PETITION REGARDING ECUADOR'S ELIGIBILITY FOR ATPA DESIGNATION

September 2005

Introduction 2
The Current Situation 2
Developments Since September 2004 4
Ecuador's Inadequate Executive Decree on Subcontracting 4
Child Labor Inspectors: Inadequate Funding, Training, and Infrastructure 6
Conclusion 7
Appendix: September 2004 Petition Ecuador's Eligibility for ATPA Designation 8
Introduction 8
Freedom of Association 9
ILO Intervention and Creation of the National Labor Council 13
Inadequate Draft Executive Decree on Third-Party Contractors 13
Draft Executive Decree Loophole 15
Harmful Child Labor 15
Inadequate Training for Child Labor Inspectors 17
Inadequate Funding for Child Labor Inspectors 17
Insufficient Programs to Rehabilitate Fired Child Workers 18
Benchmarks on Freedom of Association 18
Benchmarks for Los Alamos Case 18
Benchmarks for Reform of Laws on Freedom of Association 19
Benchmarks for Child Labor 21
Appendix: Los Alamos 2002 Labor Conflict 22

Introduction

Human Rights Watch welcomes this opportunity to present views regarding whether Ecuador meets the eligibility criteria provided for in section 204(b)(6)(B) of the Andean Trade Preferences Act (ATPA), as renewed and amended by the Andean Trade Promotion and Drug Eradication Act (ATPDEA), to qualify for trade benefits. In determining whether to designate a country an ATPA or ATPDEA beneficiary, the President must consider "[t]he extent to which the country provides internationally recognized worker rights, including . . . [t]he right of association . . . [and] [t]he right to organize and bargain collectively," and "[w]hether the country has implemented its commitments to eliminate the worst forms of child labor, as defined in section 507(6) of the Trade Act of 1974."[1]

Human Rights Watch takes no position on unilateral trade preference programs such as the ATPA and ATPDEA, per se, but we take an active interest in workers' human rights. We believe that such programs can provide meaningful leverage to promote workers' rights, but only when they include meaningful, enforceable labor rights protections and those protections are vigorously and consistently enforced.

In September 2003 and September 2004, Human Rights Watch argued for partial or total suspension of tariff benefits when we submitted ATPA petitions to the Office of the U.S. Trade Representative (USTR). In those petitions, we detailed Ecuador's failure to meet the ATPA and ATPDEA workers' rights criteria.[2] However, USTR has yet to rule on these petitions, and Ecuador has made little progress in addressing the violations of workers' rights that we identified.

This petition serves to reinforce and update our prior petitions, particularly our September 2004 submission. That petition is included as an appendix.

The Current Situation

[1] Trade Act of 2002, Title XXXI, "Andean Trade Promotion and Drug Eradication Act," Sec. 204(b)(6)(B).

[2] In determining whether to designate a country an ATPDEA beneficiary, the President must consider "[t]he extent to which the country provides internationally recognized worker rights, including . . . [t]he right of association . . . [and] [t]he right to organize and bargain collectively," and "[w]hether the country has implemented its commitments to eliminate the worst forms of child labor, as defined in section 507(6) of the Trade Act of 1974." 19 USC Sec. 3203(b)(6)(B)(iii),(iv). The APTA, for its part, establishes that the President shall not designate any country a beneficiary "if such country has not or is not taking steps to afford internationally recognized worker rights . . . to workers in the country." 19 USC Sec. 3202(c)(7).

Ecuador still fails to protect workers' rights to freedom of association and to organize and bargain collectively and fails to take adequate measures to address the worst forms of child labor. Human Rights Watch believes that Ecuador continues to fall short of meeting the ATPA and ATPDEA eligibility criteria, as it does not uphold internationally recognized workers' rights. Human Rights Watch further believes that Ecuador has not adequately demonstrated good-faith intention to take the steps necessary to satisfy the criteria. Most significantly, Ecuador has failed to fully implement the labor rights provisions of agreements it reached with the United States in October 2002, prior to receiving ATPDEA beneficiary status. These agreements addressed Ecuador's inadequate legislation on freedom of association and its failure to effectively enforce existing laws governing child labor and the right to organize.

Specifically, Ecuador has failed to propose effective reforms to address any of the important deficiencies in its labor laws governing workers' right to organize, described at length in our September 2004 ATPA petition. Ecuadorian employers who engage in anti-union discrimination still face only the threat of minimal fines for violating the law.[3] Workers dismissed for union activity have no right to reinstatement; anti-union hiring discrimination and employer interference with workers' organizations are not explicitly prohibited; the right to form industry- and sector-wide unions is not clearly guaranteed; and a minimum of thirty workers is still required to form a union, despite recommendations that this number be lowered by the International Labor Organization Committee of Experts on the Application of Conventions and Recommendations. In practice, employers continue to take advantage of these shortcomings in the law to violate workers' human rights by retaliating against workers for engaging in union activity, erecting often insurmountable obstacles to the formation of workers' organizations, and generally creating a climate of fear that deters workers from exercising their right to freedom of association.

Ecuador's Minister of Labor has recently attempted to stimulate tripartite dialogue on labor law reform, largely through the National Labor Council, discussed at length in Human Rights Watch's September 2004 ATPA petition. Human Rights Watch welcomes this positive step. Nonetheless, this dialogue, officially begun less than two months ago, has not yet resulted in any concrete proposals for labor law reforms. Indeed, the concerns discussed above regarding weaknesses in Ecuador's labor laws governing workers' right to freedom of association have reportedly not yet been specifically addressed.

---

[3] If an employer engages in anti-union discrimination or otherwise violates a worker's right to organize but does not fire the worker for engaging in union activity, the employer's conduct can only be sanctioned with a fine of up to U.S. $200 if imposed by the Ministry of Labor's regional Labor Directorate and up to U.S. $50 if imposed by labor inspectors or labor courts. Labor Code, art. 626.

Although Ecuador issued an executive decree on subcontractors in October 2004, as discussed below, the decree is so weak that it falls far short of meeting its goal of establishing a regulatory framework to prevent subcontractors from being used to violate workers' right to organize. Ecuador's congress is considering a labor law proposal that could partially address the problem of the use of subcontractors to undermine workers' rights. The National Labor Council is also discussing the issue. These are positive first steps. Nonetheless, presently, the Labor Code still contains legal loopholes that allow employers to impede workers' right to freedom of association through the unlimited use of subcontracted labor to perform employers' normal, everyday work activities.

In addition, while Ecuador took the laudable step of selecting at least twenty-two child labor inspectors as required by law earlier this year, the number has since fallen to approximately fourteen, due to firings and resignations. Furthermore, as detailed below, the inspectors often are unable to effectively perform their duties and Ecuador continues to demonstrate a lack of commitment to the elimination of harmful child labor. Ecuador has yet to issue implementing regulations, as required by law, for its new Code for Children and Adolescents, adopted over two-and-a-half years ago. It has also failed to amend the Labor Code to conform with the Code for Children and Adolescents' child labor provisions, though in August 2005, Ecuador's congress and the National Council for Children and Adolescents organized a seminar on such an amendment, whose results may form the basis for a congressional discussion on the issue in upcoming months. Ecuador also continues to fail to adequately fund and implement meaningful social protection measure to prevent child labor and effective rehabilitate former child workers.

Furthermore, as discussed in our September 2004 ATPA petition, Ecuador has also yet to fully investigate either the May 2002 anti-union violence on the Los Alamos banana plantations or the police response to that violence, failing to prosecute the perpetrators or sanction those police officers who may have responded inappropriately.

Developments Since September 2004

Ecuador's Inadequate Executive Decree on Subcontracting

In our September 2004 ATPA petition, we analyzed a draft executive decree on subcontracting under consideration in Ecuador to address the use of subcontractors to impede workers' freedom of association. We specifically recommended that Ecuador:

- allow subcontracted workers to organize and bargain collectively with the person or company for whose benefit work is realized if that person or company, in practice, has the economic power to dictate, directly or indirectly, the workers' terms and conditions of employment;

- limit the percentage of subcontracted workers in any workplace to a maximum of 20 percent of the total number of workers;

- limit the use of third-party contractors to those providing workers to perform temporary or complementary services and those operating independently and autonomously, with their own capital and personnel, to perform specific, discrete jobs; and

- codify the following provisions of the draft executive decree on third-party contractors:

    - article 3, to provide that if third-party contractors violate laws or regulations governing their operations, their subcontracted workers shall be legally considered direct employees of the main company;

    - article 11, to establish that subcontracted workers must receive the same salaries and benefits and enjoy the same employment conditions as employees at the same level hired directly by the main company; and

    - article 21, to ban third-party contractors from having business partners, associates, managers, legal representatives, or administrators who also hold such positions with the main employer or who have only one client.

However, the executive decree on subcontracting issued on October 5, 2004, is significantly weaker than previous drafts. Of the three draft articles described above—articles 3, 11, and 21—only article 21 appears in the final version. Although the decree establishes a limit on the percentage of subcontracted workers in any workplace, the limit is 75 percent of the total workforce, rather than the 20 percent we had recommended. The decree includes none of our other recommendations and does nothing to address the other violations of workers' right to organize that we have identified and that infringe ATPA and ATPDEA eligibility criteria.

In addition, the decree contains a loophole by which individuals acting as subcontractors in the agricultural sector may be exempt from many of its provisions. As Human Rights Watch documented in our 2002 report, *Tainted Harvest: Child Labor and Obstacles to Organizing on Ecuador's Banana Plantations*, the use of individual subcontractors and their hired work teams is

common in Ecuador's banana sector, creating a serious obstacle to workers' right to freedom of association. By exempting these individual subcontractors from many executive decree provisions, Ecuador further reduces an already weak decree's potential for positive impact on workers' human rights.

As a result of these serious shortcomings, the executive decree will likely fail to end the widespread use of subcontracting as a means of undermining workers' right to freedom of association in Ecuador even if it is fully enforced. In addition, implementation of the decree is off to a rocky start. The president has extended for a second time the deadline by which, according to the decree, all subcontractors covered by its terms were to have registered with the Labor Ministry. The initial deadline was December 31, 2004, but this was later extended to July 31, 2005, and then recently extended again to October 31, 2005. By the end of July 2005, reportedly only about four hundred of the estimated thousands of subcontractors in Ecuador had registered.

Child Labor Inspectors: Inadequate Funding, Training, and Infrastructure

Between September 2004 and March 2005, Ecuador selected additional child labor inspectors to reach at least the full complement required by law—twenty-two.[4] Since March 2005, however, the number of inspectors has dropped to fourteen, eight shy of the mandatory minimum.

While Human Rights Watch is encouraged that, in contrast to March 2005, the current child labor inspectors have labor contracts and are receiving monthly salaries, we are troubled by reports that they still do not have sufficient funds for operating expenses, still lack basic infrastructural and logistical support, have inadequate offices and few computers, and lack other basic supplies, including vehicles for reaching inspection sites. For example, those inspectors in banana-producing provinces frequently rely on transportation provided by banana plantation owners to reach the plantations to conduct inspections. In addition, lack of training for the newly hired inspectors remains a serious concern. Inspectors hired in late 2004 and early 2005 received far less training than their counterparts hired earlier. These newer child labor inspectors reportedly only received two days of training, as compared to the roughly seven-and-a-half days received by inspectors hired in 2004 and the three months for those hired in 2003. Worse still, the two child labor inspectors hired in the later months of 2005 reportedly have received little to no training at all. Human Rights Watch believes that it will be very difficult for the child labor inspectors to carry out their duties if they are not given adequate infrastructure, logistical support, and training.

---

[4] Ibid., art. 151(f).

Furthermore, although child labor inspections are being conducted, the Ministry of Labor reportedly lacks the resources to fully and properly process their results, a responsibility currently being fulfilled, in part, by the International Labor Organization. And while inspections have revealed numerous infractions of Ecuador's child labor laws, few fines have been imposed on violating employers.

In addition, according to a leading children's rights advocate, just over half of the approximately U.S.$300,000 allocated in the Ministry of Labor's FY 2005 budget for its child labor related activities and programs has been spent. Similarly, official government budget figures show that none of the additional U.S.$300,000 allocated to the Ministry of Social Welfare for similar purposes has been spent. Human Rights Watch is troubled that even the limited funding designated to address the problem of child labor in Ecuador is not being fully utilized for these ends.

Conclusion

Human Rights Watch believes that Ecuador continues to fail to "provide internationally recognized worker rights," as required by the ATPDEA, and has not taken meaningful "steps to afford internationally recognized worker rights," as required by the ATPA. Ecuador, therefore, continues to fail to meet ATPA and ATPDEA eligibility criteria. As we have repeatedly stated, we believe that this continued failure should result in total or partial suspension of Ecuador's ATPA and ATPDEA benefits.

Appendix: September 2004 Petition Ecuador's Eligibility for ATPA Designation

Human Rights Watch welcomes this opportunity to present views regarding whether Ecuador meets the eligibility criteria provided for in section 204(b)(6)(B) of the Andean Trade Preferences Act (ATPA), as renewed and amended by the Andean Trade Promotion and Drug Eradication Act (ATPDEA), to qualify for trade benefits. In determining whether to designate a country an ATPA or ATPDEA beneficiary, the President must consider "[t]he extent to which the country provides internationally recognized worker rights, including . . . [t]he right of association . . . [and] [t]he right to organize and bargain collectively," and "[w]hether the country has implemented its commitments to eliminate the worst forms of child labor, as defined in section 507(6) of the Trade Act of 1974."[1]

Human Rights Watch takes no position on unilateral trade preference programs such as the ATPA and ATPDEA, per se, but we take an active interest in workers' human rights. We believe that such programs can provide meaningful leverage to promote workers' rights, but only when they include meaningful, enforceable labor rights protections and those protections are vigorously and consistently enforced.

Introduction

In March 2003 and again in September 2003, Human Rights Watch submitted comments summarizing Ecuador's shortcomings in these areas and providing recommendations to help bring Ecuador into compliance. This petition updates the September 2003 submission by describing Ecuador's continued failure to protect workers' rights to freedom of association and to organize and bargain collectively and by highlighting the inadequacy of measures taken to address violations of these rights as well as the worst forms of child labor.

Human Rights Watch believes that Ecuador continues to fall short of meeting the ATPA and ATPDEA eligibility criteria, as it fails to uphold internationally recognized workers' rights. Human Rights Watch further believes that Ecuador has not adequately demonstrated good-faith intention to take the steps necessary to satisfy the criteria. Most significantly, Ecuador has failed to fully implement the labor rights provisions of agreements it reached with the United States almost two years ago, in October 2002, prior to receiving ATPDEA beneficiary status. These agreements address both Ecuador's inadequate legislation on freedom of association and its failure to effectively enforce existing laws governing child labor and the right to organize.

[1] Trade Act of 2002, Title XXXI, "Andean Trade Promotion and Drug Eradication Act," Sec. 204(b)(6)(B).

Specifically, Ecuador has failed to propose, let alone enact, reforms to address the important deficiencies in its labor laws governing workers' right to organize. It has failed to provide adequate training or resources for its newly hired child labor inspectors, has not yet hired the full complement of twenty-two such inspectors required by law, and has failed to fund programs to address the needs of recently fired child workers. Ecuador has also not fully investigated either the May 2002 anti-union violence on the Los Alamos banana plantations or the police response to that violence, failing to prosecute the perpetrators or sanction those police officers who may have responded inappropriately.

Ecuador's broken promises should not be rewarded with continued ATPA and ATPDEA beneficiary status. Instead, we believe that the U.S. government should make Ecuador's continued designation as an ATPA and ATPDEA beneficiary country conditional upon its immediate fulfillment of the workers' rights benchmarks and recommendations articulated below. Ecuador's failure to meet these conditions should result in total or partial suspension of ATPA and ATPDEA benefits.

Freedom of Association

As elaborated in Human Rights Watch's April 2002 report, *Tainted Harvest: Child Labor and Obstacles to Organizing on Ecuador's Banana Plantations*, despite general provisions in Ecuadorian law safeguarding workers' right to freedom of association, critical weaknesses and loopholes in the laws render the protections virtually meaningless. As a result, Ecuadorian law governing workers' right to freedom of association falls far short of United Nations (U.N.) and International Labor Organization (ILO) standards and fails to deter employers from retaliating against workers who exercise their right to organize.

Ecuadorian employers who engage in anti-union discrimination face only the threat of minimal fines and thus few, if any, significant repercussions for violating the law.[2] Workers dismissed for union activity have no right to reinstatement,[3]despite the findings of the ILO Committee of Experts on the Application of Conventions and Recommendations (ILO Committee of Experts) that "[t]he best solution [to anti-union dismissal] is generally the reinstatement of the worker in his post with payment of unpaid wages and maintenance of acquired rights."[4]

---

[2] If an employer engages in anti-union discrimination or otherwise violates a worker's right to organize but does not fire the worker for engaging in union activity, the employer's conduct can only be sanctioned with a fine of up to U.S. $200 if imposed by the Ministry of Labor's regional Labor Directorate and up to U.S. $50 if imposed by labor inspectors or labor courts. Labor Code, art. 626.

[3] Ibid., art. 188.

[4] International Labour Conference, 1994, *Freedom of association and collective bargaining: Protection against acts of anti-union discrimination, Report of the Committee of Experts on the Application of Conventions and Recommendations*, 81st Session, Geneva, 1994, Report III (Part 4B), para. 219.

Ecuadorian law continues to require a minimum of thirty workers to form a union,[5] yet the ILO Committee of Experts has twice recommended that Ecuador reduce that number "so as not to hinder the establishment of [unions]."[6] Under Ecuadorian law, anti-union hiring discrimination is not explicitly prohibited, though the ILO Committee on Freedom of Association has clearly stated that anti-union hiring discrimination violates workers' right to organize.[7] Employer interference in the establishment or functioning of workers' organizations is not explicitly banned in Ecuador, though ILO Convention 98 concerning the Right to Organize and Collective Bargaining states that "workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration."[8]

In practice, employers take advantage of these shortcomings in the law to violate workers' human rights by retaliating against workers for engaging in union activity, erecting often insurmountable obstacles to the formation of workers' organizations, and generally creating a climate of fear that deters workers from exercising their right to freedom of association.

For example, in late July and early August 2004, fifty-two workers on the Vizcaya banana plantation in Guayas province reportedly held founding assemblies to form a trade union. They allegedly presented their petition for union registration and their collective contract proposal to the Labor Ministry, in accordance with Labor Code procedures. As required by law, the Ministry of Labor notified their employer. Rather than entering into negotiations as the Labor Code requires, however, the employer reportedly fired all fifty-two workers and banned them from entering the workplace.

Although the workers reportedly reached an agreement with their employer on September 2 for their reinstatement, under Ecuadorian law, they have no right to their jobs back. Instead, if their dismissals were ultimately deemed illegal, they would have been owed severance pay, plus one year's salary for having been illegally fired immediately after presenting their collective contract proposal.[9] In such cases, however, workers may never see that additional one year's

---

[5] Labor Code, arts. 450, 459.

[6] ILO, *Complaints against the Government of Ecuador presented by the Confederation of Workers of Ecuador (CTE), the Ecuadorian Confederation of Free Trade Union Organisations (CEOSL) and the Latin American Central of Workers (CLAT)*, Report No. 284, Case No. 1617, Vol. LXXV, 1992, Series B, No.3, para. 1006, citing International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 79th Session, Geneva, 1992, Report III (Part 4A), pp. 212, 213, 268.

[7] ILO Committee on Freedom of Association, *General (Protection against anti-union discrimination)*, Digest of Decisions, Doc. 1201, 1996, para. 695.

[8] ILO Convention concerning the Right to Organize and Collective Bargaining (ILO Convention 98), 96 U.N.T.S. 257, July 18, 1951, art. 2. Ecuador ratified ILO Convention 98 on May 28, 1959.

[9] Labor Code, art. 329.

pay. As discussed in Human Rights Watch's September 2003 ATPA petition, employers often offer far less than the amount legally due.[10] Financially unable to wait without pay while a legal challenge against their employer is resolved, workers in these circumstances often settle, taking whatever compensation their employer offers even if far below the amount legally due.

Furthermore, although Ecuadorian law does not explicitly prohibit the formation of industry-wide or sector-wide unions, the Ministry of Labor has interpreted the law as containing such a prohibition. For example, in November 2002, the Labor Ministry denied registration to the Regional Union of Flower Workers on the ground that the Labor Code only permits unions "of workers from a specific employer."[11] In October 2003, when flower workers again attempted to register an industry-wide union, under a new administration with a new labor minister, they were again notified that the law only allows registration for unions whose workers have "a dependent relationship with one specific employer" and that the Association of Flower Workers, instead, was "an organization composed of workers that work for different employers, violating the legal provisions related to the matter."[12] The ILO Committee on Freedom of Association, however, explicitly has established that "[l]egislation should not constitute an obstacle to collective bargaining at the industry level."[13]

Employers also impede workers' freedom of association by taking advantage of legal loopholes that allow the unlimited use of subcontracted labor to perform employers' normal, everyday activities. Because they are employed by a third-party contractor rather than the corporate or individual business owner, subcontracted workers have no guaranteed legal right to organize and collectively bargain with the companies benefiting from their labor. Therefore, though the companies may determine the workers' employment terms and conditions, the workers, in

---

[10] On June 19, 2003, unionized workers on the Los Alamos banana plantations, employed by three different third-party operators, presented three collective bargaining proposals—one for each employer—to the Labor Ministry. The next day, all seventy union members were reportedly barred from the plantations. On June 24, a labor inspector visited the worksites, confirmed that the workers had been fired, and recorded their testimonies that they had been dismissed on June 20, 2003. Because they were fired after presentation of the collective contract proposals, these seventy workers were legally entitled to a year's salary, in addition to the legally mandated severance pay for unjust dismissals. Nonetheless, on June 24, their employers deposited with the Labor Ministry the severance pay due solely for unjustified dismissals. Although the Ministry of Labor explicitly stated on August 12 that the fired workers had the right to demand the indemnity due in cases of firing after presentation of collective contract proposals, the employers continued to refuse to pay. Instead, the companies bargained, starting with an offer of an additional one month's pay above that due for illegal dismissals, rising to a final offer of only 3.5 months extra. On August 22, unemployed for over two months and in dire economic straits, the seventy fired workers accepted this offer and signed waivers of all future legal claims against their employer—sacrificing their rights to freedom of association, to organize, and to bargain collectively to be able to provide, if only temporarily, for their families. See Human Rights Watch, "Petition Regarding Ecuador's Eligibility for ATPA Designation," September 2003, p. 5.

[11] Minister of Labor Martín Insua Chang, Resolution No. 000222, November14, 2002.

[12] Letter from Dr. María Elena Morales, legal department coordinator, Ministry of Labor, to Jaime Morillo, provisional general secretary, Association of Flower Workers, No. 517-GL-03, October 30, 2003.

[13] ILO Committee on Freedom of Association, *The principle of free and voluntary negotiation (Collective bargaining),* Digest of Decisions, Doc. 1406, 1996, para. 853.

most cases, are able to organize and negotiate collectively only with their subcontractors. In addition, rather than forming one union and bargaining collectively with one employer, subcontracted workers wishing to organize their workplace, in most cases, must form multiple unions (one for each subcontractor) and negotiate multiple times, creating an additional obstacle to exercising their right to freedom of association.

The use of third-party contractors to sidestep labor rights protections generally takes one of three forms: third-party operators, employment agencies, and individual subcontractors. While third-party operators can be legitimate, independent and autonomous companies performing specific jobs and services, they can also, instead, be shell companies for a primary employer. Managed by employees of the larger main employer, these shell companies can further impede workers' right to organize by rotating workers among the companies, thereby constantly changing the actors involved in any organizing drive or negotiating effort. Employment agencies and individual subcontractors, for their part, while legitimately used to hire workers temporarily or for tasks not directly related to a company's main activities, are also often hired to provide workers for a company's normal, day-to-day operations. In such cases, subcontracted workers' "temporary" contracts are often renewed indefinitely. As "permanent temporary" workers, they are not entitled to the benefits due workers seen as permanent in the eyes of the law. Because they are not permanent, they have no legal expectation that their jobs will extend beyond the few days or weeks for which they are officially hired. Therefore, their employers are not bound by the Labor Code prohibition of anti-union firing—if temporary workers are told not to return to work, they have not technically been fired, simply not rehired. And the Labor Code does not explicitly ban anti-union discrimination in hiring. In addition, in some cases, multiple individual subcontractors are also used to hire teams of fewer than thirty workers, creating work teams lacking the minimum number needed to unionize.

In October 2002, prior to receiving ATPDEA beneficiary country designation, Ecuador committed to the United States to review its existing labor laws in order to assess their compliance with international standards, particularly in the area of freedom of association. Ecuador pledged to apply ILO recommendations and to consider putting forward revised legislation to improve protection for the right to organize, possibly after requesting and receiving ILO technical assistance.

In the almost two years since it made this commitment, the Ecuadorian government has sent no reform proposals to Ecuador's congress to address the serious shortcomings in the country's laws on freedom of association. Although several meetings have been held between the government and the ILO, they have resulted in little, if any, progress in this area. And although the government promised early this year to issue an executive decree on third-party contractors, over six months later, the decree has yet to be issued. Furthermore, as discussed

below, even if issued, the decree, as drafted, will not effectively prevent the use of third-party contractors to violate workers' human rights, particularly the right to freedom of association.

ILO Intervention and Creation of the National Labor Council

Recent ILO intervention in Ecuador has reportedly focused primarily on fostering tripartite dialogue on labor related issues and facilitating the establishment of an official tripartite body to institutionalize such dialogue—the National Labor Council. Human Rights Watch recognizes that tripartite dialogue is an important first step towards improving respect for workers' human rights and, in particular, applauds the creation of the National Labor Council in June 2004. The council's primary goal is to "coordinate, negotiate, and propose labor policies on areas of common interest." [14] Human Rights Watch encourages the council to fulfill this goal as well as its more specifically enumerated objectives: a) "to foster permanent labor dialogue and promote tripartite participation with the objective of harmonizing labor relations"; b) "to foster equity in the area of labor relations, as well as respect for freedom of association"; c) "to analyze labor norms to make them more compatible with the economic, political, and social reality of the country and stimulate the adoption of a regime in accordance with fundamental labor rights"; and d) "to create conditions conducive to the creation of better quality jobs."[15] Increased tripartite dialogue and the creation and operation of the National Labor Council alone, however, will not ensure effective protection of workers' human rights. Instead, meaningful labor law reform and effective government enforcement of those reforms—which can be encouraged but not accomplished by the council—are needed.

Inadequate Draft Executive Decree on Third-Party Contractors

In October 2002, Ecuador promised to create a high-level commission to investigate reported anti-union activities on the Los Alamos banana plantations and pledged to implement the final recommendations in the commission's report. One of the recommendations called for regulations to prevent the use of third-party contractors to violate workers' human rights, "principally freedom of association and collective bargaining."[16] Although Ecuador has drafted an executive decree to address this problem, it has not yet been issued. Human Rights Watch urges that the decree be issued without delay and that it be fully and vigorously implemented and publicly promoted, yet we also believe that the decree, as drafted, contains serious shortcomings.

---

[14] *Registro Oficial [Official Register]*, no. 359, Decree No. 1779, June 18, 2004, art. 2

[15] Ibid., art. 3.

[16] Ministry of Labor and Human Resources, "Report of the Specialized Commission to Investigate the Case of the Los Alamos Plantation and Other Banana Plantations," 2003.

The decree allows for and regulates, largely through registration requirements and operating restrictions, the use of three kinds of third-party contractors: 1) subcontractors providing workers to perform temporary services; 2) subcontractors providing workers to perform "complimentary" services, defined as those not directly related to the main activities of a primary company, like security, cleaning, and maintenance; and 3) employment agencies or other third-party contractors providing workers, indefinitely, to perform the main, everyday activities of the primary company.[17]

The decree requires third-party contractors to sign contracts with the main company hiring them, setting out the jobs to be performed and the subcontracted workers' terms of employment.[18] Under the decree, these subcontracted workers must receive the same salaries and benefits and enjoy the same employment conditions as employees at their same level working directly for the main company.[19] In addition, in an attempt to curb employer use of shell companies, the decree also establishes that a third-party contractor cannot share business partners, associates, managers, legal representatives, or administrators with the main employer.[20]

Decree violation is punishable by a fine—up to U.S.$200 per subcontracted worker if imposed by high-level Labor Ministry officials and up to U.S.$50 per subcontracted worker if imposed by labor courts or labor inspectors.[21] If third-party contractors violate the decree, their subcontracted workers shall be legally considered direct employees of the main company, enjoying the increased workers' rights protections that status entails.[22]

Nonetheless, even if issued and adequately enforced, this decree, as drafted, will fall short of preventing third-party contractors from being used to circumvent labor law protections, in particular those governing the right to freedom of association. First, an executive decree does not and cannot effectively close the aforementioned legal loopholes that facilitate such abuses. For example, the decree does not grant the right to reinstatement for workers fired for union activity, prohibit anti-union discrimination in hiring, lower the minimum number of workers required for union formation, or ban the use of consecutive short-term contracts to create a "permanent temporary" workforce. To close these and other such loopholes, a legislative amendment is required, since an executive decree is only a regulation, interpreting and fleshing

[17] Draft Executive Decree, September 2004, arts. 6, 8, 9.

[18] Ibid., art. 17.

[19] Ibid., art. 11.

[20] Ibid., art. 21. Article 21 also states that a third-party contractor's business partners, associates, managers, legal representatives, or administrators cannot have solely one client.

[21] Ibid., art. 23; Labor Code, art. 626.

[22] Draft Executive Decree, September 2004, art. 3.

out but not reforming existing law. Second, the decree itself contains a key loophole that could seriously undermine its potential contribution towards curtailing the use of third-party contractors to violate workers' human rights.

Draft Executive Decree Loophole

As discussed, employment agencies and individual subcontractors are frequently hired to provide workers, indefinitely, to perform a company's everyday activities. Often in teams of just under the minimum number required for union formation, these subcontracted "permanent temporary" workers enjoy fewer legal protections than permanent workers. An executive decree that established limits on this practice could have gone a long way towards reducing the use of third-party contractors to impede workers' right to organize. For example, hiring of third-party contractors could have been restricted to those providing workers to perform temporary or complementary services or specific jobs and projects. A cap on the percentage of subcontracted workers in any workplace is another option that Human Rights Watch has previously recommended. This decree does neither. Instead, it allows employers to continue to contract out, indefinitely, normal company activities and, thus, continue to circumvent Labor Code protections, particularly those governing workers' right to organize, by doing so.[23]

Harmful Child Labor

ILO Convention 182 concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labor requires Ecuador to "take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency" and to "provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration."[24]

Ecuador does not effectively enforce its laws governing the worst forms of child labor. HRW detailed this failure in our April 2002 report *Tainted Harvest: Child Labor and Obstacles to Organizing on Ecuador's Banana Plantations.* In our investigation, we interviewed forty-five children who had worked or were working on banana plantations in Ecuador.   Of these, forty-one had begun working in the sector between the ages of eight and thirteen, and fewer than 40 percent were still in school at age fourteen. The children described workdays of twelve hours on average and hazardous conditions that violate ILO Convention 182. Most of these human rights abuses occurred in violation of Ecuador's domestic labor legislation.

---

[23] Ibid., arts. 1, 9.

[24] ILO Convention concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labor (ILO Convention 182), 38 I.L.M. 1207, June 17, 1999, arts. 1, 7(b). Ecuador ratified ILO Convention 182 on September 19, 2000.

In October 2002, Ecuador agreed to strengthen protections for children's rights and to fully comply with its obligations as a party to ILO Convention 182. Since then, the government has taken a number of limited but positive steps to fulfill its commitment to strengthen children's rights protections. For example, it created the System for the Inspection and Monitoring of Child Labor, within the National Committee for the Progressive Elimination of Child Labor (CONEPTI),[25] drafted the National Plan of Action for the Elimination of Child Labor, 2003-2206 (National Plan),[26] and adopted a new Code for Children and Adolescents.[27] In addition, the Ecuadorian banana industry signed an agreement committing to progressively eliminate child labor in the sector, charging CONEPTI with monitoring the agreement's enforcement and implementation.[28] Nonetheless, the government must do more to fulfill its promise.

Human Rights Watch welcomes these initiatives. However, these commendable steps are still insufficient to meet the country's obligations to eliminate immediately harmful child labor in the banana sector or elsewhere. The measures fail to address adequately the primary impediments to eradicating hazardous child labor—insufficient child labor law enforcement and nonexistent or under-funded social programs to prevent child labor and rehabilitate displaced child workers. These significant impediments have largely prevented the System for the Inspection and Monitoring of Child Labor from fully operating and have prevented the National Plan, the new Code for Children and Adolescents, and the banana industry's agreement from being fully and effectively implemented.

Ecuador has also recently taken steps to address the lack of child labor inspectors—one of the main problems our 2002 report documented. Ecuadorian law requires at least one child labor

[25] The functions of the system include monitoring and enforcing compliance with child labor laws; gathering, updating, and processing general information, laws, and statistics on child labor; processing complaints and cases of child labor law violations and issuing case-specific resolutions to be submitted to the relevant authorities; and engaging in information and education campaigns on the dangers of child labor and the laws governing the problem.

[26] The plan's general goal is "to promote the prevention and progressive elimination of child labor with an emphasis on the worst forms, through an articulated combination of policies, programs and actions designed to address the causes and effects of the problem." National Committee for the Progressive Elimination of Child Labor, *National Plan of Action for the Elimination of Child Labor, 2003-2006*, November 2002.

[27] The new code raises the minimum age of employment to fifteen; increases the maximum fine for violating child labor laws, providing for the closure of facilities that repeatedly violate those laws; and generally establishes more specific and comprehensive norms for regulating child labor. Nonetheless, implementing regulations have not yet been adopted for the new code, and the Labor Code has not yet been amended to conform with the Code for Children and Adolescents' provisions governing child labor.

[28] The agreement commits the signatories to abide by existing child labor laws, to create a Banana Industry Social Forum to develop policies for the elimination of child labor and work plans for the agreement's implementation, to adopt an Ethical Social Code, to allow periodic visits to assess child labor in the sector, to launch an information and education campaign to prevent child labor and promote children's health and education, and to advance the reach and quality of education in the sector.

inspector for each of the country's twenty-two provinces.[29] In 2002, there were none. In 2003, three child labor inspections were hired but conducted inspections on only ninety-eight of the approximately 6,000 plantations in the country's banana sector—1.6 percent. Reportedly, no other sectors were inspected, and only one of the three inspectors is still with the Labor Inspectorate. In May 2004, the Ministry of Labor hired eighteen additional child labor inspectors, bringing the total to nineteen—still three short of the twenty-two required by law.[30]

Human Rights Watch applauds the hiring of the additional child labor inspectors as an important step in addressing the problem of harmful child labor in Ecuador. Nonetheless, we are concerned that the child labor inspectors have not received sufficient funding or training to operate effectively.[31] We are also troubled by reports that Ecuador has failed to provide resources to ensure that child workers, who may be fired as a result of increased inspections, are successfully rehabilitated and reinserted into society, with access to appropriate education or professional training.

Inadequate Training for Child Labor Inspectors

The ILO's Labor Inspection Convention, to which Ecuador is party, provides that "[l]abour inspectors should be adequately trained for the performance of their duties."[32] Nonetheless, the new child labor inspectors were reportedly trained over a period of roughly four and a half days, during which children's human rights were barely addressed and inspection instruments and methodologies were provided only for the banana sector. A second, day-long training was held on August 18. Child workers' human rights, however, were reportedly discussed little, if at all, and inspection instruments and methodologies for other sectors were not developed. In contrast, the labor inspectors hired in 2003 were trained for roughly three months, over which time they developed appropriate methodologies, instruments, and procedures for the banana sector inspections they were charged with conducting and tested them and revised them in the field.

Inadequate Funding for Child Labor Inspectors

Not only do the recently hired inspectors lack adequate training, but they lack basic infrastructural and logistical support. At this writing, close to one third of the nineteen

---

[29] Labor Code, art. 151(f).

[30] The provinces of Napo, Pastaz, and Bolivar reportedly still lack child labor inspectors.

[31] The Ecuadorian government reportedly recently announced that U.S.$150,000 was appropriated to the Ministry of Labor to cover the costs of child labor inspectors. This funding has, in practice, however, reportedly not been authorized, no less disbursed.

[32] ILO Convention concerning Labor Inspections (ILO Convention ILO No. 81), July 11, 1947, art. 7(3). Ecuador ratified ILO Convention 81 on August 26, 1975.

inspectors reportedly still do not have offices, most lack computers, and all are missing one or more important office supplies, such as desks, chairs, fax machines, telephones, and file cabinets. No additional funding has reportedly been authorized to cover these start-up costs.[33]

In addition, only U.S.$16,000 of the U.S.$25,000 reportedly recently authorized to cover day-to-day operational costs of child labor inspections from August through December 2004 has been disbursed. This additional disbursement could be sufficient to cover inspection costs if all occurred in urban areas with accessible public transportation, where operational costs are estimated to be as low as U.S.$150 per month per inspector. At least five provinces, however, involve inspections in remote rural sectors, where vehicles are required to reach the worksites. The Ministry of Labor, however, has reportedly failed to provide rural inspectors with the necessary vehicles, so they must rent them at the prohibitively high cost of roughly U.S.$50 per day; borrow them, when possible; or use the cars often offered by employers, in many cases banana producers, raising concerns regarding possible conflicts of interest.

Finally, we are also troubled that reportedly no additional funds have been appropriated, let alone disbursed, to the Ministry of Labor for child labor inspector salaries—roughly U.S.$500 per month, per inspector. Instead, the fines and fees collected by the Ministry of Labor are reportedly being used to cover the new costs. These funds, however, were previously utilized for other Ministry of Labor operations. Therefore, rather than an increase in overall funding for the protection of workers' human rights, in this case, funding is stagnant and monies have been shifted from the protection of one set of rights towards the protection of another.

Insufficient Programs to Rehabilitate Fired Child Workers

There are at least two scholarship programs in Ecuador that provide assistance for indigent children to attend school. One, operated by the National Institute for Children and Families (INNFA), a primarily state-funded organization, specifically targets former child workers. Nonetheless, these programs are reportedly full and have little to no capacity to serve newly fired child workers. Despite the potential for more displaced child workers as child labor inspections increase, no additional funding has reportedly been authorized for these programs and no new programs have been created to address the issue.

Benchmarks on Freedom of Association

Benchmarks for Los Alamos Case

[33] Rough estimates put start-up costs for each child labor inspector at around U.S.$1,500.

Human Rights Watch recognizes that over two years have passed since the May 2002 labor conflict on the Los Alamos banana plantations, described in more detail in Appendix I, and that re-opening investigations into the anti-union violence and the police response, at this late date, would be difficult. Nonetheless, we also believe that Ecuador's failure to uphold its October 2002 commitments in this regard is unacceptable. Ecuador's response to the anti-union violence on the Los Alamos banana plantations is a tragic example of the country's continued failure to take the necessary steps to protect workers' right to freedom of association and hold accountable those who violate that right. Therefore, in order to achieve full ATPA and ATPDEA compliance, we believe that Ecuador should undertake new investigations into both the police response to the 2002 Los Alamos labor conflict and the May 2002 anti-union violence at Los Alamos.

Both investigations should include interviews with worker witnesses. In addition, unlike the previous criminal investigation, the new one should examine both incidents of anti-union violence, the shooting injuries of at least nine banana workers, and the roughly two hundred direct perpetrators of the crimes as well as those who may have masterminded the attacks. Parties suspected of bearing responsibility for the anti-union violence should be prosecuted; the findings of the investigation into police conduct should be publicly released; any police officers who failed to follow legally mandated procedures should be sanctioned; and workers negatively affected by improper police conduct should be compensated.

Benchmarks for Reform of Laws on Freedom of Association

In order to fully comply with the ATPA and ATPDEA, Human Rights Watch believes that not only must the draft executive decree on third-party contractors be immediately issued and effectively enforced but the Ecuadorian Labor Code should be amended to:

- provide for reinstatement of all workers fired for engaging in union activity and for the payment of wages lost during the period when the workers were wrongfully dismissed;

- prohibit explicitly employer failure to hire workers due to their involvement in or suspected support for organizing activity;

- reduce from thirty the minimum number of workers required to form a union, as recommended by the ILO;

- prohibit explicitly employer interference in the establishment or functioning of workers' organizations, including all activities prohibited by article 2 of ILO Convention 98 concerning the Right to Organize and Collective Bargaining;[34]

- guarantee explicitly workers' right to form industry-wide and sector-wide unions;

- prohibit not only the use of temporary contracts with durations of over 180 consecutive days, as currently provided, but also ban the use of consecutive, short-term temporary contracts—by either primary employers or third-party contractors—adding up to more than 180 consecutive days;

- allow subcontracted workers to organize and bargain collectively with the person or company for whose benefit work is realized if that person or company, in practice, has the economic power to dictate, directly or indirectly, the workers' terms and conditions of employment;

- limit the percentage of subcontracted workers in any workplace to a maximum of 20 percent of the total number of workers;

- limit the use of third-party contractors to those providing workers to perform temporary or complimentary services and those operating independently and autonomously, with their own capital and personnel, to perform specific, discrete jobs; and

- codify the following provisions of the draft executive decree on third-party contractors:

    - article 3, to provide that if third-party contractors violate laws or regulations governing their operations, their subcontracted workers shall be legally considered direct employees of the main company;

    - article 11, to establish that subcontracted workers must receive the same salaries and benefits and enjoy the same employment conditions as employees at the same level hired directly by the main company; and

[34] ILO Convention 98, article 2, establishes that "acts which are designed to promote the establishment of workers' organizations under the domination of employers or employers' organisations, or to support workers' organizations by financial or other means, with the object of placing such organizations under the control of employers or employers' organizations, shall be deemed to constitute acts of interference within the meaning of this article."

- article 21, to ban third-party contractors from having business partners, associates, managers, legal representatives, or administrators who also hold such positions with the main employer or who have only one client.

Benchmarks for Child Labor

In order to achieve ATPA and ATPDEA compliance, Human Rights Watch believes that Ecuador must meet the following benchmarks:

- Issue implementing regulations, as required by law, for the new Code for Children and Adolescents, adopted in January 2003, and amend the Labor Code to conform with the Code for Children and Adolescents' provisions governing child labor;

- hire three additional child labor inspectors, for a total of twenty-two, as required by Ecuadorian law, to implement child labor laws and the Banana Industry Agreement on Child Labor through proactive monitoring and unannounced on-site inspections, rather than reliance on a complaint-driven enforcement strategy;

- authorize and disburse additional funds to the Ministry of Labor sufficient to fully cover start-up costs, salaries, and operational expenses for twenty-two child labor inspectors;

- provide additional training to newly hired child labor inspectors to ensure that they fully comprehend Ecuadorian and international law provisions governing child workers' human rights and have adequate instruments and methodologies to conduct child labor inspections in all sectors; and

- develop, adequately fund, and implement meaningful social protection measures to prevent child labor and effectively rehabilitate former child workers, with a special focus on access to education or other professional training, as contemplated by the National Plan of Action for the Elimination of Child Labor, 2003-2006.

Appendix: Los Alamos 2002 Labor Conflict

In October 2002, not only did Ecuador agree, generally, to improve its labor law enforcement but, specifically, to investigate fully and prosecute those responsible for the May 2002 anti-union violence on the Los Alamos banana plantations and to assess the adequacy of the police response.[35] Almost two years later, Ecuador has failed to uphold these commitments.

The Ecuadorian government has still not fully investigated nor prosecuted the perpetrators of the anti-union violence. Only sixteen of the roughly two hundred men who allegedly participated in the attacks and none of the individuals who may have planned the violence were charged and prosecuted. The prosecutions that occurred were based on a fundamentally flawed investigation that omitted one of the two violent confrontations, failed to mention who might have conceived and planned the alleged crimes, and omitted eight of the nine workers injured, indicating only that one policeman and one worker were shot.[36] The sixteen defendants were convicted in January 2003 of illegal possession of fire arms, carrying a prison term of only six months to one year.[37] All sixteen convictions were later overturned on appeal. The government has given no indication that it intends to initiate a new investigation.

In addition, although an internal review of the police response was allegedly conducted, no conclusions were reached regarding whether the police upheld their duty, set forth in Labor Code article 506, to "take all measures necessary to ensure order, guarantee workers' and employers' rights, and prohibit the entry into the workplace of agitators and strikebreakers."

---

[35] On May 6, 2002, the workers of the Los Alamos banana plantations implemented a strike declaration that they had first issued on March 26. On the morning of May 16, roughly two hundred hooded, armed men entered the Los Alamos plantation group, where workers living on the plantations were sleeping. Credible reports from workers' representatives indicate that the men banged on workers' doors with rifle butts, dragged roughly eighty of them from their homes, hit many with rifle butts, insulted them, looted their homes, and told many that they would be killed and dumped into the river. The hooded men also fired at at least one striking worker, Mauro Romero, seriously injuring him in the leg, which subsequently had to be amputated. Approximately six hours later, about six policemen reportedly arrived at the plantations. The armed men remained on the Los Alamos premises throughout the day and into the early evening, at which time they allegedly told all striking workers to leave the premises by 6:30 p.m. or be forcibly evicted. Shortly after 6:00 p.m., with the workers showing no sign of leaving, the armed men allegedly began shooting, injuring several workers and a policeman. Roughly nine workers suffered gunshot wounds. Reports indicate that by 8:00 p.m., police reinforcements arrived and arrested sixteen of the armed men. Workers report that a police presence remained on the plantations for roughly one month and that during that time, and over approximately the subsequent six months, they were the victims of anti-union dismissals, employer interference in the operation of the workers' organizations, and the unlawful use of strikebreakers.

[36] Report from Jaime Shamby Huilcapi, prosecutor for Guayas province in Naranjal, to the seventeenth criminal judge of Guayas province in Naranjal (no date).

[37] Resolution, seventeenth criminal judge of Guayas province in Naranjal, January 28, 2003.

As a result, officers who may have failed to fulfill this legal duty were not sanctioned nor were any striking workers compensated for injuries suffered due to an inappropriate police response.

Instead, in February 2004, the minister of labor published police guidelines to be followed in future responses to labor strikes. The minister presented the guidelines to the head of police, to be distributed to regional police commanders and their subordinate officers. Human Rights Watch welcomes the guidelines and encourages their effective implementation. The publication of the guidelines, however, does not fulfill Ecuador's obligation to conduct a meaningful review of the police response to the Los Alamos labor conflict, hold accountable those officers who may have acted illegally, and provide redress for workers who may have suffered as a result of improper police conduct. In addition, we are troubled by reports that workers' organizations were not informed of the development of the guidelines. When we told a local trade unionist earlier this year that the new guidelines had been issued, for example, he consulted with major labor federations and prominent workers' representatives in Quito, Guayas, Pichincha, Cuenca, and Manabí and reported back that none of them knew of the guidelines.