA carries out collection duties for fines applied by the MOL).

¹¹⁴ Law 610 of 2000, Article 48 (establishing the possibility of legal responsibility of public functionaries for “harm or detriment [caused] to the economic assets of the State”).

¹¹⁵ OTLA interview with U.S. Embassy Official, December 22, 2016.

efficient. Figures to date are inconclusive regarding the extent to which that goal has been fulfilled.

The OTLA has significant concerns with respect to fine collection, which it has raised previously with the GOC in addition to reporting on them publicly.¹¹⁶ The OTLA’s review indicates that fine collection, especially of the fines levied for abusive subcontracting, has been slow and often unsuccessful. In many cases, the fines are never collected, and in cases where they are, the process can take many years.

vi. Conclusion on the Inspection System

In light of evidence gathered throughout the Submission process, including views articulated by the ILO, OECD, and others, the OTLA has significant concerns about the system in place to protect the rights to freedom of association and collective bargaining in Colombia. Specifically, the OTLA has concerns about (1) the capacity of the Labor Inspectorate, in particular with regard to inspectors’ difficulty traveling to rural areas, high staff turnover, the lack of a consistent national inspection strategy, and failure to implement a national case management system; (2) delays in the MOL’s inspection process; and (3) delays and lack of collection of certain fines related to the rights to freedom of association and collective bargaining. The OTLA’s review also raised questions regarding the imposition and application of fines.

B. Topic-Specific Enforcement Issues

i. Subcontracting

The Submission alleges the GOC failed to effectively enforce Article 63 of Law 1429 of 2010 regarding subcontracting (labor intermediation) in both the petroleum and sugar sectors.¹¹⁷ In both sectors, the Submission alleges subcontracting was used “with the intent to stifle union organizing.”¹¹⁸

Article 63 of Law 1429 of 2010 prohibits employers from using associated work cooperatives (*Cooperativas de Trabajo Asociado*—CTAs) for “permanent mission activities” and bans the use of any other hiring methods for permanent mission activities when those methods affect constitutional rights and statutory labor rights,¹¹⁹ including the rights to freedom of association

¹¹⁶ See, e.g., USTR and USDOL, UPDATE: The Colombian Labor Action Plan: Three Years Later, April 7, 2014, <https://ustr.gov/sites/default/files/Colombia%20Labor%20Action%20Plan%20update%20final-April2014.pdf> ; USTR and DOL, Standing up for Workers: Promoting Labor Rights through Trade, February 2015; USTR and DOL, The Colombian Labor Action Plan: A Five Year Update, April 11, 2016.

¹¹⁷ U.S. Submission 2016-02 (Colombia), pages 20, 40.

¹¹⁸ *Ibid.* at pages 20, 40-41. On page 6, the Submission defines “labor intermediation” as “the practice of setting up one or more sub-contracting entities – labor intermediaries – to provide labor to companies.” This report uses “subcontracting” to refer to the same phenomenon.

¹¹⁹ Law 1429 of 2010, Article 63 “In all institutions and/or public enterprises and/or private enterprises, staff required to carry out permanent mission activities cannot be contracted through CTAs performing labor intermediation or any other mechanism of contracting that affects the constitutional, legal, and benefit rights enshrined in the prevailing labor norms.”

and collective bargaining.¹²⁰ Labor inspectors may impose fines up to 5,000 minimum monthly salaries for violations of this article.¹²¹ In one notable case, the MOL in 2012 imposed one of the first large fines for abusive subcontracting against palm oil company *Oleaginosas Las Brisas* for the misuse of CTAs to hire workers. The fine, equivalent to around USD 650,000, was upheld on appeal, and, in August 2015, SENA collected the fine. This was the first fine for abusive subcontracting collected in the priority sectors.¹²²

Prior to the adoption of Law 1429 of 2010, Colombian employers seeking to avoid direct labor contracts with workers frequently acquired workers through CTAs—often firing direct employees and re-contracting the same workers through CTAs—which falsely characterize workers as cooperative “owners,” thereby excluding them from the many Labor Code protections covering “workers.”¹²³ The use of CTAs has decreased significantly since the adoption and enforcement of Law 1429 of 2010 and its regulatory Decree 2025 of 2011.¹²⁴ Instead, some employers appear to have turned to other subcontracting arrangements, such as union contracts (*contratos sindicales*) and simplified stock companies (*sociedades por acciones simplificadas*), both of which may similarly undermine workers’ right to form unions and bargain collectively.¹²⁵ This report refers to using these contracting vehicles to illegally suppress the rights to freedom of association and collective bargaining as “abusive subcontracting.”

Union Contracts

The Submission alleges that subcontracting in Colombia’s petroleum sector, including for permanent mission activities, remains common and can undermine workers’ freedom of association. The Submission describes the use of union contracts in the petroleum sector, and cites Pacific Rubiales as an example of a business that agreed to a union contract allegedly in an attempt to undermine freedom of association.¹²⁶

¹²⁰ See Substantive Labor Code, Title III, Chapter III, Articles 59 (prohibiting employers from “limiting or pressuring workers in any way in the exercise of the right to freedom of association”), 353 (declaring that employers and workers have the right to freedom of association), 482-84 (defining union contracts); Decree 1429 of 2010, Article 1; Decree 036 of 2016.

¹²¹ Law 1429 of 2010, Article 63.

¹²² USTR and DOL, *The Colombian Labor Action Plan: A Five Year Update*, April 11, 2016; ILO Press Release, December 22, 2015, http://www.ilo.org/lima/sala-de-prensa/WCMS_447772/lang-es/index.htm.

¹²³ USDOL, *Colombia Labor Rights Report 2011*, pages 7-8.

¹²⁴ In 2015, there remained only 316 CTAs in the country, down from 4,555 in April 2011. Government of Colombia Official, e-mail to the OTLA, January 3, 2017; USDOL, *Colombia Labor Rights Report 2011*, page 9. As part of its Action Plan commitments, Colombia issued Decree 2025 on June 8, 2011. Decree 2025, which partially regulates Article 63 of Law 1429 of 2010, lays out guidelines for labor inspectors to investigate and sanction the legitimacy of CTAs. It also provides for the graduated reduction of any imposed fines when the *de facto* employer agrees to formalize workers previously in the abusive CTA through an indefinite term contract.

¹²⁵ See, e.g., U.S. Labor Education in the Americas Project, “Comparative Assessment of Compliance With the Colombia Labor Action Plan: April 2011-April 2012,” January 2013; AFL-CIO, “Making the Colombia Labor Action Plan Work for Workers,” April 2014, http://www.aflcio.org/content/download/123141/3414471/version/1/file/April2014_ColombiaReport.pdf; Escuela Nacional Sindical, “Informe sobre los cuatro primeros años de implementación del Plan de Acción Laboral (2011-2015),” April 7, 2015; Escuela Nacional Sindical, “Centrales sindicales hacen balance de los 5 años del Plan de Acción Laboral Obama-Santos,” April 9, 2016, <http://ail.ens.org.co/informe-especial/centrales-sindicales-hacen-balance-los-5-anos-del-plan-accion-laboral-obama-santos/>.

¹²⁶ U.S. Submission 2016-02 (Colombia), pages 11-12.

Union contracts are permitted by the Labor Code and defined broadly as contracts between “one or more unions [and] one or more employers or employers’ associations for the provision of services or carrying out of a task through its affiliates.”¹²⁷ Some employers in Colombia have used union contracts to set up subcontracting schemes for permanent mission activities wherein the union’s legal representative signs a contract with an employer, allegedly on behalf of a union.¹²⁸ Colombia’s Constitutional Court has ruled that workers in a union contract are not employees of the union.¹²⁹ Therefore, these workers do not have a direct employment relationship with either the union or the company.¹³⁰ Rather, according to the Court, the workers are affiliates of the union that enjoy equality, rather than subordination, vis-à-vis the union.¹³¹

As discussed above, Article 63 of Law 1429 of 2010 prohibits the practice of hiring workers to perform permanent mission activities through any contracting arrangements, including union contracts, that affect their constitutional or legal rights,¹³² including the rights to freedom of association and collective bargaining.¹³³ Union contracts may infringe upon workers’ rights to freedom of association and collective bargaining when, among other situations: (1) the union that signed the contract is not an independent union and does not represent the interests of the workers in the negotiation of the contract; and/or (2) workers respond to the non-representative union by seeking independently to collectively bargain but cannot do so because they do not have a direct employment relationship with either the union or employer,¹³⁴ and according to the Constitutional Court, the workers lack the subordination with either entity needed to establish such a relationship.¹³⁵ Despite numerous complaints to the MOL about employers’ use of union contracts to infringe on workers’ exercise of their rights to freedom of association and collective bargaining, these practices remain common and appear largely unaddressed.¹³⁶ Some stakeholders, including academics and the OECD, have called for a complete ban on union

¹²⁷ Substantive Labor Code, Title III, Chapter III, Article 482.

¹²⁸ Decree 1429 de 2010; Correa C., Jorge, “Temporales ponen en la picota al contrato sindical,” Portafolio, August 24, 2013. Escuela Nacional Sindical, “Pese a lo que haga o diga el Gobierno, la intermediación laboral está más viva que nunca,” August 30, 2013.

¹²⁹ Constitutional Court ruling T-457/11, May 27, 2011.

¹³⁰ *Ibid.* The union signing the contract is responsible for paying the salaries and social security of the affiliates, but the union is not considered an employer, nor is the contracting company. Instead, the workers carry out their duties as “affiliates” of the union.

¹³¹ *Ibid.*

¹³² Law 1429 of 2010, Article 63.

¹³³ Substantive Labor Code, Title III, Chapter III, Articles 59, 353, 482-84; Decree 1429 of 2010, Article 1; Decree 036 of 2016.

¹³⁴ Confederación Sindical de Trabajadores y Trabajadoras de las Américas (CSA) and Confederación Sindical Internacional (CSI), “Tercerización Mediante Agencias de Trabajo Temporal en América Latina,” October 29, 2013, http://www.ilo.org/actrav/info/pubs/WCMS_227991/lang--en/index.htm (noting the rise in union contracts and stating that in Colombia, “false cooperatives [i.e. CTAs] are mutating into false unions, in conditions even more precarious than those imposed by CTAs.”); Government of Colombia, Standing Committee on the Coordination of Wages and Employment Policy, National Technical Secretariat, Memoria No. 4, May 14, 2014 (including statements by a representative of the MOL and by union confederation leaders characterizing union contracts as tools for labor intermediation violating workers’ rights).

¹³⁵ Constitutional Court ruling T-457/11, May 27, 2011.

¹³⁶ *See, e.g., Ibid.*; Escuela Nacional Sindical, “TLC, Plan de Acción Laboral y derechos de los trabajadores en Colombia: Cinco años esperando cambios reales,” May 17, 2016.

contracts, while other stakeholders maintain their support for the mechanism.¹³⁷

The Submission alleges that the use of union contracts for permanent mission activities at two petroleum fields being explored by Pacific Rubiales undermined the right of workers to freely associate to USO.¹³⁸ After Pacific Rubiales agreed to engage in collective bargaining with USO in September 2011, the company allegedly signed an agreement with a different union and, from that point forward, has refused to engage in negotiations with USO, according to the Submission.¹³⁹ Workers have reportedly been told to renounce any affiliation to USO and to join the other union with which Pacific Rubiales signed the agreement in order to have their fixed-term work contracts renewed.¹⁴⁰ Two of the submitters presented this same case, along with other allegations of abusive subcontracting in the petroleum sector, to the ILO's CFA. In its recent report on the case, the CFA requested that the GOC “undertake consultations with the relevant social partners on possible measures to ensure that the use of fixed-term contracts in the petroleum sector does not adversely affect the free exercise of freedom of association” and “immediately conduct or complete inquiries into the alleged anti-union termination of contracts between [contractor and subcontractor] enterprises.”¹⁴¹ The OTLA understands that this would include looking into the use of union contracts.¹⁴²

In an effort to prevent the abusive use of union contracts, the MOL published Decree 036 of 2016, which requires proof that the union that signs a union contract existed at least six months prior to the signing of the contract (although not necessarily in the workplace covered by the contract) and reiterates that both the unions and the employers that sign such contracts must respect the rights of the workers affiliated to the union.¹⁴³ Decree 036 also requires that the union members under the union contract approve the contract in an assembly of all those covered.¹⁴⁴ Although it is too early to assess the full impact of the decree, the MOL reported a 35 percent

¹³⁷ OECD, *OECD Reviews of Labour Market and Social Policies: Colombia 2016*, 2016. *See, e.g.*, López Jiménez, Juan Sebastián and Carolina D'Avalos Castrillón, “El Contrato Sindical: ¿Un Beneficio para el Afiliado o una Figura de Intermediación y Afectación de Derechos Laborales?” *Univ. Estud. Bogotá (Colombia)* N° 12: 13-32, 2015, <http://cienciasjuridicas.javeriana.edu.co/documents/3722972/6187126/1+L%C3%B3pez-D'avalos.pdf/acdbd17d-0bd7-461b-80ff-8275e5969d1e>.

¹³⁸ U.S. Submission 2016-02 (Colombia), page 16. Pacific Rubiales Energy Corp. changed its name in 2015 to Pacific Exploration and Production Corporation. This report refers to the company as “Pacific Rubiales,” the short-hand name of the company at the time of the allegations in the Submission. The company had concessions from the GOC to explore and extract petroleum in two fields: Rubiales and Quifa. On July 1, 2016, the concession given by the GOC to Pacific Rubiales for Rubiales, the larger of the two fields, expired. State-owned petroleum company Ecopetrol now controls exploration and extraction in that field and is working with USO to sort out the previous subcontracting arrangements.

¹³⁹ U.S. Submission 2016-02 (Colombia), pages 12-13.

¹⁴⁰ U.S. Submission 2016-02 (Colombia), page 13.

¹⁴¹ International Labor Organization Governing Body, Committee on Freedom of Association, 374th Report, Case No. 2946, paragraph 257 (March 2015). The ILO indicates it has received additional information from the GOC related to this case, but the CFA has not yet reexamined the case, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:323768.

¹⁴² OTLA interview with U.S. Embassy Official, December 22, 2016.

¹⁴³ Decree 036 of 2016. Due to Constitutional Court decision C-797/00, which declared Article 360 of the Labor Code unconstitutional, workers in Colombia may belong to more than one union if they so desire.

¹⁴⁴ Decree 036 of 2016.

decrease in the number of union contracts filed with the MOL between January and April 2016, as compared to the same time period in 2015.¹⁴⁵

Simplified Stock Companies

Simplified stock companies (*sociedades por acciones simplificadas*—SASs) are provided for in Colombian commercial law as an expedited way to constitute a private business. SASs can be set up by one person or multiple people. They require minimal capital and paperwork to constitute, simplifying their establishment and registration. SASs have flexibility to establish the purpose for which they are constituted and to define the legal relationships between any partners.¹⁴⁶

In the sugar sector, it appears that some employers have turned to SASs as the preferred subcontracting mechanism, following the categorical prohibition of using CTAs for permanent mission activities.¹⁴⁷ The Submission alleges that La Cabaña sugar mill hires sugar cane cutters through intermediaries set up as SASs that either (a) refuse to renew the fixed-term contracts of sugar cane cutters who join Sintrainagro, infringing on workers' right to freely choose a union, or (b) change names to different SASs to avoid court findings of legal labor relationships between the original SASs and the cane cutter, thereby avoiding having to engage in collective bargaining in response to workers' petitions.¹⁴⁸

SASs performing permanent mission activities can be misused to undermine workers' rights to freedom of association and collective bargaining when employers create and then contract with undercapitalized or fictitious SASs, often on a short-term basis for no more than a year, acting as intermediaries to hire workers.¹⁴⁹ The result can be temporary employment arrangements lacking the protections permanent workers receive and an atmosphere of retaliation through non-renewal of contracts if workers engage in union organizing activities.¹⁵⁰ In addition, bargaining collectively with an undercapitalized or fictitious SAS—in contrast to a legitimate SAS acting as an employer's subsidiary—is difficult and largely unproductive.¹⁵¹ A SAS that is an intermediary for a single company cannot respond effectively to workers' requests to negotiate salary increases or other economic benefits or other terms and conditions of employment because the

¹⁴⁵ Government of Colombia Official, e-mail to the OTLA, January 3, 2017.

¹⁴⁶ Law 1258 of 2008; Bogota Chamber of Commerce, *Guía del Registro Mercantil 28: Constitución de SAS*, November 2011, <http://www.ccb.org.co/content/download/5044/65882/version/3/file/Gu%C3%ADa%20n%C3%BAm.%2028.%20Constituci%C3%B3n%20de%20SAS.pdf>.

¹⁴⁷ OTLA interview with U.S. Embassy Official, December 22, 2016. In 2011, nearly 70 percent of cane cutters belonged to CTAs. USDOL, *Colombia Labor Rights Report 2011*, page 9. Though the majority of workers who were previously in abusive CTAs in the sector formed unions and negotiated collective bargaining agreements with subsidiaries of the main sugar processing companies, see USTR and USDOL, *Labor Action Plan Three Years Later*, April 7, 2014, page 5, questionable subcontracting practices still exist in the sector.

¹⁴⁸ U.S. Submission 2016-02 (Colombia), pages 30 and 36.

¹⁴⁹ Actualícese, "Convertir CTA en SAS para evadir la contratación directa, también es fraude y es sancionado," August 4, 2011, <http://actualicese.com/actualidad/2011/08/02/convertir-cta-en-sas-para-evadir-la-contratacion-directa-tambien-es-fraude-y-es-sancionado/>; Freidrich Ebert Stiftung en Colombia and Escuela Nacional Sindical, "La precariedad laboral en Colombia," 2014, p.27-29, <http://library.fes.de/pdf-files/bueros/kolumbien/11109.pdf>.

¹⁵⁰ Freidrich Ebert Stiftung en Colombia and Escuela Nacional Sindical, "La precariedad laboral en Colombia," 2014, p.33-35, <http://library.fes.de/pdf-files/bueros/kolumbien/11109.pdf>.

¹⁵¹ OTLA interview with U.S. Embassy Official, December 22, 2016.

SAS is bound by the terms of its contract with the employer.¹⁵² Despite numerous worker and union complaints to the MOL about the use of SASs to undermine workers' rights at La Cabaña, the issues persist and workers remain vulnerable to abuse.¹⁵³

GOC Efforts to Combat Abusive Subcontracting and Remaining Problems

The USG regularly has expressed concern to GOC senior-level officials about the use of different kinds of abusive subcontracting and has worked intensively with the GOC on its efforts to address the problem.¹⁵⁴

Since 2012, nearly all of Colombia's labor inspectors have participated in trainings on how to identify and sanction "ambiguous and disguised employment relationships" (i.e., abusive subcontracting).¹⁵⁵ In addition, in a 2014 ruling, the Colombian Constitutional Court underlined that the entire scope of labor rights enshrined in the Constitution—including the rights to freedom of association and collective bargaining—must be respected regardless of the contracting scheme by which a worker is hired.¹⁵⁶ The court's assertion that constitutionally mandated labor rights apply to subcontracted workers in effect reinforced Law 1429 of 2010 and strengthened the basis for inspectors to investigate abusive subcontracting.¹⁵⁷ Nevertheless, the application of administrative sanctions for abusive subcontracting practices involving arrangements other than CTAs, especially in Action Plan priority sectors, appears to have been limited.¹⁵⁸

In 2014, the *Escuela Nacional Sindical* (ENS) worked with the Single Confederation of Workers of Colombia (*Central Unitaria de Trabajadores de Colombia*—CUT) and the Confederation of Workers of Colombia (*Confederación de Trabajadores de Colombia*—CTC) to file with the MOL 150 complaints of illegal subcontracting and suppression of workers' freedom of association. As of April 2016, the MOL had issued definitive administrative acts in only five of

¹⁵² *Ibid.*

¹⁵³ Escuela Nacional Sindical, "TLC, Plan de Acción Laboral y derechos de los trabajadores en Colombia: Cinco años esperando cambios reales," May 17, 2016; Confederación de Trabajadores de Colombia (CTC) and Central Unitaria de Trabajadores (CUT), "Tres años de incumplimiento del Plan de Acción Obama Santos: Informe sobre los tres primeros años de implementación del Plan de Acción Laboral," April 2014; U.S. Government Officials meetings with La Cabaña management, workers, and union officials, January 2014; U.S. Government Officials meetings with union officials and sugar industry representatives, December 2015 and October 2016.

¹⁵⁴ See, e.g., USTR and DOL, UPDATE: The Colombian Labor Action Plan: Three Years Later, April 7, 2014; USTR and DOL, The Colombian Labor Action Plan: A Five Year Update, April 11, 2016.

¹⁵⁵ O'Brien & Associates International, Promoting Compliance with International Labor Standards in Colombia: Independent Final Evaluation, publication forthcoming. Specifically, a total of 1,173 labor inspectors have received the ILO training.

¹⁵⁶ Constitutional Court ruling C-593 of 2014, <http://www.corteconstitucional.gov.co/RELATORIA/2014/C-593-14.htm>.

¹⁵⁷ *Ibid.*

¹⁵⁸ Government of Colombia Official, e-mail to the OTLA, January 3, 2017. The MOL reports that in all economic sectors in 2014, inspectors imposed 99 fines for illegal subcontracting. In 2015, it imposed 140 fines, and through April of 2016, it had imposed 26 fines. According to data from the MOL, the majority of these fines were imposed against CTAs: 87 of the fines reported for 2014, 58 of the fines reported for 2015, and 12 of the fines reported for 2016.

those cases.¹⁵⁹ No fines have been applied. In 2014, labor inspectors undertook 54 investigations for illegal subcontracting in the five priority sectors. Only one fine was imposed as a result.¹⁶⁰ That fine is currently in abeyance pending compliance with a negotiated formalization agreement. In 2015, the MOL reported it imposed 61 fines in the priority sectors but none for illegal subcontracting.¹⁶¹ Through October 31, 2016, the MOL reported five fines imposed against contracting companies for illegal subcontracting in the priority sectors, coming three years after the MOL started its investigations into abusive subcontracting at the companies.¹⁶² The fines are currently under appeal.

The MOL reports having imposed fines for abusive subcontracting across all sectors since 2014.¹⁶³ Based on data provided by the GOC, almost 60 percent of the fines imposed for abusive subcontracting from the beginning of 2014 to April 2016 have been imposed against CTAs.¹⁶⁴ Although both CTAs and end-user employers are covered by the provisions of Article 63 of Law 1429 and are sanctioned separately,¹⁶⁵ CTAs that engage in abusive subcontracting are little more than shells – they have no capital and no assets.¹⁶⁶ Imposing an administrative sanction on a CTA for abusive subcontracting requires the CTA’s dissolution and withdrawal of its legal personality,¹⁶⁷ which halts the labor law violation, but makes it unlikely that any fine against the CTA will ever be collected. For the fines imposed for abusive subcontracting to have a broader deterrent effect, the MOL should increase the number of fines that it imposes and collect a higher percentage of those fines on the companies that enter into abusive subcontracting arrangements with the CTAs, because only those companies have the capital to pay the fines. This same principle—fining the end-user company—would also logically apply to other methods of subcontracting such as union contracts and SASs.

Labor authorities appear to be shifting toward the negotiation of labor formalization agreements, which may explain the low number of fines imposed for abusive subcontracting arrangements not involving the use of CTAs. The MOL, for example, has indicated that it has incentivized the

¹⁵⁹ Escuela Nacional Sindical, “TLC, Plan de Acción Laboral y derechos de los trabajadores en Colombia: Cinco años esperando cambios reales,” May 17, 2016.

¹⁶⁰ Ministry of Labor, Plan de Acción Laboral Notas de Avance, December 2015.

¹⁶¹ *Ibid.*

¹⁶² Ministry of Labor, “Por Intermediación laboral ilegal, MinTrabajo impone mayor número de sanciones,” November 8, 2016, <http://mintrabajo.gov.co/noviembre-2016/6526-por-intermediacion-laboral-ilegal-mintrabajo-impone-mayor-numero-de-sanciones.html>.

¹⁶³ Government of Colombia, Answers to the OECD, August 2016. The MOL reports that in all economic sectors in 2014, inspectors imposed a total of 99 fines for illegal subcontracting. In 2015, it imposed 140 total fines, and through April of 2016, it had imposed 26 total fines.

¹⁶⁴ Government of Colombia, Response to the OTLA, October 31, 2016 (providing statistics that show 265 total fines imposed for abusive subcontracting from 2014 to April 2016 and 154 fines imposed against CTAs over the same period).

¹⁶⁵ Law 1429 of 2010, Article 63; Decree 2025 of 2011, Article 4.

¹⁶⁶ Cabrera, Wilson, press for Senate of the Republic of Colombia, “Comisión Primera examinó ‘cooperativas de papel,’” September 24, 2013, <http://www.senado.gov.co/historia/item/18220-debate-comision-primera-sobre-cooperativas-de-papel> (covering debate of the Colombian Senate on “fake” CTAs, described as “fictitious” and existing only on paper to “violate principles of cooperative solidarity and labor rights”); Constitutional Court Ruling T-559 of 2010, <http://www.corteconstitucional.gov.co/relatoria/2010/T-559-10.htm> (ruling that the CTA concerned had operated purely as a “façade”).

¹⁶⁷ Law 1233 of 2008, Article 7(3).

drafting of formalization agreements.¹⁶⁸ Established by Law 1610 of 2013 and clarified by Resolution 321 of 2013, formalization agreements allow employers to negotiate binding agreements with the MOL to hire, on a long-term basis, workers who were previously in unlawful subcontracting relationships. The MOL can negotiate and conclude such agreements at any time, as well as during an open investigation, prior to imposition of a fine, in exchange for suspending the investigation.¹⁶⁹ In those cases in which fines have already been imposed, the MOL will commit to reduce and ultimately eliminate a fine after five years, pending successful fulfillment of the terms of the agreement.¹⁷⁰ MOL inspectors are supposed to undertake follow-up investigations of the formalization agreements to ensure the employers are complying with the agreement's stipulations.¹⁷¹ If the employers do not comply with the terms of the agreement, the fines imposed against them, by law, are reactivated.¹⁷² The MOL reports finalizing a total of 171 formalization agreements covering some 25,000 workers (out of a labor force of 25 million)¹⁷³ in various economic sectors since 2012,¹⁷⁴ when the first regulations on formalization agreements were issued.¹⁷⁵

Formalization agreements have the potential to successfully address certain cases of abusive subcontracting by creating stable, long-term hiring arrangements for the impacted workers. Unions and other labor groups, however, have expressed concerns about the application of formalization agreements in practice.¹⁷⁶ Concerns include reservations regarding the underlying Colombian law, according to which formalization agreements are not required to establish direct, indefinite-term contracts for the covered workers.¹⁷⁷ Instead, they must establish contracts that

¹⁶⁸ Government of Colombia, Answers to the OECD, August 2016, page 29.

¹⁶⁹ Law 1610 of 2013, Article 16.

¹⁷⁰ Decree 2025 of 2011, Article 10.

¹⁷¹ Government of Colombia, Ministry of Labor, Resolution 321 of 2013, Article 2(6).

¹⁷² Law 1610 of 2013, Article 16.

¹⁷³ Government of Colombia, National Statistics Department (DANE), "Estadísticas por tema: Mercado Laboral," October 2016, <https://www.dane.gov.co/index.php/estadisticas-por-tema/mercado-laboral>.

¹⁷⁴ Government of Colombia, Response to the OTLA, October 31, 2016. The government's response lists 171 formalization agreements through September 30, 2016. The MOL website that houses the formalization agreements (<http://www.mintrabajo.gov.co/tlc-plan-de-accion-laboral.html>) lists 175 agreements between 2012 and 2016 as of September 10, 2016. The most recent agreements for 2016 are dated July; there is no explanation for the discrepancy in the numbers. Ministry of Labor, "MinTrabajo presentó avances en materia laboral del TLC con EE.UU.," October 27, 2016, <http://www.mintrabajo.gov.co/octubre-2016/6495-mintrabajo-presento-avances-en-materia-laboral-del-tlc-con-eeuu.html>.

¹⁷⁵ Government of Colombia, Ministry of Labor, Resolution 2272 of 2012. Law 1610 of 2013 superseded the 2012 regulations and included its own regulations in Resolution 321 of 2013.

¹⁷⁶ Escuela Nacional Sindical, "Centrales sindicales hacen balance de los 5 años del Plan de Acción Laboral Obama-Santos," April 9, 2016. Beyond the general concerns discussed in these paragraphs, the Submission specifically alleges the GOC has failed to effectively enforce Article 2 of Resolution 321 on formalization agreements by not taking action to ensure negotiations for a formalization agreement took place when a union requested it. According to Resolution 321, an employer, workers, or a union with members at a business can file a request that the MOL and the business enter into an agreement. Resolution 321 does not require an inspector to accept any such request, however, nor to offer a formalization agreement to an employer. Furthermore, there is no obligation on the part of an employer to accept an offered formalization agreement.

¹⁷⁷ Law 1610 of 2013, Articles 13-14. *See also* Government of Colombia, Ministry of Labor, "Alcance de los Acuerdos de Foramlización Laboral en la Ley 1610 de 2013," 2015, <https://www.minsalud.gov.co/Documentos%20y%20Publicaciones/PRESENTACION%20ACUERDOS%20DE%20FORMALIZACI%C3%93N%20LABORAL%20-%20ESE.pdf>.

tend toward permanence (*vocación de permanencia*).¹⁷⁸ As a result, agreements in several cases have not resulted in direct, indefinite-term employment relationships with the main employer.¹⁷⁹ Instead there are reports that new, at times illegal, subcontracting arrangements were created, thereby perpetuating the original abusive subcontracting situation.¹⁸⁰ For context, the MOL reports that 22 percent of workers covered by formalization agreements have direct, indefinite-term contracts with the main employer.¹⁸¹

Various unions and the ENS have also expressed increasing concern that formalization agreements are not adequately monitored from the outset to ensure that all workers affected by illegal subcontracting are included initially in the agreements, and subsequently to ensure that those covered workers remain employed for a period of five years, as legally required for full waiver of any fine imposed.¹⁸² The MOL asserts that it is undertaking verification inspections of the formalization agreements in these areas and reports that it conducted 198 verification visits between 2013 and June 2016 and has programmed an additional 76 visits between July and December 2016.¹⁸³

Responding in part to the growing complaints of continuing abusive subcontracting, in particular the shifting away from CTAs to other arrangements, and to requests from domestic stakeholders and international organizations for more clarity on the scope of prohibited subcontracting conduct, the GOC issued two subcontracting-related decrees in 2016. Decree 036, issued in January 2016 and discussed previously, is intended to combat unlawful union contracts.¹⁸⁴ Decree 583, issued on April 8, 2016, articulates the factors that should be considered in determining when subcontracting for permanent mission activities through any arrangement affect workers' rights and is unlawful.¹⁸⁵ It is intended to help labor inspectors investigate and impose potentially significant fines on employers who undermine workers' rights using subcontracting methods (such as those that have become common alternatives to CTAs) for the performance of permanent mission activities. It complements existing regulations implementing Article 63 of Law 1429. If robustly enforced, it could have a significant impact on the ground for workers.¹⁸⁶ Nevertheless, the decree has been criticized by some stakeholders, including and in particular for: 1) establishing a list of practices to be considered potentially indicative of abusive subcontracting, rather than *per se* evidence of unlawful conduct; and 2) clearly articulating a

¹⁷⁸ Law 1610 of 2013, Articles 13-14.

¹⁷⁹ See, e.g., Acuerdo de Formalización Laboral entre la Empresa de Transporte Masivo de Valle de Aburrá LTDA, La Fundación Universidad de Antioquia y la Dirección Territorial de Antioquia del Ministerio del Trabajo, April 29, 2013; Acuerdo de Formalización Laboral entre Palmas Oleaginosas Bucarelia S.A. y Ministerio del Trabajo, June 3, 2013.

¹⁸⁰ OTLA interview with U.S. Embassy Official, December 22, 2016.

¹⁸¹ Government of Colombia Official, e-mail to the OTLA, January 3, 2017.

¹⁸² OTLA interview with U.S. Embassy Official, December 22, 2016. In addition, see e.g., Escuela Nacional Sindical, "TLC, Plan de Acción Laboral y derechos de los trabajadores en Colombia: Cinco años esperando cambios reales," May 17, 2016.

¹⁸³ Government of Colombia Official, e-mail to the OTLA, January 3, 2017; Government of Colombia, Response to the OTLA, October 31, 2016.

¹⁸⁴ Decree 036 of 2016.

¹⁸⁵ Decree 583 of 2016.

¹⁸⁶ USTR, "USTR and Department of Labor Issue Five-Year Update on the Colombian Labor Action Plan and Welcome New Decree on Illegal Subcontracting," April 11, 2016, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/april/ustr-and-dol-issue-five-year-update>.

two-part test for abusive subcontracting, requiring that the subcontracting involve permanent mission activities and affect workers' rights. The decree is being challenged at Colombia's Council of State (*Consejo de Estado*), the country's highest court on administrative law.¹⁸⁷

In August 2016, the MOL announced 20 cases under "preliminary review" (*averiguación preliminar*) in which the inspectors are applying Decree 583.¹⁸⁸ Two of the cases involve CTAs, which could also be investigated and, as appropriate, sanctioned in accordance with Decree 2025. As of December 2016, the MOL was in the process of initiating administrative sanction investigations in two cases, finalizing charges in another, and notifying the company of a sanction in a fourth.¹⁸⁹ The MOL had closed three of the 20 cases for a lack of evidence and is negotiating a formalization agreement in another.¹⁹⁰ The remaining 11 cases are still under preliminary review,¹⁹¹ and accordingly, they are now beyond the timelines listed in the MOL's inspection manuals for conclusion of such reviews. While it is still too early to fully assess the GOC's enforcement of Decree 583, the limited number of cases being reviewed under the decree and the initial delays in the open cases are concerning.

The GOC has taken significant steps to combat abusive subcontracting, including the recent and much-needed decree targeting contracting arrangements not involving CTAs that can also undermine workers' rights. Given the history of abusive subcontracting, the OTLA remains concerned about the effect of such subcontracting on the rights to freedom of association and collective bargaining and will continue to monitor closely. Although it will take time to see the full effects of the recent decrees, the OTLA has significant concerns that the MOL is not taking sufficient action to implement them or to otherwise enforce the ban in Article 63 of Law 1429 of 2010 on subcontracting that may undermine the rights to freedom of association and collective bargaining.

ii. **Collective Pacts**

The Submission alleges that the GOC has failed to adequately enforce laws that prohibit the use of collective pacts that inhibit workers' rights to organize and bargain collectively.¹⁹²

According to the Labor Code, employers may offer collective pacts (*pactos colectivos* or workplace benefits packages that cover non-union workers) to non-union workers in workplaces where unions are not present, as well as in workplaces where unions represent less than one-third of the company's workforce.¹⁹³ Some employers reportedly offer better conditions through

¹⁸⁷ Government of Colombia, Council of State, Supreme Tribunal of Contentious Administration and Supreme Consultative Body of the Government, Lawsuit filed by Asociación Colombiana de Empresas de Servicios Temporales (ACOSET) against the Government of Colombia, Ministry of Labor, May 31, 2016, <http://www.consejodeestado.gov.co/actuaciones.asp?numero=11001032500020160048500>; RCN Radio, "CUT demand decreto que legaliza la tercerización laboral," June 9, 2016, <http://www.rcnradio.com/nacional/cut-demando-decreto-legaliza-la-tercerizacion-laboral/>.

¹⁸⁸ Government of Colombia Official, e-mail to the OTLA, January 3, 2017.

¹⁸⁹ Government of Colombia, Ministry of Labor, e-mail to the OTLA, December 20, 2016.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.* Note: one of the twenty cases, upon examination of the evidence, was found not to be relevant and removed from the initial group, bringing the number of cases being examined under Decree 583 to 19.

¹⁹² U.S. Submission 2016-02 (Colombia), page 7.

¹⁹³ Substantive Labor Code, Article 481.

collective pacts than those contained in existing collective bargaining agreements.¹⁹⁴ However, Article 354 of the Labor Code prohibits employers from interfering with workers' freedom of association;¹⁹⁵ therefore, employers may not use a collective pact that interferes with or undermines legitimate union activity.¹⁹⁶

In practice, there is evidence that collective pacts in Colombia sometimes have been used to infringe on workers' rights to freedom of association and collective bargaining.¹⁹⁷ Reports note that employers have used collective pacts to pressure workers not to join or to leave a union by offering better terms.¹⁹⁸ Collective pacts may in effect operate as a "ceiling" for collective bargaining negotiations, ensuring that union and non-union workers receive the same benefits and incentivizing workers to not join the union.¹⁹⁹ The ENS analyzed a group of workplaces with collective pacts in 2015 and found that in 71 percent of the workplaces where collective pacts and unions coexisted, the number of workers affiliated with the union(s) fell.²⁰⁰ The ILO's Committee of Experts on the Application of Conventions and Recommendations and the OECD have recommended that Colombia eliminate the option of collective pacts in workplaces where a union is present.²⁰¹

In spite of these concerns, the MOL's investigations of complaints alleging illegal use of collective pacts that undermine freedom of association have not consistently proceeded in a timely manner. Labor Action Plan commitments required the GOC to seek technical assistance from the ILO to monitor the use of collective pacts. Since 2014, the ILO has worked with the MOL to prioritize and investigate 49 cases alleging misuse of collective pacts. The MOL has imposed 12 fines in these cases for violation of Article 354; at least two of those fines are under appeal.²⁰² Twenty-two cases, the majority of which have been with the MOL since 2014, are still

¹⁹⁴ OECD, *OECD Reviews of Labour Market and Social Policies: Colombia 2016, Executive Summary and Assessment and Recommendations*, 2016.

¹⁹⁵ Substantive Labor Code, Article 354; Cialti, Pierre-Henri, "Negociación colectiva en Colombia: una visión cruzada entre el sector público y el sector privado," *Revista Estudios Socio-Jurídicos* 18.1, January-June, 2016, page 194 (referencing Article 354 and stating that "if [collective] pacts tend to discourage union affiliation by way of granting the parties benefits or conditions not contemplated in a collective bargaining agreement applying in the same unionized workplace, the [Substantive Labor Code] . . . allows for sanctions").

¹⁹⁶ *See, e.g.*, Constitutional Court Sentencia T-069/15, February 18, 2015.

¹⁹⁷ OECD, *OECD Reviews of Labour Market and Social Policies: Colombia 2016, Executive Summary and Assessment and Recommendations*, 2016, page 21; International Labor Organization, International Labor Conference, 104th Session, Report of the Committee of Experts on the Application of Conventions and Recommendations, June 2015, page 63.

¹⁹⁸ *Ibid.*, page 116; El Tiempo, "Cruzada sindical en contra de los pactos colectivos," July 3, 2014, <http://www.eltiempo.com/economia/sectores/sindicatos-en-contra-de-los-pactos-colectivos/14198925>; AFL-CIO, "Legislative Alert!," October 11, 2011, http://www.aflcio.org/content/download/7066/76196/file/colombiafta_101111.pdf.

¹⁹⁹ International Labor Organization, International Labor Conference, 104th Session, Report of the Committee of Experts on the Application of Conventions and Recommendations, June 2015, page 63.

²⁰⁰ Escuela Nacional Sindical, "TLC, Plan de Acción Laboral y derechos de los trabajadores en Colombia: Cinco años esperando cambios reales," May 17, 2016, page 22.

²⁰¹ International Labor Organization, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labor Conference, 101st Session, 2012; OECD, *OECD Reviews of Labour Market and Social Policies: Colombia 2016, Executive Summary and Assessment and Recommendations*, 2016, page 21.

²⁰² OTLA interview with U.S. Embassy Official, December 22, 2016.

in various stages of investigation.²⁰³ The ENS similarly reported that 45 affected unions filed complaints with MOL about the use of collective pacts that infringe on workers' freedom of association.²⁰⁴ Approximately two years after the complaints were filed, only five of the cases had resulted in imposed fines; fourteen of them had been archived; three of them were either withdrawn or not followed by the union; and the remaining were, as of mid-2016, in various stages of investigation.²⁰⁵

As a result, the OTLA has ongoing concerns regarding the enforcement of the Labor Code's prohibition against the use of collective pacts that undermine workers' rights to freedom of association and collective bargaining.

C. Lack of Prosecutions in Cases of Threats and Violence against Unionists

The Submission alleges that by failing to both prevent and prosecute cases of anti-union threats and violence, the GOC has failed to provide freedom of association in practice.²⁰⁶ The Submission specifically references the lack of investigations into death threats received by USO leaders and their families after they testified against Pacific Rubiales in a criminal case,²⁰⁷ and the "escalating pattern of threats and intimidation on the part of officials from La Cabaña and its intermediaries" against Sintrainagro.²⁰⁸ The union members and leaders reported the threats to the *Fiscalía* (Prosecutor General's Office), Colombia's criminal prosecution agency. The Submission claims that no investigation into the reported threats occurred.²⁰⁹

The rights to freedom of association and collective bargaining are enshrined in Colombian law, from the Constitution to Labor Code, and a robust legal framework exists to protect those rights, including criminalizing actions that infringe on the rights.²¹⁰ In addition, Colombia has ratified ILO Conventions 87, 98, and 154 on the rights to freedom of association and collective bargaining and incorporated them into domestic law.²¹¹

The ILO has repeatedly recognized that a failure to effectively and expeditiously address threats and violence against labor activists and leaders constitutes a violation of freedom of association. As described by the ILO, the rights of workers' organizations can be effectively exercised only

²⁰³ *Ibid.* The 22 cases still in investigation include 10 cases in preliminary review, nine cases with open investigations, and three cases pending notification of charges. Nine of the 22 cases are from 2015, the rest are from 2014. The status of the other 15 cases are: one case notified of charges; nine cases archived or dropped; four cases in administrative appeals (not including the two sanctions under appeal); and one case resolved with a collective bargaining agreement replacing the collective pact.

²⁰⁴ Escuela Nacional Sindical, "TLC, Plan de Acción Laboral y derechos de los trabajadores en Colombia: Cinco años esperando cambios reales," May 17, 2016, page 22.

²⁰⁵ *Ibid.*

²⁰⁶ U.S. Submission 2016-02 (Colombia), pages 47-48.

²⁰⁷ *Ibid.* at page 17.

²⁰⁸ *Ibid.* at page 41.

²⁰⁹ *Ibid.* at page 19

²¹⁰ Political Constitution of the Republic of Colombia, Articles 11 (protecting the right to life), 34 (protecting the right to free association), and 39 (establishing the right to form unions); Law 599 of 2000 (criminal code), Articles 103 (criminalizing homicides), 104(10) (providing for increased sentences for homicides of union members); 347 (criminalizing threats and increasing sentences for threats against union members).

²¹¹ *Ibid.* at Article 53; Law 26 of 1976; Law 524 of 1999 (together with Law 26 of 1976, enshrining the rights to freedom of association and collective bargaining into Colombian law).

in a climate that is free from violence, pressure, or threats against the leaders and members of such organizations.²¹² The ILO also notes that “the absence of judgements 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.”²¹³ According to the ILO, when a climate of violence exists, the judiciary must “shed full light, at the earliest date, on the facts and the circumstances in which such actions [of violence] occurred and in this way, to the extent possible, determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events.”²¹⁴

The ENS reported that unions filed with the *Fiscalía* 113 cases of threats in 2015 and 91 through August 2016.²¹⁵ Although the *Fiscalía* reports having assigned prosecutors and investigators to all cases of threats against labor leaders and activists,²¹⁶ representatives of unions and other civil society organizations report there have not been any results.²¹⁷ The U.S. Embassy in Bogota received information from the *Fiscalía* on prosecutions for threats against unionists on April 29, 2016, which indicates that there have not been any convictions since 2009.²¹⁸

From 2001 to 2010, the ENS reported an average of close to 100 homicides of union members per year. Since entry-into-force of the CTPA, the number has dropped to an average of 25 labor homicides per year, and in 2015, there were 21 labor homicides reported. Through October 2016, eight such homicides have been reported.²¹⁹ Nevertheless, according to the OECD, “[v]iolence continues to be a challenge in spite of considerable progress and strongly affects trade union activities.”²²⁰ Although numbers vary depending on the source and the years reviewed, one Colombian criminal court judge alleged that in the last 22 years, there have been only 105 sentences handed down in cases of 86 homicides of unionists.²²¹ The ITUC reports that there were 2,500 homicides of trade unionists in the last 20 years.²²² Although such impunity for labor homicides has existed for decades, it appears to continue in recent cases, where the evidence is newer, prosecutions most likely to be successful, and the potential deterrent effects greater. According to the *Fiscalía*, in the 152 notices of labor homicides that have occurred since 2011,

²¹² International Labor Organization, Committee on Freedom of Association Digest of Decisions 5th Edition, 2006, paragraph 44.

²¹³ *Ibid.* at paragraph 52.

²¹⁴ *Ibid.* at paragraph 48.

²¹⁵ Escuela Nacional Sindical, “Violaciones a la vida, libertad e integridad cometidas contra sindicalistas en Colombia, del 01 de enero de 2014 al 31 de agosto de 2016,” provided to the OECD, September 2016.

²¹⁶ U.S. Government Official and others meeting with Fiscalía General de la Nación, August 24, 2016.

²¹⁷ OTLA interview with U.S. Embassy Official, December 22, 2016.

²¹⁸ Fiscalía General de la Nación, Radicado No. 20161700028211, April 29, 2016.

²¹⁹ Escuela Nacional Sindical, Sistema de Información en Derechos Humanos (SINDERH) (indicating 22 homicides in 2012; 35 in 2013; 21 in 2014; 21 in 2015; and 8 through October 31, 2016).

²²⁰ OECD, OECD Reviews of Labour Market and Social Policies: Colombia 2016, Executive Summary and Assessment and Recommendations, 2016, page 97. While there has been a steady decline in Colombian homicide rates nationwide, including for union members and labor activists, Colombia’s homicide rate is still high. According to the OECD, “the homicide rate in Colombia stood at 30.8 per 100,000 population in 2012 (down from 66.5 in 2000), compared with a global average homicide rate of 6 per 100,000 population.”

²²¹ La FM Radio, “Más de 1300 procesos por crímenes contra sindicalistas están en el limbo,” July 29, 2016, <http://www.lafm.com.co/justicia/noticias/m%C3%A1s-de-1300-procesos-cr%C3%ADmenes-211409#ixzz4Lx2DZ21v>.

²²² International Trade Union Confederation (ITUC), The 2016 Global Rights Index: The World’s Worst Countries for Workers, 2016, page 24.

there have been 18 convictions, although some homicide cases have multiple defendants and, therefore, multiple convictions.²²³ With regard to the Action Plan priority sectors, there have been two murders of unionists in the sugar sector (2012 and 2013), one of which was explicitly mentioned in the Submission, and four homicides of USO members.²²⁴ Only one of those six cases has entered the trial phase; the case detailed in the Submission, as well as the other four, remain under investigation.²²⁵

In Colombia, the *Fiscalía* is the only entity that can prosecute individuals for crimes, except for those committed by minors, members of congress, or members of the military in the course of duty.²²⁶ The *Fiscalía* is divided into specialized prosecutorial directorates, including the Human Rights Directorate (*Dirección de Fiscalía Nacional Especializada de Derechos Humanos y Derecho Internacional Humanitario*), the National Directorate for Citizen Security and Regional Offices (*Dirección Nacional de Seccionales y de Seguridad Ciudadana*), and the Directorate for Analysis and Context (*Dirección Nacional de Análisis y Contextos*).²²⁷ All three directorates handle cases of violence and threats against unionists.²²⁸ The Human Rights Directorate, however, houses the prosecutors with the most specialized knowledge of crimes against human rights defenders, including unionists and labor activists.²²⁹

In the Human Rights Directorate, 22 prosecutors handle labor-related crimes,²³⁰ 18 of whom focus exclusively on cases of violence against unionists and labor activists, including homicides.²³¹ All 22 have experience with and should have received specialized training on investigating and prosecuting such crimes, including those with the possibility of anti-union animus as an underlying motive.²³² These prosecutors are stationed in eight offices of the *Fiscalía* around the country and build cases with the help of 83 judicial police investigators.²³³

²²³ U.S. Government Officials meeting with Fiscalía General de la Nación, October 28, 2016. The OTLA's analysis of the publicly available sentences in cases of crimes against unionists can verify 10 cases with sentences, although at least two of the cases have more than one sentence (i.e., more than one defendant). There are only five cases with sentences since entry-into-force of the CTPA.

²²⁴ U.S. Submission 2016-02 (Colombia), page 32.

²²⁵ U.S. Government Officials meeting with Fiscalía General de la Nación, October 28, 2016.

²²⁶ Political Constitution of the Republic of Colombia, Articles 249-253; Government of Colombia, Ministry of Law and Justice, Preguntas y Respuesta Frecuentes, No. 26, <http://www.minjusticia.gov.co/ServicioalCiudadano/PreguntasYRespuestasFrecuentes/tabid/359/Default.aspx?QuestionID=172&AFMID=1980>.

²²⁷ See Fiscalía General de la Nación, Estructura Fiscalía General de la Nación – Decreto 016 de 2014, <http://www.fiscalia.gov.co/colombia/wp-content/uploads/ORG4.pdf>.

²²⁸ Government of Colombia, Response to the OTLA, October 31, 2016.

²²⁹ Government of Colombia Official, e-mail to the OTLA, January 3, 2017.

²³⁰ Fiscalía General de la Nación, La Fiscalía del siglo XXI: un camino hacia la modernización, 2016, http://www.fiscalia.gov.co/colombia/wp-content/uploads/Informe_Cuatrenio_corregido_2012-2016.pdf, page 93.

²³¹ Government of Colombia Official, e-mail to the OTLA, January 3, 2017.

²³² Fiscalía General de la Nación, Informe de Gestión: 2014-2015, 2015, <http://www.fiscalia.gov.co/colombia/wp-content/uploads/212419-Gesti%C3%B3n-2014-2015-final-11.pdf>, page 107.

²³³ Government of Colombia, Response to the OTLA, October 31, 2016. The 22 prosecutors are distributed geographically as follows: 8 in Bogota, 4 in Medellin, 3 in Cali, 1 in Pasto, 1 in Barranquilla, 2 in Bucaramanga, 1 in Neiva, 1 in Villavicencio, and 1 in Popayan. Fiscalía General de la Nación, La Fiscalía del siglo XXI: un camino hacia la modernización, 2016, http://www.fiscalia.gov.co/colombia/wp-content/uploads/Informe_Cuatrenio_corregido_2012-2016.pdf, page 93.

As of August 2016, the Human Rights Directorate reported 966 active cases of unionist homicides dating from 1994, divided among the 22 prosecutors.²³⁴ Not all cases of violence against unionists are handled by these 22 prosecutors, however. Many of these cases, instead, are assigned to general “Citizen Security” prosecutors located in the regional offices of the *Fiscalía*.²³⁵ A case of violence against a unionist is transferred to the Human Rights Directorate only pursuant to a petition of the victim’s family or union approved by the Prosecutor General (frequently called the Attorney General or the *Fiscal General*),²³⁶ a process that can be burdensome and take over a year.²³⁷ This results in cases of violence against unionists, including homicides, being investigated by prosecutors who may not have the appropriate experience and expertise handling labor-related crimes or by specialized prosecutors who receive the cases after many months of delay, during which time important evidence may grow cold, significantly impeding the investigation.

Some Colombian prosecutors understand their law to require prosecutors to direct, in writing, the actions of the judicial police and members of the technical investigation corps (*Cuerpo Técnico de Investigación*) who gather evidence in homicide cases.²³⁸ Although preliminary evidence should be collected at the crime scene, it may be months before a prosecutor orders the police to follow-up on the evidence.²³⁹ The same can be true of witness statements and interviews with a victim’s family members or union.²⁴⁰ The time period between a prosecutor sending a follow-up order to the police and receiving a response can be between eight and 18 months.²⁴¹ This significantly delays the investigation, allowing critical time to pass and may undermine prosecutors’ ability to prove cases and cause cases to stagnate in the investigation phase and not move to trial.

In its review of Colombia’s labor market and social policies, the OECD said, “[o]ver the past few years, the Colombian Government took a number of initiatives to address the impunity for trade-union related cases of violence.” The OECD concluded, however, that “[t]he changes in the processes of crime investigation and prosecution have so far not led to substantial results.”²⁴²

The history of and continued high rate of impunity in cases of threats and violence against unionists undermines the right to freedom of association and raises concerns about the adequacy of investigation and prosecution for violence against trade unionists in Colombia. These concerns include the low number of prosecutors, particularly in the Human Rights Directorate; delays created by prosecutors’ understanding that they must request in writing the judicial police to gather evidence; and the low conviction rate.

²³⁴ Government of Colombia Official, e-mail to the OTLA, January 3, 2017.

²³⁵ *Ibid.*

²³⁶ U.S. Government Official meeting with Fiscalía General de la Nación, July 28, 2014.

²³⁷ U.S. Department of Justice meeting with U.S. Embassy Official, August 19, 2016.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² OECD, OECD Reviews of Labour Market and Social Policies: Colombia 2016, Executive Summary and Assessment and Recommendations, 2016, pages 106-07.

D. Enforcement of Criminal Code Article 200

Article 200 of the Criminal Code allows for criminal sanctions against employers who undermine workers' rights to freedom of association and collective bargaining.²⁴³ The Submission alleges the GOC has failed to effectively enforce Article 200 of the Criminal Code when it "consistently failed to respond to Article 200 cases brought by unions . . . despite receiving 1,146 complaints."²⁴⁴ The Submission details, as an example, the Article 200 case filed in 2013 by USO against Pacific Rubiales and its contractors for allegedly infringing on the workers' freedom of association.²⁴⁵

In 2011, the Colombian Congress reformed Criminal Code Article 200, as specified in the Labor Action Plan, to increase criminal sanctions for employers that undermine workers' rights to association and collective bargaining and criminalize the use of collective pacts to offer better conditions to non-union workers.²⁴⁶ The reform provides for fines and jail time for violators. Three factors, however, appear to have affected the enforcement of Article 200.

First, the short length of possible jail time and the overcrowding of Colombia's penitentiaries make it very likely that a fine would be the only sentence an employer judged guilty would face.²⁴⁷ Second, Article 200 cases are "*querellable*,"²⁴⁸ meaning that, under Colombian law, the victim has to file the case (*querrela*) directly with the *Fiscalía* in order for a prosecutor to investigate a possible crime. Labor inspectors who receive and investigate civil complaints related to conduct that would violate Article 200 can send information to the *Fiscalía* to support related criminal investigations, but prosecutors cannot act on the information unless and until victims press charges.²⁴⁹

Finally, prosecutors are required, by law, to try to conciliate each Article 200 case by bringing together the complaining worker(s) and the complained against employer to discuss and agree to remedies, if possible, before taking the case in front of a judge.²⁵⁰ If conciliation leads to an agreement between the worker(s) and employer to settle the case, that agreement is considered binding; and the case does not proceed to court.²⁵¹ Currently, there is a significant backlog of Article 200 cases in the *Fiscalía*. There are 628 active cases under Article 200 that have been filed since 2011; 432 of them await conciliation, and 196 are in the investigation stage.²⁵² Since 2015, the *Fiscalía* has worked with the ILO to prioritize cases that have the greatest chance of

²⁴³ Criminal Code, Article 200.

²⁴⁴ U.S. Submission 2016-02 (Colombia), page 21.

²⁴⁵ *Ibid.* at page 16.

²⁴⁶ Law 1453 of 2011, Article 26 (containing the modification).

²⁴⁷ U.S. Government Official and others meeting with Fiscalía General de la Nación, January 30, 2014.

²⁴⁸ Law 906 of 2004, Article 74; Law 1453 of 2011, Article 108.

²⁴⁹ 15 prosecutors in the Directorate for Citizen Security and Regional Offices work principally but not exclusively on the 628 active cases under Article 200. The Fiscalía has received a total of 1,769 Article 200 cases between January 1, 2011, and August 31, 2016. Of those, 628 are listed as active and 1,141 as inactive. 649 of the inactive cases have been closed (*archivado*). The remaining inactive cases are in that status for a variety of reasons. Government of Colombia, Response to the OTLA, October 31, 2016.

²⁵⁰ Law 906 of 2004, Article 522.

²⁵¹ Review Law 640 of 2001.

²⁵² Government of Colombia, Response to the OTLA, October 31, 2016.

moving through the judicial system relatively quickly, including the case filed by USO in 2013.²⁵³ Even with the ILO assistance, at this pace, it could take years to address the backlog.

A total of 82 cases under Article 200 have been conciliated since 2011,²⁵⁴ of the over 1,000 that the unions have reported. In conducting its review, the OTLA did not encounter or receive information of a single conviction in an Article 200 case. As a result of the above-described issues, the OTLA has ongoing concerns about the GOC's enforcement of Article 200.

IV. Findings

Based on a review of the information provided by the submitters, the GOC, and others with direct knowledge of the relevant issues, as well as through the OTLA's knowledge of labor law and practice in Colombia, the OTLA has concerns related to the protection of the rights to freedom of association and collective bargaining.

Regarding the civil labor inspection system, the OTLA has significant concerns about the GOC's system to protect the rights to freedom of association and collective bargaining. Specifically, the OTLA has concerns about (1) the lack of capacity of the Labor Inspectorate, in particular with regard to inspectors' difficulty traveling to rural areas, high staff turnover, lack of a consistent national inspection strategy, and failure to implement a national case management system; (2) delays in the MOL's inspection process; and (3) delays and lack of systematic collection of certain fines related to the rights to freedom of association and collective bargaining. The OTLA's review also raised questions regarding the imposition and application of fines. These issues adversely affect the GOC's enforcement of labor laws related to the rights to freedom of association and collective bargaining.

Furthermore, the OTLA has significant concerns about the protection of workers from abusive subcontracting. The OTLA also has ongoing concerns regarding the enforcement of the Labor Code's prohibition against the use of collective pacts that undermine the exercise of freedom of association and collective bargaining and about the GOC's enforcement of Article 200.

The OTLA also has concerns about the adequacy of criminal investigation and prosecution of cases of anti-union threats and violence, including the low number of prosecutors, particularly in the Human Rights Directorate; delays created by prosecutors' understanding that they must request in writing the judicial police to gather evidence; and the low conviction rate.

The problems outlined above evidence a system that faces serious challenges related to protecting workers' exercise of the rights to freedom of association and collective bargaining.

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

V. Recommendations and Next Steps

In light of the above, the OTLA sets out the following recommendations to the GOC to help guide subsequent engagement between the USG and the GOC aimed at addressing the questions and concerns identified during the review:

- 1. Improve the labor law inspection system to ensure inspections comply with legal procedures and timelines and are carried out in accordance with a national inspection strategy targeting at-risk sectors.**
 - Ensure that inspectors effectively utilize the inspection tools developed by the ILO.
 - Ensure that all inspectors receive adequate training on procedural requirements for investigations, follow those procedures, and do not exceed legal timeframes for them.
 - Upon its completed start-up, require inspectors and supervisors to use the ILO-designed electronic case management system.
 - Track investigations through the electronic case management system and publish a periodic summary report of investigations undertaken on a national level, including with data disaggregated by sector.
 - Ensure that preventive inspections are not used as a substitute for administrative sanctions and that the MOL imposes fines for identified violations.
 - Adopt measures to combat high turnover among inspectorate staff.
 - Develop, implement, and include in the MOL's strategic plan a national inspection strategy for carrying out directed (*de oficio*) inspections in areas where violations are most common, such as rural areas and the five identified priority sectors under the Action Plan, and include timelines for conducting such inspections.
 - Provide sufficient funding and other resources, including for transportation and inspector per diems (*viáticos*), to allow inspectors to carry out worksite inspections, including in rural areas and the identified priority sectors.

- 2. Improve fine application and collection to ensure that employers who violate labor laws are sanctioned and that applied fines are collected in a timely manner.**
 - Publish timelines for persuasive and coercive fine collection and ensure those responsible for collecting fines observe them, including providing appropriate training, as needed.
 - Link SENA's fine collection system and the MOL's inspection system to ensure a smooth transfer to SENA of MOL cases applying a fine and to allow the MOL to track SENA's fine collection for those cases.
 - Ensure that SENA can carry out effective and timely fine collection, including removing the redundancies for SENA collection of fines that often result in delays.

- 3. Take additional effective measures to combat abusive subcontracting and collective pacts, including improving application of existing laws and adopting and implementing new legal instruments where necessary.**

- Systematically investigate and sanction all forms of abusive subcontracting under Article 63 of Law 1429 of 2010, particularly in the five identified priority sectors, and applicable regulations that prohibit the use of subcontracting; prioritize such labor law enforcement in the national inspection strategy.
 - Ensure that all legal requirements for formalization agreements are satisfied and monitor the agreements to determine ongoing compliance.
 - Investigate in a timely manner and sanction according to Colombian law the illegal use of collective pacts that undermine freedom of association.
 - Address collective pacts being offered in workplaces where a union is present that undermine the rights to freedom of association and collective bargaining, as recommended by the ILO and the OECD.
- 4. Improve the investigation and prosecution of cases of violence and threats against unionists, prioritizing recent cases, and ensure the swift resolution of cases under Criminal Code Article 200.**
- Clarify, including by amending regulations, as needed, that Article 200 cases should always be investigated by the Human Rights Directorate.
 - Establish and ensure that cases of violence against unionists, including homicides, will be transferred to and investigated by the Human Rights Directorate, as appropriate, and that the judicial police notify the Directorate of unionist homicides within 48 hours of the discovery or report of the crime.
 - Amend existing procedures, as needed, to allow prosecutors to direct orally, rather than only formally in writing, the actions of judicial police and technical investigators to collect criminal evidence and witness statements and interviews.
 - Ensure that the *Fiscalía* investigates and prosecutes, where appropriate, Article 200 cases and cases of threats and violence against unionists, including homicides, in particular by providing the Human Rights Directorate sufficient resources and capacity, including additional staff and specialized training, as needed.

Next Steps

The OTLA recommends to the Secretary of Labor that the U.S. government initiate consultations through the contact points designated in the CTPA Labor Chapter under Article 17.5.

The OTLA will continue to monitor the issues raised by the Submission, including any progress the GOC may make with respect to addressing the concerns identified in this report. The OTLA, in coordination with USTR and the State Department, will meet with the GOC as soon as possible to begin contact point consultations to discuss the questions and concerns identified in this review and determine the next steps for implementing the above recommendations, or similar measures; the OTLA will seek the input of relevant civil society stakeholders regarding the contact point consultations.

The OTLA, in consultation with USTR and the State Department, will use progress towards implementing these recommendations, or similar measures, to determine appropriate next steps in engagement with the GOC and will assess any such progress by the GOC within nine months and thereafter, as appropriate.