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REVIEW OF PUBLIC COMMUNICATION CAN 2016-1

Report issued pursuant to the Canada-Colombia Agreement on Labour Cooperation

Canada

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EXECUTIVE SUMMARY

Background

This report responds to Public Communication CAN 2016-1 (Colombia) submitted to the Canadian National Administrative Office (NAO) by the Canadian Labour Congress and five Colombian labour organizations pursuant to Article 10 and Annex 2 of the *Canada-Colombia Agreement on Labour Cooperation* (CCOALC). The Canadian NAO accepted Public Communication CAN 2016-1 for review on July 15, 2016 after it was determined that it met all the requirements established in Canada's *Guidelines for Public Communications*. In accordance with the Guidelines, the Canadian NAO conducted a review and has prepared this public report within 180 days of the acceptance of the Public Communication.

The Public Communication alleges that the Government of Colombia has failed to comply with its obligations under the CCOALC by failing to provide adequate protection for internationally recognized labour principles and rights. More specifically, the Public Communication identifies failures in the areas of (a) freedom of association and the right to collective bargaining including protection of the right to organize and strike; (b) enforcement of labour laws; (c) derogation from labour laws in order to encourage trade and foreign investment; and (d) timely access to labour justice.

In support of the allegations, the Public Communication includes information on two cases: (1) Pacific Rubiales, an extractive company, for which reported events occurred between 2011 and 2013 at the Campo Rubiales oil fields and involved the trade union *Unión Sindical Obrera* (USO); and (2) Ingenio La Cabaña, a sugar producing and processing company, for which reported events occurred between 2012 and 2015 at the sugar plantation and mill La Cabaña and involved the trade union *Sindicato Nacional de Trabajadores de la Industria Agropecuaria* (SINTRAINAGRO). In both cases, the submitters allege that misuse of subcontracting, systematic anti-union practices and the climate of violence that still prevails in the country have had a negative impact on workers' rights generally and particularly on the exercise of their rights to freedom of association and collective bargaining. The problems are attributed to both inadequate legal protection for these fundamental rights and a failure to effectively enforce the existing labour law.

During the review process, the Canadian NAO visited Colombia on two occasions to assess the extent to which the allegations raised by the submitters demonstrate non-compliance with CCOALC obligations. The review process involved gathering information from a wide range of sources, including through consultations with the Colombian NAO. In response to the allegations, the Colombian NAO provided the Canadian NAO an extensive report on November 1, 2016, which included explanations regarding Colombia's labour law framework as well as the actions undertaken by labour authorities in both alleged cases. As part of its review process, Canada also consulted with the submitters, representatives from Pacific Rubiales and Ingenio La Cabaña, the incumbent unions at these two companies, representatives of the major Colombian trade unions and the business sector, officials from the Ministry of Labour, and other government and civil society representatives.

Findings and Analysis

The two cases reviewed reflect distinct realities and occurred in different economic sectors. However, they both bring to the forefront certain common challenges in the area of labour relations.

The Colombian legal framework provides workers and employers the right to freedom of association and to enter into collective bargaining discussions. The legal framework allows for the registration and formation of a union in a given workplace, the existence of multiple unions in one workplace, and for workers to join one or more unions active in their workplace. Trade unions generally enjoy independence and the benefits of collective bargaining. Nevertheless, the evidence gathered throughout the review process suggests the existence of noteworthy challenges.

Subcontracting

Neither Pacific Rubiales nor Ingenio La Cabaña appeared to oppose the presence of unions in their companies. In fact, three trade unions operate freely at La Cabaña and the trade union *Unión de Trabajadores de la Industria Energética Nacional* (UTEN) signed an agreement with Pacific Rubiales. The submitters alleged that workers affiliated with USO and SINTRAINAGRO trade unions met the threshold established in the law, i.e. 25 workers or more, to form a union in both companies and, therefore, enter into bargaining discussions with the companies. But these workers were contracted through subcontractors. They were not directly employed by Pacific Rubiales or Ingenio La Cabaña. In this context, the employer could legally dismiss the request from USO and SINTRAINAGRO to enter into collective bargaining discussions with workers that were not, at least from a contractual perspective, their employees.

Herein lies a major concern related to the recognition of trade unions by the "real" employer, particularly in contexts where workers are contracted through a third-party for the execution of work or the provision of services. In both cases, the misuse of subcontracting may have created situations where it was difficult for workers to effectively exercise their rights to freedom of association and collective bargaining because employment relationships were ambiguous. While workers in both cases were hired through third-party arrangements, the direction, monitoring and control of the working activities remained under the authority of Pacific Rubiales and Ingenio La Cabaña. The relationship between the companies and the subcontractors was not therefore at arm's length. The effective control of the working activities of subcontracted workers indicates that Pacific Rubiales and Ingenio La Cabaña intended to disguise their *de facto* employment relationship with workers and thus avoid their responsibilities under the law.

Subcontracting part of the production process is a common practice and may occur for legitimate economic reasons. However, when subcontracting becomes a vehicle to eschew labour law obligations, it becomes a problem. The significant interference of the main employers in the labour management activities of their subcontractors is a strong indication that the subcontracting relationships were, in fact, used for that purpose.

In the case involving Ingenio La Cabaña, for instance, submitters indicated that the use of a *Sociedad por Acciones Simplificada* (Simplified Stock Companies, SAS) as a subcontractor allowed the company to subcontract workers to perform permanent core business functions under short-term contracts in violation of Colombian law. According to SINTRAINAGRO, the SAS subcontractor for La Cabaña was created in the first instance as an Associated Work Cooperative, however, in order to comply with the changes in legislation that prohibited the use of cooperatives for the subcontracting of permanent core business functions, the cooperative transformed into a SAS with a view to continuing to provide its work and services to La Cabaña. Overall, if no employment relationship is recognized between the employer and its workers, it is nearly impossible for trade unions to effectively negotiate the terms and conditions of work.

The situation was exacerbated by the fact that, in both cases, workers were "employed" by subcontractors under temporary contracts and were therefore further deterred from exercising their associative rights by the precarious nature of their employment. They feared retaliation for their union activities or for joining a union that is not favoured by the companies. Workers affiliated with USO feared being blacklisted, were apprehensive about losing their jobs because of the looming possibility that their contract would not be renewed, and felt undue pressure to join UTEN, the union that had a collective agreement with Pacific Rubiales, rather than USO. Workers affiliated with SINTRAINAGRO expressed that they were intimidated, threatened, and harassed by the company and the subcontractors, frustrating their attempts to exercise their rights. The misuse of third-party contractors has resulted in a climate in which subcontracted workers are reluctant to unionize as they do not benefit from legal protections against unfair dismissal or discriminatory practices vis-à-vis their *de facto* employer.

In recent years, the Colombian Government has issued regulations to address the misuse of subcontracting. These regulations defined "permanent core business functions" and prohibited any form of subcontracting of such permanent core business functions. But the absence of regulatory criteria to assist in identifying any "other form[s] of subcontracting" resulted in the increased use of civil-law contracts (e.g. SAS, associated work cooperatives, union contracts) to contract out permanent core business functions. In that context, Decree 583 was adopted in 2016 with a view to putting an end to the misuse of subcontracting. Unfortunately, the Decree was difficult to understand and led to the weakening of important legal measures designed to protect workers against improper subcontracting. The Decree listed a number of elements as indicative of illegal subcontracting even though some of those same elements had previously been identified as stand-alone punishable offences by the courts. Even more problematically, the Decree was interpreted as "legalizing" the subcontracting of permanent core business functions under certain circumstances although the law had previously been interpreted as prohibiting such subcontracting in all circumstances. Overall, the misuse of subcontracting serves to disguise the actual employment relationships and continues to seriously undermine workers' collective rights.

Union Contracts

Union contracts are agreements between unions and employers in which a union provides the employer with the labour required to perform a specific task. While technically the union and its members are partners in the union contract, in practice, the union is the financial recipient and acts as an intermediary between its member-workers and its customer, the business owner. The worker must remain a member of the union to benefit from the union contract and receives payment directly from the union for their services. The union contract is to be distinguished

from a closed shop union arrangement. In the latter situation, the employee is directly employed by the business owner while in the former the employee is in practice an employee of the union assigned to perform services for the business owner. Furthermore, under a closed shop union situation workers can at any time decide to change their representative union without an impact of their employment, whereas under a union contract employees effectively lose their freedom of association to decide collectively on their representative union, since a change in union means the end of the union contract and loss of employment for all its members. Like other forms of subcontracting, the use of union contracts has undermined workers collective rights by preventing workers from asserting rights under the law vis-à-vis their *de facto* employer, the business owner.

Union contracts also present additional risks to freedom of association and the independence of the participating unions. Nothing in the law prevents unions from having both a union contract and a separate collective agreement with the same employer and therefore engaging in collective negotiations to represent the interest of one group of workers while at the same time knowing that the employer could refuse to extend or renew an existing union contract on which the union depends financially. The terms of the union contract between UTEN and Pacific Rubiales provide an illustration of such a situation. Such arrangements seriously threaten the independence of trade unions and distort the essential function of a union of protecting and defending the interests and rights of its members.

Collective Pacts

Collective pacts are collective agreements between employers and non-unionized workers. Colombian labour law allows employers to negotiate collective pacts with non-unionized workers if trade unions represent less than one third of the employer's workforce. While employers are not allowed to offer better conditions than those contemplated in collective agreements with the trade unions in the same workplace, the reality is that collective pacts have been embraced by employers as a way to curtail trade union activity.

The issue of collective pacts was raised during the review process and strongly impacts the right to collective bargaining which was raised by submitters and is central to this report. Like union contracts, the use of collective pacts have been broadly recognized by both domestic and international observers as an impediment to the ability of unions to form and effectively defend the collective interests of their members.

Labour Inspectorate

The submitters also expressed serious concerns about inadequate labour inspections and the lack of sanctions in cases of non-compliance. While the Colombian Government has made efforts to improve the labour inspection system, there are still challenges. First, despite increases in the amount of fines, the measures in place may not produce the desired results unless the process for collecting the fines is effective. Second, in order to fulfil their functions, labour inspectors require adequate training and resources including clear and consistent direction on the application of the law. This is particularly important in cases with a high level of complexity.

Violence against Trade Unionists

Both cases also illustrate the prevailing climate of hostility, intimidation, and threats against trade union leaders and labour activists in Colombia. The role played by government institutions to properly investigate and prosecute those responsible for violence against union members is essential to tackle violence and impunity. The strengthening of the National Protection Unit in recent years has been critical in the fight against violence affecting trade unionists. But these efforts and the progress achieved could be compromised if the institution is not provided with appropriate and sustained financial resources to effectively address the urgent needs of those workers that put their own safety at risk to defend their legitimate rights.

The work of the Attorney General's Office is also key. No case of trial and subsequent conviction under Article 200 of the Criminal Code, which criminalizes violations of freedom of association, was reported by the Colombian Government. Undue delays in the administration of justice may result in criminal prosecutions not being pursued, often due to the expiry of timelines, ultimately increasing the climate of impunity and lack of trust in the judicial system by Colombian workers. The high number of files in the pre-investigative phase may point to the need for substantial reforms either in the Criminal Code or in investigative practices.

There are also serious concerns at the national and international levels regarding excessive use of force by the Mobile Anti-Disturbances Squadron (*Escuadrón Móvil Antidisturbios*, ESMAD), a unit within the Colombian National Police in charge of securing demonstrations and controlling riots, including strikes. Several reports detail how ESMAD has on multiple occasions seriously injured workers.

Based on the evidence gathered as part of the review process, the Canadian NAO has serious concerns about whether the current labour law and policy framework, including enforcement processes, are sufficient to prevent abuse and discriminatory practices and protect the full exercise of association and collective bargaining rights.

Recommendations

The Canadian NAO offers, in the spirit of cooperative discussions, the following recommendations to the Government of Colombia aimed at addressing the issues and concerns identified during the review process:

1. In order to protect workers' fundamental rights to freedom of association and collective bargaining, remove legal vehicles used to undermine these rights by making the following changes:

    - Eliminate union contracts. These contracts have become a platform for abusive labour practices and bad faith bargaining. The use of these contracts has also had significant negative impact on the autonomy of trade unions and their ability to fulfill their primary purpose;

- Eliminate collective pacts. These pacts undermine the ability of independent trade unions to organize and negotiate authentic collective agreements thereby unduly interfering with the balance of power in labour relations;

- Eliminate the misuse of short-term contracts. Repeatedly renewed short-term contracts are being used to disguise permanent employment relationships and thereby denying workers legal protection. The resulting high degree of job insecurity significantly impedes the ability of trade unions to organize and operate;

- Implement measures to reduce the widespread and systematic practices of illegal labour intermediation and subcontracting including:

    - repealing Decree 583 (which has, in practice, enabled the subcontracting of permanent core business functions) and replacing it with a legal instrument that unambiguously empowers labour inspectors to combat the misuse of intermediation and subcontracting;

    - ensuring that labour inspectors are empowered to identify and address situations where intermediation or subcontracting is being used to disguise a direct employment relationship regardless of the formalities associated with the relationship;

    - developing guidelines for labour inspectors that identify permanent core business functions in specific economic sectors;

    - directing enforcement resources at ensuring that civil law contracts (e.g. SAS, associated work cooperatives) are not used to deny workers social and labour protections provided in the law;

- Consider the creation of a specialized quasi-judicial regulatory body to make decisions on union registration and dissolution and to hear complaints of unfair labour practices and discrimination by unions and employers. This body would be independent of the government and tripartite with appointees representing employers, unions and neutrals with specialized knowledge of law and labour standards.

2. Strengthen compliance with and enforcement of labour law through a labour inspectorate that focuses on preventive measures, provides effective advice, and establishes and efficiently collects penalties by:

    - ensuring that workers have timely access to justice in a manner that workers can claim labour rights, such as reinstatement or severance for dismissals, in the ordinary judicial process;

- streamlining the administrative process for more effective imposition of fines, including considering the harmonization of existing sanctions in both the Substantive Labour Code and other labour law;

- ensuring that Colombia's public collector (CISA) effectively collects the fines and makes the achieved results known in the short and medium term, including an analysis of whether the fines imposed have a sufficient deterrent effect;

- providing labour inspectors the appropriate training and resources to perform effectively their duties, including preventive and proactive labour inspections;

- investigating multiple complaints filed against a particular employer under a single process;

- increasing the supervision and monitoring of labour formalization agreements negotiated with employers that obtained a reduction or remission of a fine for illegal labour intermediation or subcontracting to ensure that these companies offer permanent contracts rather than fixed-term contracts to workers through the implementation of these agreements.

3. Strengthen efforts to fight impunity and violence in the country by bringing those responsible to justice by:

    - evaluating the effectiveness of the mandatory conciliation phase (a precondition for the investigation to start) as required by the criminal proceedings for Article 200 of the Criminal Code and ensuring that existing procedures do not curtail the timeliness and efficiency of the administration of justice;

    - reviewing active files for violations under Article 200 of the Criminal Code, in particular those that may not be pursued due to timelines and for which immediate measures would be required;

    - providing the National Protection Unit sufficient and permanent financial resources to operate effectively;

    - ensuring that inter-institutional coordination mechanisms (between the Ministry of Labour and the Office of the Attorney General) are in place for the exchange of information and sharing of relevant evidence;

    - critically and independently examining the role of the ESMAD, whose actions and interventions have been strongly criticised by Colombian and international stakeholders for excessive use of force;

- effectively advancing the investigation of violations under Article 347 of the Criminal Code, which criminalizes threats against trade unionists, including by ensuring that guilty parties are brought to trial when warranted;

- ensuring that reassignments of files are done in accordance with proper investigative practices to avoid unreasonable delays; and

4. Evaluate and report on efforts to promote freedom of association and free collective bargaining in the country.

In conclusion, and pursuant to Article 12 of the CCOALC which provides that a Party may request in writing consultations with the other Party at the ministerial level regarding any obligation under the Agreement, the Canadian NAO recommends that the Minister of Employment, Workforce Development and Labour seeks consultations with the Minister of Labour of Colombia related to the above-mentioned recommendations.

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LIST OF ACRONYMS

CAJAR	*Colectivo de abogados José Alvear Restrepo*
CCOALC	Canada-Colombia Agreement on Labour Cooperation
COLJUSTICIA	*Corporación Colombiana Para la Justicia y el Trabajo*
CGT	*Confederación General del Trabajo*
CTC	*Confederación de Trabajadores de Colombia*
CUT	*Central Unitaria de Trabajadores*
CISA	*Central de Inversiones SA*
ENS	*Escuela Nacional Sindical*
ESMAD	*Escuadrón Móvil Antidisturbios*
NAO	National Administrative Office
OECD	Organization for Economic Cooperation and Development
SAS	*Sociedad por Acciones Simplificada*
SENA	*Servicio Nacional de Aprendizaje*
SINTRAINAGRO	*Sindicato Nacional de Trabajadores de la Industria Agropecuaria*
SINTRAINCABAÑA	*Sindicato de Trabajadores del Ingenio La Cabaña*
SINTRACAÑAZUCOL	*Sindicato Nacional de Trabajadores de la Agroindustria de la Caña de Azúcar de la Azúcar y Afines Similares*
SINTRAZUCAR	*Sindicato de Trabajadores del Azúcar*
UNP	*Unidad Nacional de Protección*
USO	*Unión Sindical Obrera*
UTEN	*Unión de Trabajadores de la Industria Energética Nacional*

INTRODUCTION

The Agreement

The Canada-Colombia Agreement on Labour Cooperation (CCOALC), a parallel agreement to the Free Trade Agreement between the two countries, was signed on November 21, 2008, and came into effect on August 15, 2011.[1] The CCOALC provides for a Public Communication process through which members of the public can raise concerns to one CCOALC Party related to labour laws matters arising in the territory of the other CCOALC Party and that pertain to any matters under the CCOALC.[2] Each country has also established a Point of Contact or National Administrative Office (NAO) that can accept and review such public communications in accordance with domestic procedures.[3] The Canadian *Guidelines for Public Communications* describes the procedures and criteria to be followed by the Canadian NAO for the submission, acceptance and review of public communications.[4] The role of the Canadian NAO in reviewing a public communication is to gather information and make recommendations to the Minister of Employment, Workforce Development and Labour of Canada on whether to engage in Ministerial Consultations in accordance with Part III of the CCOALC regarding the issues pertaining to compliance with the obligations under the CCOALC that were not resolved during the review.

The Public Communication

On May 20, 2016, a Public Communication was received by the Canadian NAO, the first one under the CCOALC. It was submitted by the Canadian Labour Congress and five Colombian labour organizations: *Central Unitaria de Trabajadores* (CUT), *Confederación de Trabajadores de Colombia* (CTC), *Corporación Colombiana para la Justicia y el Trabajo* (COLJUSTICIA), *Sindicato Nacional de Trabajadores de la Industria Agropecuaria* (SINTRAINAGRO) and *Unión Sindical Obrera* (USO). The Canadian NAO determined that the Public Communication met all the eligibility and technical requirements set out in Canada's *Guidelines for Public Communications*. It was therefore accepted for review on July 15, 2016 and was assigned reference number CAN 2016-1.

The Public Communication alleges that the Government of Colombia has violated the obligations of the CCOALC and includes information on two cases in support of the allegations: (1) Pacific Rubiales, an extractive company, for which reported events occurred between 2011 and 2013 at the Campo Rubiales oil fields and involved the trade union USO; and (2) Ingenio La Cabaña, a sugar producing and processing company, for which reported events occurred between 2012 and 2015 at the sugar plantation and mill La Cabaña and involved the trade union SINTRAINAGRO.

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[1] Labour Program of Employment and Social Development Canada, Canada-Colombia Agreement on Labour Cooperation, available at https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/colombia.html

[2] The Canada-Colombia Agreement on Labour Cooperation [hereinafter the CCOALC], Article 10 and Annex 2.

[3] CCOALC, Article 8.2.

[4] Labour Program of Employment and Social Development Canada, *Guidelines for Public Communications submitted to the Canadian National Administrative Office under Labour Cooperation Agreements or Chapters*, available at https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/guidelines.html

According to the submitters, the Colombian Government failed to comply with the following provisions of the CCOALC:

- Article 1, which states that "[e]ach Party shall ensure that its statutes and regulations, and practices thereunder, embody and provide protection for […] a. freedom of association and the right to collective bargaining (including protection of the right to organize and the right to strike)" as articulated in the 1998 ILO Declaration.[5]

- Article 2, which states that "[e]ach Party shall ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour laws in a manner that weakens or reduces adherence to the internationally recognized labour principles and rights referred to in Article 1 as an encouragement for trade between the Parties, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory."[6]

- Article 3, which states that "[e]ach Party shall […] promote compliance with and effectively enforce its labour law through appropriate government action"[7]

- Article 4, which states that "[e]ach Party shall ensure that a person with a legally-recognized interest under its law has appropriate access to proceedings before a tribunal which can enforce the Party's labour law, give effect to such person's labour rights and remedy breaches of such law or rights."[8]

- Article 5, which states that "[e]ach Party shall ensure that […] the proceedings referred to in Article 3.1(b), 3.1(e) and Article 4 […] do not entail unreasonable fees or delays, and the time limits do not impede exercise of the rights."[9]

Article 26 of the CCOALC defines labour law as "laws, regulations and jurisprudence […] that implement and protect the labour principles and rights set out in Article 1". Article 1 of the CCOALC includes the following principles and rights: (a) freedom of association and the right to collective bargaining (including protection of the right to organize and the right to strike); (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour (including protections for children and young persons); (d) the elimination of discrimination in respect of employment and occupation; (e) acceptable conditions of work with respect to minimum wages, hours of work and occupational health and safety; and (f) providing migrant workers with the same legal protections as the Party's nationals in respect of working conditions.

[5] CCOALC, Articles 1.1 and 1.2.
[6] CCOALC, Article 2.
[7] CCOALC, Articles 3.1 and 3.2.
[8] CCOALC, Article 4.
[9] CCOALC, Article 5.1 (d).

The Review Process

The Public Communication was reviewed by the Canadian NAO to assess the extent to which the allegations raised by the submitters demonstrate non-compliance with the CCOALC, if at all. The review process involved gathering information from a wide range of sources, including through consultations with the Colombian NAO under Article 11 of the CCOALC.[10]

The review process included the following:

- The Canadian NAO met with COLJUSTICIA representatives on August 15, 2016, on the margins of a presentation at Global Affairs Canada in Ottawa, to hear their views on the Public Communication and discuss next steps of the review process.

- A list of questions related to specific allegations in the complaint was sent to the Colombian NAO via e-mail on August 15, 2016, a response was received on August 28, 2016 and an updated response was received on September 30, 2016.

- From August 29 to September 2, 2016, Canadian NAO officials travelled to Colombia and met in Bogotá with Colombian government officials, including the Ministry of Labour, the Office of the Inspector General, and the National Protection Unit. They also met with representatives from CUT, CGT, CTC, the National Association of Enterprises, Pacific Rubiales, the state-owned oil company Ecopetrol, and the Department of Labour of the United States. Canadian officials also visited Pacific Rubiales oilfields in Puerto Gaitán (Meta Department) and the facilities of Ingenio La Cabaña in Puerto Tejada (Cauca Department), where they met with workers' and companies representatives. While in Cauca, Canadian officials met with representatives from the Association of Sugarcane Growers in Cali.

- Canadian NAO officials visited Bogotá from September 26 to 30, 2016, to review key aspects of Colombian labour law with officials from the Ministry of Labour of Colombia. Canadian NAO officials also met with officials from the Attorney General's Office.

- Following the Canadian NAO visit in late September, the Colombian NAO sent draft minutes of the joint meetings and asked for comments from the Canadian NAO on October 6, 2016, to which the Canadian NAO provided comments on October 13, 2016. The Colombian NAO requested additional comments on November 30, 2016, to which the Canadian NAO responded on December 1, 2016.

- In response to the allegations by the submitters, the Colombian NAO sent a report[11] on November 1, 2016, where they provided explanations regarding Colombia's labour legislative framework as well as the actions undertaken by labour authorities in both alleged cases.

[10] CCOALC, Article 11.

[11] Government of Colombia, *Response to the Public Communication to the Canadian National Administrative Office (NAO) under the Canada-Colombia Agreement on Labour Cooperation (CCCOALC) concerning the Failure of the Government of Colombia to comply with the Canada-Colombia Agreement on Labour Cooperation* [hereinafter the Government of Colombia November 1, 2016 response].

While the review process by the Canadian NAO remained independent, the Canadian NAO provided updates and exchanged views with the following stakeholders throughout the process: (a) the Colombian NAO; (b) the submitters; and (c) the United States Department of Labour, which received a nearly identical public communication under the *Colombia-United States Trade Promotion Agreement.*

Notably, the CCOALC creates obligations that the governments of Canada and Colombia must respect and, therefore, the focus of the review process was Colombia's compliance with those obligations as opposed to the actions of specific employers and workers. In relation to the specific events described in the Public Communication, it was not always possible to reconcile what were, at times, contradictory versions of events. In addition, some allegations of non-compliance were of a general nature and did not stem directly from the events reported at the production facilities. All allegations were carefully considered when findings of fact were made.

This Report

In the context of the review process discussed above, this report aims to examine and propose resolutions to the issues of a systemic nature that are at the root of the challenges raised by the Public Communication.

The report consists of four sections. The first section reviews aspects of Colombian labour law that are relevant to the issues raised in the Public Communication beginning with a brief overview of the current labour situation in the country. It also includes some observations from the Canadian NAO. The second section presents key elements of the allegations including Colombia's response and certain observations from the Canadian NAO. The third section includes a summary of findings and analysis in which the most important issues identified in the review of the allegations are examined and discussed in light of the NAO's observations about Colombia's labour situation and legal framework. Finally, the fourth section includes recommendations to strengthen adherence to the CCOALC and its underlying principles.

1. LABOUR LAW IN COLOMBIA

The objective of this section is to outline the relevant legal framework as it pertains to the issues raised by the Public Communication. In particular, basic information is provided about Colombian law governing the rights to freedom of association, collective bargaining, including the rights to organize and strike, and their enforcement.

A. Overview of the Labour Situation in Colombia

Colombia faces deep structural challenges in the area of labour, notwithstanding certain positive trends.[12] Labour informality is widespread, the rate of self-employment is high, and many employees have limited term contracts. In order to reduce their operating costs, a large number of employers have used over the years different forms of subcontracting to avoid complying with obligations under the labour law. The sanctions and penalties imposed by Colombian labour authorities in this area have not had sufficient deterrent effect. At the same time, anti-union activities continue to affect the full exercise of the right to freedom of association and collective bargaining. Child labour also remains a challenge in the informal and illicit sectors.[13]

Decades of internal armed conflict have also resulted in more than 6 million internally-displaced people and the second highest number of landmine casualties worldwide.[14] The climate of violence has affected the Colombian union movement and its leaders.[15] Several union leaders and members feel that they are perceived as belonging to guerillas groups and are persecuted for demanding their rights, which is an expression of the prevailing anti-union sentiment in the country.[16] Trade unions are often viewed not only as oppositionist, but often as subversive or as enemies of the institutional order.[17] This perception has manifested itself in the stigma surrounding trade unions that has spread into Colombian society, including businesses and political elites.[18] The anti-union culture has posed significant challenges to the advancement of trade unionism. Between 1986 and 2014, more than 3000 trade unions activists were murdered,

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[12] Escuela Nacional Sindical, *TLC, Plan de Acción Laboral y derechos de los trabajadores en Colombia: Cinco años esperando cambios reales*, May 2016.

[13] United States Department of State, "Worker rights", Country Reports on Human Rights Practices for 2015: Colombia, Bureau of Democracy, Human Rights and Labour, available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dlid=253001; OECD (2016), OECD Reviews of Labour Market and Social Policies: Colombia 2016, OECD Publishing, Paris, pp.86-88, available at http://dx.doi.org/10.1787/9789264244825-en

[14] Global Affairs Canada, *Annual Report Pursuant to the Agreement concerning Annual Reports on Human Rights and Free Trade Agreement ,* Fifth Report, January to December 31, 2015, p. 3.

[15] OECD (2016), *OECD Reviews of Labour Market and Social Policies: Colombia 2016,* OECD Publishing, Paris, p. 11., available at http://dx.doi.org/10.1787/9789264244825-en

[16] For instance, between 2009 and 2013, the database of the *Escuela Nacional Sindical* reported 30 complaints for union persecution in the oil industry in Puerto Gaitán, particularly in 2011, from workers affiliated with the *Unión Sindical Obrera* (USO).

[17] United Nations Development Program, *Acknowledging the Past, Building the Future,* Report on Violence against Trade Unionists and Unionized Workers 1984-2011, November 2013, p. 11., available at http://www.co.undp.org/content/colombia/es/home/library/democratic_governance/-informe-sobre-violencia-contra-sindicalistas-y-trabajadores-sin.html

[18] Vásquez Fernández, Héctor. "*La negociación colectiva en Colombia".* In *Estrategias sindicales por una mayor y mejor negociación colectiva en América Latina y Caribe: Campaña Libertad Sindical, Negociación Colectiva y Autoreforma Sindical.* p. 259, TUCA, ITUC. 2013, available at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_230682.pdf

230 disappeared and many thousands more were threatened with death, kidnapping or were victim to other types of violence.[19] In 2015, there were 18 labour homicides.[20] While the number of murdered unionists has dropped in recent years[21] and despite the progress achieved thus far, violence against unionists and other anti-union activities are still prevalent in Colombia.

B. Law Governing Labour Relations

The protection of the rights to freedom of association and collective bargaining, including the rights to organise and strike, are guaranteed in the Colombian Constitution, the Substantive Labour Code, the Procedural Code of Labour and Social Security, and the Code of Administrative Procedure. Colombia has also ratified a number of Conventions of the International Labour Organization aimed at protecting the exercise of freedom of association and the right to collective bargaining, including Convention No. 87 on Freedom of Association and Protection of the Right to Organize and Convention No. 98 on the Right to Organize and Collective Bargaining, which are incorporated into Colombian labour legislation.[22]

Freedom of Association

Colombia's Constitution guarantees freedom of association and the right to organize trade unions without the intervention of government authorities. Unions are legally recognized by way of registration of their constituting documents with the Ministry of Labour.[23] Unions' internal structure and functioning are subject to the legal order and to democratic principles.[24] Trade unionists are also protected constitutionally under a privilege called *Fuero Sindical,*[25] which provides special protection to some union members in the exercise of trade union functions.[26] The cancellation or the suspension of a union's legal personality can only be made by the decision of a labour judge.[27]

The Substantive Labour Code recognizes the right to freedom of association for workers and employers, as well as their right to form a union, belong to a union or to refrain from joining a union.[28] Workers are entitled to change their union representatives and are protected from any

[19] OECD (2016), *OECD Reviews of Labour Market and Social Policies: Colombia 2016,* OECD Publishing, Paris, p. 98, available at http://dx.doi.org/10.1787/9789264244825-en
[20] *The Colombian Action Plan: A Five Year Update* (United States Department of Labour, April 2016), available at https://www.dol.gov/ilab/reports/pdf/2016_Colombia_action_plan_report_FINAL.pdf
[21] The Colombian government has taken measures to address violence and impunity, such as the creation in 2011 of the National Protection Unit, under the Ministry of Interior, to provide protection for vulnerable people including union leaders or members facing threat of violence. According to *The Colombian Action Plan: A Five Year Update* (United States Department of Labour, April 2016), the number of murders has dropped to an average of 26 labour homicides per year since 2011.
[22] Colombian Constitution of 1991, Article 53, Law 26 of 1976, Law 524 of 1999.
[23] Colombian Substantive Labour Code, Articles 364 and 365.
[24] Colombian Constitution of 1991, Articles 38 and 39. Colombian Substantive Labour Code, Articles 12 and 353.
[25] *Fuero sindical* is defined in Article 405 of the Colombian Substantive Labour Code as "the guarantee that some workers enjoy of not being dismissed, nor having their working conditions deteriorate, nor being transferred to other establishments of the same enterprise or to a different town without just cause, as previously determined by a labour judge."
[26] Colombian Constitution of 1991, Article 39. Colombian Substantive Labour Code, Articles 405, 406, 407.
[27] Colombian Substantive Labour Code, Article 401. ILO Convention 87, Article 4.
[28] Colombian Substantive Labour Code, Articles 353 and 354.

interference in their choices. Anyone acting against the right to association is subject to financial penalties.[29]

Registration of Unions

Colombian labour law generally describes trade unions as not-for-profit associations of workers whose main purpose is to defend and promote their own interests.[30]

With the exception of the police and armed forces,[31] any employee over the age of 14 is allowed to form or join a trade union,[32] and only a minimum of 25 workers is required to form or maintain a trade union without prior authorization from labour authorities.[33]

The trade union is granted official status by submitting certain documents to the Ministry of Labour including governing documents (constitution and by-laws) with a list of founders and initial members of the union.[34] The Ministry of Labour has then 15 days to accept, request changes, or deny registration.[35] If the authority does not make a decision, the union is automatically registered.[36] Registrations may be denied in cases where the by-laws are contrary to the Constitution and the law, or where the union is formed with a number of members below the legally required threshold.[37]

In the exercise of their functions, trade unions are prohibited from certain activities including interfering with the right to work and choice of union,[38] promoting work stoppages and engaging in activities disruptive to peace and order.[39] Unions may form federations and confederations which enjoy the same rights as unions with the exception of the right to strike.[40]

Multiple Unions

Colombian labour law now allows for the existence of multiple trade unions in a company and workers have the right to join one or more of these unions. The limitations imposed to prevent the coexistence of multiple unions in a company and to allow workers to join more than one union were declared unconstitutional by the Constitutional Court in 2000 and 2008.[41] Prior to these rulings, the bargaining agent was the trade union with the majority of the company's workforce and workers were prevented from simultaneously joining multiple trade unions.

[29] Ibid., Article 358.
[30] Ibid., Article 355.
[31] Colombian Constitution of 1991, Article 39.
[32] Colombian Substantive Labour Code, Article 383.
[33] Ibid., Article 359.
[34] Ibid., Article 365.
[35] Ibid., Article 366.
[36] Ibid., Article 366 (3).
[37] Ibid., Article 366 (4).
[38] Ibid., Article 378.
[39] Ibid., Article 379.
[40] Ibid., Article 417.
[41] Government of Colombia, Constitutional Court Rulings C-567 of 2000, C-797 2000, C-063 of 2008 which declared unconstitutional Articles 360 and 357 of the Colombian Substantive Labour Code.

In order to provide clear mechanisms to trade unions and employers for their collective bargaining and to address some of the gaps created by the decisions of the previously mentioned decisions of the Constitutional court, the Colombian Government issued Decree 089 in 2014 to provide trade unions the possibility of joining forces to present a unified list of demands to the employer. If unions do not agree to present only one list of demands, multiple lists of demands can still be negotiated at a single bargaining table.

Special Criminal Protections for Trade Unionists

The Criminal Code also protects the right to freedom of association and the right to organize. Article 83 establishes that the murder of a trade unionist is punishable with up to 30 years in prison and Article 200 provides for the imposition of penal sanctions on actions that prevent or disturb the exercise of rights protected under Colombian labour law. Article 347 of the Code establishes fines and sanctions when threats are made, including threats against trade unionists. The Attorney General's office is responsible for the investigation and prosecution of criminal offences as provided for in Articles 200 and 347, in accordance with the procedures established in the Criminal Procedure Code.[42]

Collective Bargaining

Collective Agreements

The Colombian Constitution protects the right to collective bargaining. Colombia's Substantive Labour Code establishes for the private sector a regime of collective negotiation between employers and trade unions which sets the stage for discussions on a list of demands or *Pliego de peticiones*.[43] Once unions submit a request to negotiate their list of demands, the employer is usually required to enter into initial discussions with unions within the next 24 hours. In exceptional cases, the employer is given up to five days to commence negotiations.[44] Failure by the employer to initiate negotiations is subject to financial penalties.[45] Should the parties reach an agreement at the end of the negotiating period, a copy of the signed collective agreement is provided to labour authorities.[46] The collective agreement applies to all workers, including non-unionized workers, if the union represents more than one third of the company's workforce.[47] Otherwise, the collective agreement only applies to the members of the union that negotiated the agreement.[48] In cases where no agreement is reached, workers may choose to strike or refer the labour dispute to an Arbitral Tribunal.[49] The decision of the Arbitral Tribunal ends the dispute and has the status of a collective agreement.[50]

[42] Attorney General's Office, *La Fiscalía del siglo XXI: un camino hacia la modernización, 2016*, p. 93, available at: http://www.fiscalia.gov.co/colombia/wp-content/uploads/Informe_Cuatrienio_corregido_2012-2016.pdf.
[43] Colombian Substantive Labour Code, Article 432.
[44] Ibid., Article 433.
[45] Ibid., Article 433 (2).
[46] Ibid., Article 435.
[47] Ibid., Article 471.
[48] Ibid., Article 470.
[49] Ibid., Article 444.
[50] Ibid., Article 461.

Collective Pacts

The Colombian Substantive Labour Code also grants workers and employers the right to enter into collective bargaining through Collective Pacts, which are agreements negotiated between an employer and non-unionized workers. According to Colombian labour regulations, employers have the possibility to enter into collective pacts when trade unions in a given company represent less than one third of the company's total workforce.[51] However, employers are not allowed to offer better conditions than those contemplated in collective agreements with the trade unions in the company.[52]

Right to Strike

As noted earlier, Colombian workers may choose to strike should the collective bargaining process fail. With the exception of essential public services, workers in the private sector can exercise the right to strike as recognized and guaranteed under the Constitution and the Substantive Labour Code.[53] A strike is defined as a temporary and peaceful collective suspension of work[54] and deemed legitimate provided that workers have an employment relationship with the employer. A decision to strike must be made within ten working days following the end of direct negotiations. A strike cannot exceed 60 days.[55] If the parties do not agree after this period, an arbitral tribunal can be convened.[56]

Under Colombian law, a strike must be organized and conducted in a peaceful manner[57] and police authorities are responsible for ensuring that the strike is carried out peacefully.[58] The Mobile Anti-Disturbances Squadron (*Escuadrón Móvil Antidisturbios,* ESMAD), a unit within the Colombian National Police, is in charge of securing demonstrations and controlling riots, including in the context of strikes. Several reports indicate that the ESMAD has used excessive force on numerous occasions in their interventions.[59] For instance, in March 2015, the ESMAD

[51] Ibid., Article 481 modified by Article 70 Law 50 of 1990. Regulatory Decree 1072 of 2015, Article 2.2.2.2.3.
[52] Colombian Criminal Code, Article 200.
[53] Colombian Constitution of 1991, Article 56. Colombian Substantive Labour Code, Articles 444 and 451. Constitutional Court judgment on the right to strike (*C-858/08 Derecho de huelga - Connotaciones básicas de su consagración como garantía constitucional*).
[54] Colombian Substantive Labour Code, Articles 429 and 446.
[55] Ibid., Article 448 (4).
[56] Ibid., Article 452 and Decree 017 of 2016.
[57] Ibid., Article 446.
[58] Ibid., Article 448.
[59] There are a number of concerns at the national and international levels regarding the actions undertaken by the ESMAD: CAJAR, *Corte Constitutional admitió Demanda al Código de Policía,* October 8, 2016, available at http://www.colectivodeabogados.org/?Corte-Constitucional-admitio-demanda-al-Codigo-de-Policia; CAJAR, *Carta de Eurodiputados al Presidente Juan Manuel Santos en el marco de la Cumbre Agraria*, June 10, 2016 available at http://www.colectivodeabogados.org/?Carta-de-Eurodiputados-al-Presidente-Juan-Manuel-Santos-en-el-marco-de-la; Contagio Radio, *Día contra la Brutalidad Policial en Colombia*, February 24, 2016, available at http://www.contagioradio.com/dia-contra-la-brutalidad-policial-en-colombia-articulo-20643/; Contagio Radio, *Gases Aturdidoras del ESMAD Pobladores San Martin*, 2016, available at http://www.contagioradio.com/gases-aturdidoras-del-esmad-pobladores-san-martin-articulo-31330/

intervened in a strike involving sugar cane cutters which resulted in five wounded workers, including two seriously injured workers.[60]

Temporary Employment Contracts

The rights to collective bargaining and strike under Colombian labour law are in principle protected only when workers enter into contracts with employers directly. However, the Substantive Labour Code allows employers to use different types of temporary employment contracts[61] including:

- contracts for specific work: a contract limited to the completion of a specific task, which can be renewed indefinitely for new work; and
- fixed-term contracts: a contract for less than one year or for one to three years that is automatically renewed unless a 30-day notice of non-renewal is provided.[62]

As a result, while employees have their labour rights protected with their employers, they are unable to assert these rights because of the constant renewal of their temporary contracts.[63] Under those circumstances, employers circumvent obligations under Colombian labour law that would apply to permanent employees including procedural and substantive rights arising from termination.

Labour Intermediation and Subcontracting

The Colombian government undertook significant reforms in the early 1990s that impacted the labour law regime, including the introduction of provisions to regulate temporary labour. In this context, Law 50 was promulgated with a view to removing rigidities in the labour market. It introduced the possibility of temporary employment agencies.[64] These agencies serve as intermediaries between employers and workers by providing personnel to a company when dealing with short-term increases in the workload, also known as labour intermediation. The strict regulations governing temporary employment agencies led employers to seek more flexible approaches for the hiring of personnel. Employers began using other forms of contracting, such as Worker Cooperatives (*Cooperativas de Trabajo Asociado*)[65] to avoid a direct employer/employee relationship. These other forms of contracting were recognized as limiting the ability of workers to exercise their fundamental rights including the right to freedom of association and collective bargaining.[66]

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[60] Escuela Nacional Sindical, *Cuaderno de Derechos Humanos* N. 24-*Voces Que No Callan*, Report on Human Rights Violations on Trade Unionists and Impunity 2010-2015, Analysis of the *Escuela Nacional Sindical*, November 2016, available at http://ail.ens.org.co/?s=Voces+que+no+callan.
[61] Colombian Substantive Labour Code, Article 45.
[62] Ibid., Article 46.
[63] Ibid.
[64] Government of Colombia, Law 50 of 1990, Articles 71-94; Decree 4369 of 2006
[65] Worker Cooperatives are regulated through: Law 79 of 1988; Decree 4588 of 2006; Law 1233 of 2008; Article 63 Law 1429 of 2010; and Law 1450 of 2011.
[66] OECD (2016), *OECD Reviews of Labour Market and Social Policies: Colombia 2016,* OECD Publishing, Paris, pp. 86-88, available at http://dx.doi.org/10.1787/9789264244825-en

Given the widespread abuse of worker cooperatives, the Colombian government issued a number of regulations[67], starting in 2010, to address the misuse of subcontracting arrangements. These regulations: (i) expressly prohibited the use of worker cooperatives; and (ii) prohibited the contracting out in any form of the permanent core business functions or activities of a company. In practice, the prohibition on using worker cooperatives and the absence of clear direction on the prohibited forms of contracting out resulted in the continued subcontracting of permanent core business functions but through different legal vehicles such as union contracts.[68] Furthermore, with a view to assisting labour inspectors in identifying illegal subcontracting, the Government of Colombia issued Decree 583 in 2016. According to Decree 583, illegal subcontracting occurs only when the two following conditions are met: (i) permanent core business functions are contracted out; ***and*** (ii) workers are affected in their constitutional, legal and other rights under Colombian labour law. In addition, Decree 583 lists a number of indicative elements that describe potential situations of illegal subcontracting to give guidance to labour inspectors in the imposition of sanctions. Those situations are not, according to Decree 583, punishable offences despite the fact that courts had already found some of those situations to be punishable.

The Law 1429 of 2010 was also issued to encourage employers to regularize their workers with a view to generating formal employment. The law encouraged employers found to be engaged in illegal subcontracting to directly hire employees by offering the employers financial incentives, including a reduction or remission of imposed fines.[69] While many workers have formalized their employment since Law 1429 was enacted, the effectiveness of the Law has been criticized by civil society stakeholders, given that the contracts that workers have signed are not systematically monitored. It appears that the contracts, which should guarantee job stability as per Law 1429, are fixed-term contracts that usually do not extend beyond one year. In addition, employers who regularize their workers voluntarily and those that do so after being fined receive the same financial incentives. As such, there could be an incentive to engage in such illegal practices for as long as possible. Overall, Law 1429 and other related regulations appear to have been only partially effective in discouraging illegal subcontracting.[70]

At the same time as laws were being adopted to discourage illegal subcontracting and encourage direct employment relationships between businesses and their workers, union contracts were revived as vehicles for industrial relations.[71] Union contracts trace their roots to the 1930s when there were significant labour conflicts, no regulation of labour relations and no collective

[67] These regulations include Law 1429 of 2010 (Article 63) and Decree 2025 of 2011 that regulates Article 63.
[68] In addition to union contracts, other legal vehicles include simplified stock companies, associated work cooperatives, and dependent self-employed workers (OECD (2016), *OECD Reviews of Labour Market and Social Policies: Colombia 2016,* OECD Publishing, Paris, pp. 86-87, available at http://dx.doi.org/10.1787/9789264244825-en)
[69] While the parameters in regard to the reduction or remission of fines are under Law 1610 of 2013, the conditions and requirements to subscribe formalization agreements are established in Resolution 321 of 2013.
[70] Escuela Nacional Sindical, *Formalization Agreements with no due Implementation and Follow-up*, November 2016.
[71] Ochsenius Andersson, Daniela. *The Development of the Colombian Union Contract – Contrato Sindical. A challenge for the Colombian trade union movement*, UMEA University, Thesis, 2013.

agreements. They were incorporated in the Substantive Labour Code but unused until the issuance of regulations, starting in 2010, prohibiting the use of workers cooperatives.[72]

Union contracts are agreements between unions and employers in which a union provides the employer with the labour required to perform a specific task. [73] The union that enters into a union contract is responsible for its direct obligations under the contract and for ensuring the respect of the obligations set out in the contract for union members. [74] While technically the union and its members are partners in the union contract, in practice, the union is the financial recipient and acts an intermediary between its member-workers and its customer, the business owner. Labour regulations adopted in 2010 promote union contracts as an alternative model in the industrial relations framework by giving union contracts equal value to collective pacts and collective agreements.[75] Regulations adopted more recently establish the formalities for signing a union contract, related obligations and responsibilities and dispute resolution processes.[76]

In a union contract, the worker must remain a member of the union to benefit from the union contract and receives payment directly from the union for their services. The union contract is to be distinguished, however, from a closed shop union arrangement where the union is the source from which the employer obtains its labour. In the latter situation, the employee is directly employed by the business owner while in the former the employee is in practice an employee of the union assigned to perform services for the business owner. Under a union contract, the union must provide not only the workforce required for the implementation of the contract, but also the tools and materials to carry out the tasks. In addition, the regulation provides that a union contract is a form of collective contract, a legal instrument of a collective nature by which trade unions can participate in the management of a company, the promotion of collective work and the creation of employment.[77]

C. Labour Law Enforcement

Colombia enforces its labour laws through administrative, coercive collection, and judicial processes. Five legislative instruments are in place to apply and enforce the labour law: the Substantive Labour Code, the Procedural Code of Labour and Social Security, the Code of Administrative Procedure, and the Collection Process under the Tax Act and Regulatory Decree 1072 of 2015.

Administrative Enforcement

In regard to the administrative enforcement process, the Ministry of Labour is responsible for the monitoring, compliance and enforcement of the labour code and other legal provisions.[78] The Ministry of Labour uses its administrative authority to enforce labour law by imposing sanctions through an administrative sanctioning procedure implemented by the labour inspectorate.

[72] Government of Colombia, Legal instruments governing union contracts: Decree 1429 of 2010; Regulatory Decree 1072 of 2015; and Decree 36 of 2016.
[73] Colombian Substantive Labour Code, Article 482.
[74] Ibid., Article 483.
[75] Decree 1429 of 2010.
[76] Government of Colombia, Decree 36 of 2016.
[77] Government of Colombia, Ministry of Labour, *Labour Standards,* available at http://mintrabajo.gov.co/normatividad/decretos/2016.html
[78] Colombian Substantive Labour Code, Articles 485 and 486.

Labour inspectorates are divided into 35 territorial directorates and 154 municipal labour inspections services.[79] According to the Ministry of Labour, there are 904 inspector positions, of which 819are filled.[80] Labour inspectors are generally hired on a provisional basis and their appointment as career civils servant is subject to budgetary constraints.[81] They are invested with the administrative authority to monitor, control and enforce labour law through preventive actions (advice and persuasion)[82] and coercive actions (investigation and imposition of sanctions in cases of non-compliance). In line with Law 1610 of 2013, the inspection process may be initiated in response to a request of an interested party or in a proactive manner by labour authorities. While labour inspectors are invested with sanctioning powers, the power to decide on disputes emanating from individual and collective labour relationships rests on the judiciary.[83]

The sanctioning administrative process follows structured steps and terms, in line with due process principles enshrined in the Colombian Constitution and the law.[84] When a complaint is received, labour inspectors are required to open a file and, in cases where there is more than one complaint but they are related to the same facts, inspectors are required to treat the complaints as one file to avoid conflicting decisions.[85]

The sanctioning process entails a non-mandatory preliminary inquiry conducted for a period of ten working days. If the circumstances warrant, labour inspectors may initiate a formal investigation, or close the preliminary inquiry by issuing an administrative final decision which may be subject to appeal.[86] When an investigation is initiated, a notification of indictment is delivered to the person under investigation. Over the following 28 working day period, the party under investigation is provided with an opportunity to present or request evidence for its consideration within the process and in order to prepare a defense. During this period, labour inspectors may also gather additional evidence that would support the final decision.[87] Once this period is concluded, labour inspectors have 30 calendar days to render a decision.[88] While a

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[79] Government of Colombia, Ministry of Labour, *Territorial Directions,* available at http://mintrabajo.gov.co/el-ministerio/directorios/direcciones-territoriales.html

[80] Canadian National Administrative Office's First mission from August 29 to September 2, 2016 Bogota-Colombia. Discussions with senior officials from the Ministry of Labour

[81] Government of Colombia November 1, 2016 response, p.17. According to the Government of Colombia provisional appointments enjoy stability. OECD (2016), *OECD Reviews of Labour Market and Social Policies: Colombia 2016,* OECD Publishing, Paris, p.122, available at http://dx.doi.org/10.1787/9789264244825-en; Also, Constitutional Court confirms level of stability as per rulings SU054/15, T-221/14, T-007/08, and T-716/13

[82] Government of Colombia, Ministry of Labour, *The Social Security and Labour Inspector's Manual,* pp. 46-58, available at http://www.mintrabajo.gov.co/publicaciones-mintrabajo/3372-manual-del-inspector-de-trabajo-y-seguridad-social-.html

[83] Colombian Substantive Labour Code, Article 486. Colombian Procedural Code of Labour and Social Security, Article 2 (this article defines the scope of the judiciary in regard to labour disputes).

[84] Government of Colombia, Ministry of Labour, *The Social Security and Labour Inspector's Manual*, p. 416, Graph 1, and p. 431, Graph 7, available at http://www.mintrabajo.gov.co/publicaciones-mintrabajo/3372-manual-del-inspector-de-trabajo-y-seguridad-social-.html

[85] Government of Colombia, Law 1437 of 2011, Article 36.

[86] Government of Colombia, Ministry of Labour, *The Social Security and Labour Inspector's Manual*, p. 66, available at http://www.mintrabajo.gov.co/publicaciones-mintrabajo/3372-manual-del-inspector-de-trabajo-y-seguridad-social-.html. Government of Colombia, Law 1610 of 2013, Article 10.

[87] Government of Colombia, Ministry of Labour, *The Social Security and Labour Inspector's Manual*, pp. 65-73, available at http://www.mintrabajo.gov.co/publicaciones-mintrabajo/3372-manual-del-inspector-de-trabajo-y-seguridad-social-.html.

[88] Ibid., pp.66-76. Government of Colombia, Law 1610 of 2013, Articles 10 and 12.

decision may be subject to appeals, the process for collection of fines is launched once a decision has been made.[89]

Collection of Fines

The fines that are imposed by labour inspectors are collected by the Colombian National Training Service (*Servicio Nacional de Aprendizaje*, SENA)[90], an educational institution attached to the Ministry of Labour. The actual asset investigation, localization of debtors, persuasive and coercive actions, exchange of information between governmental entities, and other duties that are part of the process for the collection of fines are implemented by CISA (*Central de Inversiones S.A.*), a partially state-owned enterprise responsible for the management of government assets and real estate property and attached to the Ministry of Finance. In order to enhance SENA's capacity to better collect fines,[91] an agreement between CISA and SENA was signed in 2016.

When a decision includes the imposition of fines, it is sent to SENA with a view to enabling the institution to assess within five days whether the decision meets the requirements for the launching of the coercive process for the collection of fines.[92] If requirements are not met, the decision is returned to the Ministry of Labour for the necessary corrections. According to Colombian government officials, the duration of the process for the collection of fines has been recently reduced from 484 to 417 working days.[93] Given CISA's expertise and available technology, it is expected that the reduction in time to effectively collect fines will be more substantial in the future. CISA is therefore faced with the challenge of delivering on its mandate by redefining to a certain extent the process for collection of fines. Nonetheless, the enforcement of labour law remains a challenge, particularly considering failures to meet the established timelines for the sanctioning processes. For instance, based on a detailed examination of files in the context of the review process,[94] it seems that the timeframes were not at times met.

In the context of the 2014-2018 National Development Plan, the Colombian Government has set the goal to make determinations within the specified time periods for at least 70% of the cases under the administrative sanctioning process.[95] In 2013, the Government also enacted Law 1610 to increase the amount of fines imposed. For instance, between 2011 and 2015 the amount of

[89] Government of Colombia, Law 1437 of 2011, Articles 74-81. Government of Colombia, Ministry of Labour, *The Social Security and Labour Inspector's Manual*, pp.74-76, available at http://www.mintrabajo.gov.co/publicaciones-mintrabajo/3372-manual-del-inspector-de-trabajo-y-seguridad-social-.html

[90] In Colombia, the Labour Risk Fund (*Fondo de Riesgos Laborales*) collects fines applied for violations of workplace health and safety standards; the Pension Solidarity Fund (*Fondo de Solidaridad Pensional*) collects fines for violations related to pensions; and the SENA collects the fines imposed for all other violations of labour law, in particular violations of the rights to freedom of association and collective bargaining.

[91] SENA's mission is to provide comprehensive vocational training for the incorporation and development of people in productive activities within the labour market. SENA is not a collection agency.

[92] Resolution 1235 of 2014, Article 21.

[93] Canadian National Administrative Office's mission to Colombia from September 26 to 30, 2016. OECD (2016), *OECD Reviews of Labour Market and Social Policies: Colombia 2016,* OECD Publishing, Paris, p. 128, available at http://dx.doi.org/10.1787/9789264244825-en

[94] Cases 408 and 410 filed against Ingenio La Cabaña and its subcontractors. The analysis indicated that it took between 16 to 21 months for preliminary investigations (including appeals) with no charges, resulting in the file being closed.

[95] Canadian National Administrative Office's First mission from August 29 to September 2, 2016 Bogota-Colombia. Discussions with senior officials from the Ministry of Labour.

fines imposed increased by 30% annually, from approximately CAD$6 million to CAD$14 million.[96] While these two initiatives are positive steps, failure to meet the timelines of the administrative and coercive sanctioning processes could undermine the deterrent effect of increased penalties, particularly in cases where sanctions expire after five years when the fines imposed are not collected.[97]

Judicial Enforcement

In Colombia, workers may also resort to the ordinary judicial system to submit their labour disputes through the Court System. In general, the Labour Court System may hear disputes about individual contracts of employment, issues regarding trade union immunity and matters related to the suspension, dissolution or cancellation of union registration, among others, as provided for in the Procedural Code of Labour and Social Security.[98]

Labour disputes can be initiated at lower courts or first instance, either in a Circuit Labour Court (*Juzgado Laboral del Circuito*) or a Circuit Civil Court if there is no Circuit Labour court in the area.[99] Labour Courts of the Superior District Courts (*Salas Laborales de los Tribunales Superiores de Dístrito Judicial*) may hear appeals of rulings issued by Labour courts of first instance, including Circuit Civil courts, related to the Procedural Code of Labour and Social Security. The Labour Chamber (*Sala de Casación Laboral*) of the Supreme Court may overturn or reverse lower court decisions, including decisions of the Labour Courts of the Superior District Courts. For instance, this Chamber may overturn arbitral tribunal decisions concerning collective disputes of economic nature; hear appeals that are not in the purview of the Superior District Courts; or review decisions that deny parties the right to seek an annulment or reversal of a lower court decision; among others.

Furthermore, in matters of fundamental rights violations as protected by the Constitution, Colombian citizens may seek remedy through the Action of Tutelage.[100] This is a mechanism by which a citizen, who has no other means of judicial protection available, may present a request to a judge at any time and place to seek the immediate protection of his or her fundamental constitutional rights when these rights are violated or threatened by the action or omission of any public authority. The judge's decision is expected to be rendered within ten days following the request for protection, and must be complied with it immediately. The rights to freedom of association, collective bargaining and to strike may be protected by the Action of Tutelage mechanism.

[96] Government of Colombia November 1, 2016 response, p. 22.
[97] Resolution 1235 of 2014, Articles 40 and 43 a) and b).
[98] Colombian Procedural Code of Labour and Social Security, Articles 1 and 2.
[99] Ibid., Articles 7-9 and 11-13.
[100] Colombian Constitution of 1991, Article 86.

2. SPECIFIC ALLEGATIONS

The Public Communication includes information on the events that occurred involving two employers in support of the allegations:[101]

- Pacific Rubiales: The submitters allege that workers at Pacific Rubiales were prevented from organizing and bargaining collectively, thus violating their fundamental labour rights and principles, such as the right to freedom of association and collective bargaining. The submitters provide examples dating back to 2011 of illegal labour intermediation, anti-union discrimination, obstacles to the right to strike, excessive use of force by police authorities, and ineffective labour inspections and investigation processes.

- Ingenio La Cabaña: The submitters also allege violations to the right of freedom of association and collective bargaining. The examples provided dating back to 2012 include illegal labour intermediation, systematic practices of dismissals and intimidation of trade union leaders and members, and ineffective labour inspections and investigation processes.

The Colombian NAO responded to these allegations by providing explanations regarding the labour law framework as well as the actions undertaken by authorities in both alleged cases. The response maintains that Colombia has in place the requisite legal framework and procedures to ensure the respect for freedom of association and collective bargaining including protections against anti-trade union discrimination and violence. In relation to the specific cases, the response affirms that the Colombian authorities took the necessary steps to guarantee the protection of workers.

This section presents the main allegations and the Colombian response in relation to each situation, and includes the Canadian NAO's observations.

A. Pacific Rubiales and USO

The submitters allege that Pacific Rubiales and its intermediaries interfered with workers' freedom to associate by:

- conducting mass dismissals of union members;
- establishing a blacklist system to prevent workers affiliated with the *Union Sindical Obrera* (USO) from returning to work;
- refusing to renew worker contracts unless the worker resigned from USO and joined the *Unión De Trabajadores De La Industria Energética Nacional* (National Union of Energy Workers, UTEN).[102]

[101] Readers may wish to refer to the chronological tables in Annex A to see the overall sequence of events as described by the submitters in Public Communication CAN 2016-1.
[102] Labour Program of Employment and Social Development Canada, *Public Communication to Canadian National Administrative Office (NAO) under the Canada-Colombia Agreement on Labour Cooperation (CCOALC)*

The submitters indicate that USO filed a complaint with the Ministry of Labour on July 25, 2011 about various violations including labour intermediation and refusal to bargain by Pacific Rubiales.[103] The submitters add that on February 2, 2012, USO filed a complaint with the Ministry of Labour against Pacific Rubiales and its intermediaries regarding mass dismissals of USO members, pressures on workers to disaffiliate from USO to join UTEN, and prevention of union leaders from entering the worksite.

The Government indicates that the complaint filed in February 2012 was dismissed on the basis that: i) there was no direct employment relationship between Pacific Rubiales and USO workers; ii) there was no violation of the right to freedom of association by Pacific Rubiales; and iii) the termination of workers' contracts took place due to the termination of the object of the commercial contract signed between Pacific Rubiales and its intermediaries.[104] The dismissals, according to the Government, are justified by the fact that the commercial relations between Pacific Rubiales and its intermediaries were terminated.[105]

During the first mission to Colombia, Canadian NAO officials met with Pacific Rubiales representatives who indicated that their permanent core business functions were the exploration and production of oil and that the company had a number of permanent workers hired directly. However, in the process of an oil field expansion, the company engaged in subcontracting in response to the temporary increase in workload. While subcontracting is a common practice in the oil sector,[106] particularly through short-term contracts during the development phase of a new oil field, comments from various stakeholders suggest that Pacific Rubiales became involved in the internal operations of its sub-contractors creating confusion among workers as to the identity of their employer.

Furthermore, the submitters allege that USO's union leaders were prohibited from accessing the worksite and talking to workers in the exercise of their legitimate union activities.[107] These allegations were submitted to the Committee on Freedom of Association of the International Labour Organization which, in turn, made a number of recommendations to the Colombian Government.[108] The submitters allege that the Colombian Government has not implemented to date any of the Committee's recommendations.[109] The Government states that the recommendations of the Committee were conveyed to a number of enterprises, including Pacific Rubiales and its subcontractors, so that these enterprises can take the necessary measures.[110] While companies have the right to ensure the safety of their facilities, the Canadian NAO

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concerning the Failure of the Government of Colombia to comply with the Canada-Colombia Agreement on Labour Cooperation [hereinafter the Public Communication CAN 2016-1 (Colombia)], May 20, 2016, p.16.

[103] Ibid., p.13.

[104] Government of Colombia November 2016 response, pp. 55-56.

[105] Government of Colombia November 2016 response, p. 56. International Labour Organization, *Report of the Committee on Freedom of Association Case 2946 – the Government`s Reply (234)(xi),* Governing Body 323rd Session, Geneva, March 12-27 2015, p. 59.

[106] Muñoz, Sandra Milena and Adriana Guarnizo, *PACIFIC RUBIALES (PRE) Estado actual de los derechos humanos laborales en la industria petrolera en Puerto Gaitán, Meta*, Documento N. 106, Escuela Nacional Sindical, 2016, pp. 23-28.

[107] Public Communication CAN 2016-1 (Colombia), p. 17.

[108] International Labour Organization, *Report of the Committee on Freedom of Association case 2946,* Governing Body 323rd Session, Geneva, March 12-27, 2015, pp. 66-67.

[109] Public Communication CAN 2016-1 (Colombia), p. 17.

[110] Government of Colombia November 2016 response, p. 61.

observes that Colombian labour law requires employers to implement internal regulations which include procedures for the exercise of union activities in the workplace.[111] While the Colombian Ministry of Labour is not required to oversee these internal regulations[112] the labour inspectorate is empowered to ensure that workplace regulations are not contrary to national labour law and serve to promote the realization of labour rights.[113]

Moreover, the submitters allege that Pacific Rubiales and its subcontractors refused several times to engage in collective bargaining with USO and that the labour authorities were notified and provided with evidence of Pacific Rubiales' refusal to enter into discussions.[114] The Government indicates that they facilitated discussions between Pacific Rubiales and USO, including by organizing roundtables to encourage the dialogue between USO, Pacific Rubiales and its intermediaries, and the community in which the oil field was located, Puerto Gaitán.

The submitters allege that the Ministry of Labour convened a meeting on September 20, 2011, between Pacific Rubiales and USO, and that workers agreed to suspend further protests, and Pacific Rubiales agreed to engage in collective bargaining and refrain from retaliating against workers who participated in the work stoppages. The submitters add that follow-up negotiations were scheduled on October 6 and 25, 2011.[115] The Government states that between September 21 and October 6 the Ministry of Labour fulfilled its responsibilities as a promoter and facilitator in the search for conflict resolution in conjunction with the community and Pacific Rubiales, which culminated in the signing of an agreement on December 1, 2011, that put an end to the dispute between the community and Pacific Rubiales. The Government adds that, notwithstanding the signed agreement, follow-up activities were organized by the Ministry of Labour.[116]

The submitters also allege that the follow-up negotiations scheduled for October 6, 2011, did not take place since Pacific Rubiales refused to negotiate given that they had reached an agreement with the National Union of Energy Workers (*Unión de Trabajadores de la Industria Energética Nacional*, UTEN). The submitters also allege that the Labour Normalization Agreement, signed between Pacific Rubiales and UTEN on October 6, 2011, was a commercial contract for the delivery of services rather than a collective agreement[117] and that Pacific Rubiales signed two union contracts with UTEN.[118]

In the context of the first Canadian NAO mission to Colombia, Pacific Rubiales representatives indicated that they were in favour of trade union plurality, but that they did not receive from USO the list of Pacific Rubiales workers affiliated to the union. They did however receive a list from UTEN, which resulted in the signing of an agreement in October 2011.[119] On their part, USO leaders recognized that it was a mistake not having registered workers from Pacific

[111] Colombian Substantive Labour Code, Article 108 (6), 120.
[112] Law 1429 of 2010, Article 22.
[113] Summary of reasons to Bill 057 of 2010.
[114] Public Communication CAN 2016-1 (Colombia), p. 26.
[115] Ibid., p. 15.
[116] Government of Colombia November 2016 response, pp. 57-61.
[117] Public Communication CAN 2016-1 (Colombia), p. 15.
[118] Ibid., p. 18.
[119] Canadian National Administrative Office's First mission from August 29 to September 2, 2016 Bogota-Colombia. Discussions with representatives from Pacific Rubiales.

Rubiales in the first place to engage into bargaining talks with the company in 2011.[120] Learning from this experience, USO has registered workers from Pacific Rubiales since 2014, which has allowed USO to engage in collective bargaining discussions with Pacific Rubiales. In a recent communication by the Colombian NAO, the Canadian NAO was informed that the dispute has been referred to an Arbitral Tribunal for a final determination since no agreement has been reached.[121]

During the discussions conducted by the Canadian NAO, UTEN representatives indicated that workers of Pacific Rubiales preferred to be affiliated with UTEN as they represent a modern and alternative unionism and that, in contrast to many other unions, they condemn violence.[122] They also indicated that they had signed two union contracts and a collective agreement with Pacific Rubiales. The Canadian NAO observes that this is a clear situation where a union, UTEN, entered into union contracts to fulfill the role of an employer vis-à-vis the workers (i.e. responsible for ensuring sound labour relations and work environment) and served also as an intermediary between these workers and Pacific Rubiales. The Government states that, even if the actions of Pacific Rubiales could be questioned, the agreement signed between Pacific Rubiales and UTEN was nevertheless of significant value for workers of Pacific Rubiales.[123]

Furthermore, the submitters allege that the Government repeatedly failed to conduct adequate labour inspections and has not issued timely decisions in complaints lodged by USO before labour authorities in 2012, 2013 and 2015. For instance, the submitters allege that:

- the complaint lodged under Article 200 of the Criminal Code in May 2013 was reassigned at least three times;[124]
- there are no convictions recorded across the country despite the 1,146 complaints filed;[125]
- the unit created to reduce impunity is insufficiently staffed, has a backlog, and rarely pursues charges;[126] and
- there was no meaningful investigation conducted following the death threats received by USO leaders and their families for testifying against Pacific Rubiales.[127]

The Government indicates that the Ministry of Labour established a plan to inspect Pacific Rubiales and its intermediaries with a view to collecting facts in relation to the violations alleged by USO. Labour inspectors conducted 146 visits as of July 29, 2011 to determine the relationship between Pacific Rubiales and its intermediaries, and as of August 10, 2011, 162 inspections were conducted to assess the compliance with labour standards by Pacific

[120] Canadian National Administrative Office's First mission from August 29 to September 2, 2016 Puerto Gaitan-Colombia. Discussions with representatives from USO.
[121] Canadian National Administrative Office's correspondence with the Colombian National Administrative Office, November 8, 2016.
[122] Canadian National Administrative Office's First mission from August 29 to September 2, 2016 Bogota-Colombia. Discussions with representatives from UTEN.
[123] Government of Colombia November 2016 response, p. 90.
[124] Public Communication CAN 2016-1 (Colombia), p. 19.
[125] Ibid., p. 20.
[126] Ibid.
[127] Ibid.

Rubiales.[128] However, the Canadian NAO observes that the impact of those visits and inspections in effectively addressing the alleged violations is not part of the Government response.[129] A recent study concluded that labour rights violations and illegal subcontracting are widespread practices in Pacific Rubiales.[130]

The Government states that the Office of the Attorney General has received, from 2011 to September 2016, 1769 criminal notices (or denunciations) for violations of freedom of association under Article 200.[131] They also indicate that between May 2012 and April 2016, there were 53 investigations in which USO members are identified as victims of criminal actions.[132] The Government adds that the Office of the Attorney General has given priority[133] to the complaint filed by USO in May 2013.[134] The Government also indicates that out of the 1769 files under Article 200, there were 1149 files closed, including 249 where the complaint was withdrawn by the affected person and 84 where conciliation occurred between the parties. The remaining files were not pursued, in some instances due to the expiry of timelines, as provided for in the Criminal Procedure Code.

In addition, there are currently 628 active files for violations under Article 200 of which only one file is currently under investigation.[135] The Canadian NAO notes that violations to freedom of association under Article 200 of the Criminal Code are *delitos querellables*, i.e. they require that the affected individual files a formal complaint to ensure that an investigation is initiated. This has consequences for the applicable procedure which involves: (i) a mandatory presentation of a complaint by the affected individual, (ii) the possibility for the affected individual to withdraw the claim, (iii) a conciliation process between the involved parties (a precondition for the investigation to start)[136], and (iv) mandatory archiving within five years from the date the criminal notice is brought to the attention of the authorities if indictment has not been made.[137] The Canadian NAO observes that out of these 628 files, 69% (432) are in the pre-investigative phase, i.e. waiting to exhaust the conciliation process. Particular attention is also drawn to cases dating from 2011 to 2013 which not only have exceeded the two-year limitation period for the pre-investigative phase[138] but may not be pursued as of December 2016 as some of them will reach the five-year period without indictment.

The Canadian NAO notes that no case of trial and subsequent conviction under Article 200 was reported by the Government. The Canadian NAO observes that, while conciliation may be a mechanism to provide a dialogue between the parties, its mandatory nature may cause unreasonable delays and increase the risk that most criminal notices will be not be pursued due to

[128] Government of Colombia November 2016 response, p. 58.
[129] Ibid., pp. 57-58.
[130] Muñoz, Sandra Milena and Adriana Guarnizo, *PACIFIC RUBIALES (PRE) Estado actual de los derechos humanos laborales en la industria petrolera en Puerto Gaitán, Meta,* Documento N. 106, Escuela Nacional Sindical, 2016.
[131] Government of Colombia November 2016 response, p. 37.
[132] Ibid., p. 71.
[133] Ibid., p. 68.
[134] Public Communication CAN 2016-1 (Colombia), p. 19.
[135] Government of Colombia November 2016 response, p. 36.
[136] Colombian Criminal Procedure Code, Article 522; and Law 640 of 2001.
[137] Colombian Criminal Procedure Code, Articles 83 and 292.
[138] Ibid., Article 175.

timelines, which would ultimately deepen the sense of impunity and lack of trust in the judicial system by workers. The Canadian NAO notes that the high number of files at the pre-investigative phase may point to the need for reforms either in the Criminal Code or in the investigative practices and techniques applied.

The Government also indicates that the National Protection Unit (*Unidad Nacional de Protección,* UNP) has performed 2,745 risk assessments[139] for trade union leaders and members, provided special protection to 2,480 union leaders between 2012 and 2015, and currently provides special protection to 597 trade unionist including USO leaders and activists.[140] While the Canadian NAO acknowledges the Government's efforts to prevent and reduce violence perpetrated against trade unionists in Colombia, the Canadian NAO notes that the fluctuating budget of the UNP may compromise its effectiveness in achieving sustainable results.[141]

The submitters allege that the Government of Colombia failed in maintaining peace during industrial relations disputes. The submitters indicate that USO officials were barred from accessing workers in order to conduct a strike vote and that workers were prevented from engaging in work stoppages because of the violent intervention of Colombian security forces.[142] The use of excessive force by the anti-riot unit ESMAD has seriously injured workers.[143] The submitters add that USO requested that inquiries be made regarding the excessive use of force by police authorities but their requests have not led to investigations.

The Government indicates that the Colombian Constitution guarantees workers the right to strike under Article 56, with the exception of essential public services workers. The Government also indicates that the Labour Chamber of the Supreme Court declared in April 2013 that the work stoppages conducted by USO in March, April and May 2012 were illegal.[144] The Government adds that the events of 2011 were considered a work stoppage and a social protest rather than a strike as no collective bargaining process was ongoing at that time between USO and Pacific Rubiales. The Government also indicates that the use of force by police authorities is legitimate when all peaceful means (i.e. dialogue, persuasion, warnings) have failed to resolve the conflict and when there may be a risk of damage to property.

While the right to strike is protected under Colombian law, the Canadian NAO observes that the systemic use of short-term contracts puts workers in precarious employment relationships and makes it difficult for them to effectively exercise their right to strike. The Canadian NAO notes that this precarious labour situation may give an unjustified reason to the government to deny workers the ability to take legitimate labour actions. The Canadian NAO further observes that it is unclear from the information provided in the Government's response whether any action has

[139] According to the National Protection Unit, the risk assessment is the process where the different factors of threat, vulnerability and risks are assessed to determine the level of risk (ordinary, extraordinary or extreme). Each request is assessed by committees to determine the level of risk and the level of protection needed. (http://www.unp.gov.co/preguntas-frecuentes).

[140] Government of Colombia November 2016 response, p. 38.

[141] Canadian National Administrative Office's First mission from August 29 to September 2, 2016 Bogota-Colombia. In the discussions with officials from the National Protection Unit, it was suggested that the budget fluctuates in accordance with the operations of the Unit.

[142] Public Communication CAN 2016-1 (Colombia), pp. 12-13.

[143] Ibid., p. 14.

[144] Government of Colombia November 2016 response, p. 72.

been taken in regard to the reports of excessive use of force by police, in particular actions by the ESMAD.

B. Ingenio La Cabaña and SINTRAINAGRO

The submitters allege serious systematic anti-union practices at Ingenio La Cabaña, namely, threats, intimidation, and threat of the non-renewal of workers' contracts.[145] The submitters specifically point to the dismissal of workers by La Cabaña's subcontractor, CAÑACORT D&B SAS, on the basis of their membership in SINTRAINAGRO.[146] CAÑACORT was the intermediary or subcontractor providing cane cutters to Ingenio La Cabaña. The submitters also allege that La Cabaña's human resources director used threats of violence to discourage workers from joining SINTRAINAGRO.[147]

The Government states that, following the investigations conducted by the labour inspectorate of the Ministry of Labour, it was determined that no violations of the right of freedom of association occurred.[148] The investigation by the Ministry of Labour for anti-union discrimination was initiated on January 22, 2013 and closed on November 12, 2013 by decision No 157, subject to relevant appeals. In support of this decision,[149] the labour inspectorate considered that SINTRAINAGRO: i) was formed by virtue of the right to freedom of association protected under Colombian regulations and international treaties; ii) was in violation of its own by-laws as irregularities undermining the legitimacy of workers' affiliation to SINTRAINAGRO emerged during the investigation; and iii) did not follow the legal mechanism to collect union dues. The labour inspectorate added that the testimonials gathered indicate that workers joined SINTRAINAGRO under the unsupported promise that by doing so they would preserve their jobs.[150] With respect to the interference from the human resources director in the activities of SINTRAINAGRO, the labour inspectorate refused to consider the audio recording presented as evidence because it was recorded without permission and was, therefore, in violation of constitutionally protected privacy rights.[151] With respect to the allegations that workers were dismissed due to their affiliation with SINTRAINAGRO, the labour inspectorate stated that no evidence of termination was tendered; rather the workers' temporary employment contracts reached their natural conclusion.[152] The labour inspectorate emphasized that SINTRAINAGRO did not demonstrate that the workers affected by the alleged anti-union practices were in fact members of the union in accordance with the requirements established by SINTRAINAGRO's own statutes. The labour inspectorate concluded subsequently that there was no violation of the exercise of freedom of association by Ingenio La Cabaña and its subcontractor CAÑACORT.

The submitters also allege that Ingenio La Cabaña refused to bargain collectively in good faith. The Canadian NAO notes that an investigation by the Ministry of Labour was initiated on

[145] Public Communication CAN 2016-1 (Colombia), p. 32.
[146] Government of Colombia, Decision N.157 Case 410, pp.86-87. Public Communication CAN 2016-1 (Colombia), pp. 32, 33, 42, 43, 45.
[147] Public Communication CAN 2016-1 (Colombia), p. 33.
[148] Government of Colombia November 2016 response, p. 75.
[149] Government of Colombia, Decision N.157 Case 410, November 12, 2013, p. 250.
[150] Ibid., p. 259.
[151] Ibid., pp. 264-265.
[152] According to Article 45 of the Colombian Substantive Labour Code, the workers' contracts are considered a Contract for Specific Work, which is a contract limited to the completion of a specific task.

January 21, 2013, and was closed by decision No 136 on September 17 of 2013 and that this decision remained unchanged notwithstanding the appeals. The labour inspectorate explained that there were inconsistencies in the process for workers to join SINTRAINAGRO and that the union's authority to defend workers' interests may be in doubt.[153] The labour inspectorate also indicated that the SINTRAINAGRO workers had no right to submit their list of demands to Ingenio La Cabaña since there was no employment relationship between them. In addition, although SINTRAINAGRO also presented a list of demands to CAÑACORT, CAÑACORT indicated that it was not in a position to bargain with the workers. Specifically, its contract with Ingenio La Cabaña had been terminated and so the specific work contracts of the SINTRAINAGRO workers also automatically came to an end.

The submitters allege that workers' rights to freedom of association and collective bargaining are undermined by the common practice of illegal labour intermediation and subcontracting, particularly in the sugar industry, as illustrated by the case involving La Cabaña and SINTRAINAGRO.[154] Submitters claim that cane cutters hired through intermediaries for the performance of permanent core business functions, such as cane cutting, is illegal and impacts workers fundamental rights.[155] In a document provided to the labour inspector in Quilichao, Ingenio La Cabaña indicated that 209 cane cutters are hired directly by the company to work in their own sugar mill, and that 1200 cane cutters are subcontracted through intermediaries (e.g. CAÑACORT, AGROPECUARIA GARCÍA Y MARTINEZ SAS, CORTEAGRO SAS) [156] to work in sugar cane fields that are not owned by the Ingenio La Cabaña. [157] While segments of the production chain can be subcontracted through intermediaries, particularly in cases where workers are subcontracted for cane cutting in fields that do not belong to La Cabaña, these intermediaries are ultimately responsible to ensure that, as employers, they respect the labour rights of their workers and provide them with any social protection under the law.[158] The Canadian NAO notes, however, that, in practice, Ingenio La Cabaña monitors and controls the activities of its subcontractors and their workers even in fields that are not owned by Ingenio La Cabaña. Such actions are incompatible with the terms of the subcontracts. The Canadian NAO also notes that Ingenio La Cabaña's high degree of control over the activities of its subcontractors can lead subcontracted workers to believe, with reason, that Ingenio La Cabaña is their actual employer.[159]

The submitters allege widespread misuse of short-term contracts.[160] As noted earlier, the insecurity resulting from the pervasive use of these contracts impacts the ability of workers to exercise their associative rights and advocate for appropriate working conditions. In addition, the fact that these contracts are frequently used to employ workers through labour intermediaries or subcontractors further diminishes the ability of workers to exercise their rights.

[153] Government of Colombia, Decision N.157 Case 410, November 12, 2013, p.249.
[154] Public Communication CAN 2016-1 (Colombia), pp. 35, 50.
[155] Ibid., p. 35
[156] Government of Colombia, Case 408, pp. 161-170.
[157] Ibid., p. 140.
[158] Government of Colombia, Decision 136 Case 408, pp. 140, 161-17.
[159] Government of Colombia, Complaint N. 121119 presented by SINTRAINAGRO on June 20 2013, p. 2.
[160] Public Communication CAN 2016-1 (Colombia), p 30.

The submitters further allege misuse of contracting of workers through the use of Simplified Stock Companies (SAS), which has increased steadily since their introduction in Colombian legislation in 2008. SAS are commercial entities where workers are considered as partners (therefore not covered under Colombian labour law) and then contracted out to user companies who, in many instances, use the SAS to disguise the employment relationship.[161] SINTRAINAGRO workers have complained about the use of SAS arguing that it is an unfair and discriminatory labour practice that undermines their individual and collective rights.[162] The submitters further explain that subcontractors created in the form of SAS frequently cease their operations only to re-emerge under a new business name thus negatively affecting the ability of workers to exercise their labour rights.[163]

During its first mission to Colombia, Canadian NAO officials met with representatives of SINTRAINCABAÑA, SINTRAZUCAR and SINTRACAÑAZUCOL[164] (the latter is a member of the CUT, the same confederation to which SINTRAINAGRO is also a member). These three unions represent permanent workers of Ingenio La Cabaña and have a collective agreement with the company. The unions' representatives indicated that relations with the company's management team were excellent and that they had not encountered major obstacles in the exercise of their collective rights. They also mentioned that they were absolutely opposed to SINTRAINAGRO's presence at Ingenio La Cabaña. The difficult and hostile environment toward SINTRAINAGRO turned into confrontations and violence between workers. The Canadian NAO notes that unionization *per se* was not an issue at Ingenio La Cabaña given the presence of multiple unions. The presence of these unions implies a rather sound environment conducive to the protection of workers' labour rights. The Canadian NAO observes, however, that the misuse of subcontracting, unclear contractual arrangements, misuse of short-term contracts, lack of clarity in the responsibility regarding labour and employment obligations, and apparent confusion over what constitutes permanent core business functions, among others, leave workers unprotected against abusive practices and exposed to precarious conditions of work.

Due to the widespread and systemic misuse of subcontracting, the submitters proposed that a labour formalization agreement be reached in accordance with Law 1610 of 2013.[165] The Government indicates that the Ministry of Labour provided support to SINTRAINAGRO workers to follow-up on their proposal for job formalization. The Canadian NAO notes however that there is no available information as to the kind of support actually provided by the Ministry of Labour to SINTRAINAGRO.[166] The submitters also indicate that, despite several complaints for illegal subcontracting filed with the Ministry of Labour, only one inspection took place at Ingenio La Cabaña on June 18, 2013. The Government indicates that the complaints for illegal intermediation are being examined by a special investigation unit housed within the labour

[161] OECD (2016), *OECD Reviews of Labour Market and Social Policies: Colombia 2016,* OECD Publishing, Paris, p. 86, available at http://dx.doi.org/10.1787/9789264244825-en
[162] Government of Colombia, Complaint N. 121119 presented by SINTRAINAGRO on June 20 2013 N.6 (Not providing copy of employment contracts to workers and deny it when requested).
[163] Government of Colombia, Case 408, p. 18.
[164] Canadian National Administrative Office's First mission from August 29 to September 2, 2016 Bogota-Colombia. Discussions with union representatives at Ingenio La Cabaña.
[165] Public Communication CAN 2016-1 (Colombia), p. 40.
[166] Government of Colombia November 2016 response, p. 83.

inspectorate of the Colombian Ministry of Labour.[167] In a recent communication by the Colombian NAO, the Canadian NAO has been informed that the Ministry of Labour has initiated the sanctioning process and filed charges against Ingenio La Cabaña for alleged misuse of subcontracting.[168]

The Canadian NAO observes that administrative and judicial proceedings to investigate the allegations made against Ingenio La Cabaña by SINTRAINAGRO were conducted. However, the Canadian NAO is concerned about the obstacles encountered by workers affiliated with SINTRAINAGRO, despite the existing legal and constitutional protections for the right of freedom of association and collective bargaining. The Canadian NAO observes that it is unclear whether the labour inspectorate conducted an appropriate investigation into the allegations of anti-union practices.[169] The Canadian NAO notes that labour inspectors are empowered to proactively seek evidence and probe the evidence received a part of the investigative process.[170]

In order to reinstate dismissed workers and impose sanctions for anti-union discrimination practices, the submitters allege that they sought judicial remedy using the Action of Tutelage. The judge dismissed the case asserting that the Action of Tutelage is not the appropriate mechanism for the protection of labour rights, particularly when workers have other judicial mechanisms at their disposal.[171]

The submitters further allege that there was an arbitrary separation of a single complaint into two files resulting in confusing and burdensome proceedings.[172] The Government indicates that the complaints submitted to the Ministry of Labour were presented in two different documents and, therefore, two different investigations were initiated.[173] The Canadian NAO notes that any complaint made to the Ministry of Labour may be considered a *derecho de petición* (right to request*)* regardless of its content and it is, therefore, the responsibility of the inspector to examine the facts and undertake the appropriate process.[174] The Canadian NAO also notes that Colombian law indicates that documents and proceedings that are related may be investigated under one file.[175] While the principles of efficiency, economy, and due process do guide the work of the inspector in advancing investigations for the benefit of all parties,[176] the Canadian NAO observes that regulations would benefit from being reviewed to ensure that future cases are

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[167] Ibid., p. 77.
[168] Canadian National Administrative Office's correspondence with the Colombian National Administrative Office, November 8, 2016.
[169] The investigation could have considered inquiring into whether dismissed workers were called back to work as a result of a new contract and whether the contract reflects the reality of the testimonials gathered during the investigation.
[170] Government of Colombia, Law 1437 of 2011, Article 40.
[171] Government of Colombia, Ruling N. 075 – file: 201300331-00 Santiago de Cali, May 27, 2013, Municipal Court, SINTRAINAGRO vs. Ingenio La Cabaña and other subcontractors, Case 408, May 27, 2013, pp. 175-181.
[172] Public Communication CAN 2016-1 (Colombia), p. 33.
[173] Government of Colombia November 2016 response, p .74.
[174] Government of Colombia, Ministry of Labour, *The Social Security and Labour Inspector's Manual*, p. 425, available at http://www.mintrabajo.gov.co/publicaciones-mintrabajo/3372-manual-del-inspector-de-trabajo-y-seguridad-social-.html
[175] Government of Colombia, Law 1437 of 2011, Article 36.
[176] Government of Colombia, Ministry of Labour, *The Social Security and Labour Inspector's Manual*, p. 45, available at http://www.mintrabajo.gov.co/publicaciones-mintrabajo/3372-manual-del-inspector-de-trabajo-y-seguridad-social-.html

investigated in a streamlined manner. In addition, the sanction regimes, as described in part 1 of this report, could benefit from harmonization with a view to facilitating the imposition of fines when applicable.[177]

The submitters also allege that investigations carried out led to no sanctions, that no meaningful inspections were conducted, and that the complaints were not resolved within the established timeframes. The Government emphasizes that the allegations by the submitters are not founded and insists on having taken the necessary actions in response to the complaints.[178] The Canadian NAO notes that two investigations were initiated to determine if there was enough merit for a formal process to take place and that labour inspectors had 30 days to investigate claims and decide on the matter.[179] The complaints were dismissed on the grounds that there were no violations of workers' rights, based on documentary and testimonial evidences. The Canadian NAO observes that lengthy processes[180] may provide workers with little incentive for pursuing claims particularly if no fines or sanctions are ultimately imposed. The Canadian NAO also observes that some of the SINTRAINAGRO workers were unaware of the type of contract regulating their employment relations and that they had no copy of their contracts.[181] The Canadian NAO cannot determine, from the Government's response to the allegations, whether preventive measures were undertaken by the labour inspectorate in Quilichao to reduce this informational gap, including measures to raise awareness of labour rights among workers and employers.

Finally, the submitters allege that trade unionists have been subjected to violence, threats and intimidation, including the murder of SINTRAINAGRO union activist Mr. Juan Carlos Pérez Muñoz.[182] The submitters allege an escalating pattern of threats and intimidation by representatives from La Cabaña and its intermediaries.[183] In a communication dated July 15, 2015,[184] the Canadian NAO observes that the murder of Mr. Pérez Muñoz is still under investigation. The Canadian NAO notes that the investigation was assigned to different prosecutors and units, but it is unaware of the criteria and objectives for the reassignment. The Canadian NAO also observes that a criminal investigation is conducted if threats and intimidation against trade unionists meet specific restrictive criteria as established under Article 347 of the Criminal Code.[185] The Canadian NAO observes that serious threats against trade unionists may not meet some of the criteria established under Article 347. In addition, the Canadian NAO notes that there are currently 190 active files under Article 347 but, despite

[177] Government of Colombia, Law 1610 of 2013. Colombian Substantive Labour Code, Articles 433 and 354.
[178] Government of Colombia November 2016 response p.80.
[179] Government of Colombia, Resolution 007, January 21, 2013, Case 0408, p.5. Government of Colombia, Resolution 006, January 22, 2013, Case 0410, which provides the inspector a time frame to conclude the investigation, p. 6.
[180] Based on the analysis of cases 408-410, the duration of the investigation was between 16-21 months including appeals.
[181] Government of Colombia, Case 408 Testimonial of Mauricio Ramos, July 8, 2013, p.185. Government of Colombia, Case 410 Testimonials of Quintiliano Sanchez and Vladimir Vivas Ortiz, July 3, 2013, pp. 238-239.
[182] Public Communication CAN 2016-1 (Colombia), p. 34.
[183] Ibid., p. 45.
[184] Documentary evidence gathered during the Canadian National Administrative Office's First mission from August 29 to September 2, 2016 Bogota-Colombia.
[185] Canadian National Administrative Office's Second mission from September 26 to 30, 2016 Bogota-Colombia. Discussions with officials from the Office of the Attorney General.

efforts from the Colombian authorities to prosecute perpetrators of crimes, there has been no conviction to date under Article 347[186] thereby contributing to cycles of violence and impunity.

Generally, the Canadian NAO acknowledges that SINTRAINAGRO workers had access to administrative and judicial mechanisms to seek redress for the violation of their rights[187] but expresses concerns about whether those mechanisms were effective and expeditious.

[186] Government of Colombia November 2016 response, p.43.
[187] Public Communication CAN 2016-1 (Colombia), p. 40.

3. SUMMARY OF FINDINGS AND ANALYSIS

In this section, the most important issues identified in the review of the cases are examined and discussed in light of the NAO's observations about the labour situation, the legal framework and the specific allegations. Notably, although the two cases reflect distinct realities and occurred in different economic sectors, they both bring to the forefront common challenges in the area of labour relations.

As noted earlier, the Colombian legal framework provides workers and employers the right to freedom of association and to enter into collective bargaining discussions. The legal framework allows for the registration and formation of a union in a given workplace, the existence of multiple unions in one workplace, and for workers to join one or more of the unions active in their workplace. In recent years, a number of legal changes have been introduced to remove rigidities in the labour market and better manage labour and employment relations in a changing world of work. In view of the above, the Canadian NAO observes that the rights of workers to organize, form and join a union appear to be formally protected. Trade unions generally enjoy independence and the benefits of collective bargaining. Nevertheless, serious challenges remain.

It will be recalled that three trade unions are present in Ingenio La Cabaña representing workers of the company, and that one of these unions is affiliated to the CUT, which is one of the submitters of this Communication and the same union federation to which SINTRAINAGRO is a member. Union practices seem therefore to be protected in Ingenio La Cabaña. In the case involving Pacific Rubiales, the signing of an agreement between the company and UTEN – a union that proposes an alternative unionism – leads the Canadian NAO to consider that Pacific Rubiales was not strongly opposed to the presence of unions in the workplace. The submitters alleged in the Communication that workers affiliated with USO, one of the most important unions in the oil sector, and SINTRAINAGRO met the threshold established in the law, i.e. more than 25 workers. However, the workers represented by USO and SINTRAINAGRO were neither workers at the plant level in Pacific Rubiales nor Ingenio La Cabaña. They were hired by subcontractors. In this context, Pacific Rubiales and La Cabaña could legally dismiss the request from USO and SINTRAINAGRO to enter into collective bargaining discussions with workers that were not, at least from a contractual perspective, their workers. Overall, it appears that in both cases workers were not prevented from organizing, forming or joining a union. Nonetheless, there is a major concern related to the recognition of trade unions by the "real" employer, particularly in contexts where workers are hired by subcontractors for the execution of work or the provision of services.

Subcontracting

In both cases, the misuse of subcontracting created situations where it was difficult for workers to effectively exercise their rights to freedom of association and collective bargaining because employment relationships were ambiguous. It became difficult to identify who should be considered as the employer and, ultimately, who should be the party responsible for the protection of rights and the respect of obligations, including liabilities in case of breach of those obligations. While workers in both Pacific Rubiales and Ingenio La Cabaña were hired through subcontractors, the Canadian NAO notes that the direction, monitoring and control of the working activities remained under the authority of the main employer. The relationship between the main employer and the subcontractors was not therefore at arm's length. Pacific Rubiales,

for instance, dictated working conditions for its subcontractors and appeared to have favoured those subcontractors who did not have USO members.

The effective control of the work activities of subcontracted workers indicate that Pacific Rubiales and Ingenio La Cabaña intended to disguise their *de facto* employment relationship with workers and thus avoid their responsibilities under the law. The Canadian NAO understands that subcontracting part of the production process is a common practice and may occur for legitimate economic reasons. However, when subcontracting becomes a vehicle to avoid labour law obligations, it becomes a problem. The significant interference of the main employers in the labour management activities of their subcontractors is a strong indication that the subcontracting relationships were, in fact, used for that purpose.

In particular, the subcontractors in both cases seem to have shared in the management of workers with the business owners and hired workers in short-term contracts to provide the necessary flexibility for the dismissal of workers. In the case involving Ingenio La Cabaña, for instance, submitters indicated that the use of the SAS as a subcontractor allowed the main employer to illegally contract workers to perform permanent core business functions under short-term contracts. According to SINTRAINAGRO, the SAS subcontracting for La Cabaña was created in the first instance as an Associated Work Cooperative; however, in order to comply with the changes in legislation that prohibited the use of cooperatives for the subcontracting of permanent core business functions, the cooperative transformed into an SAS with a view to continuing to provide its work and services to La Cabaña. In summary, if no employment relationship is recognized between the workers and the actual employer, it is impossible for trade unions to negotiate with the employer who ultimately directs the terms and conditions of work and, consequently, workers are negatively affected in the exercise of their collective bargaining rights.

Workers of the subcontractors felt that they were limited in their exercise of association and collective bargaining rights. They feared retaliation for their union activities or for joining a union that was not favoured by the main employer. Workers affiliated with USO feared being blacklisted, were apprehensive about losing their jobs if their contract was not renewed or extended, and felt undue pressure to join UTEN rather than USO. Workers affiliated with SINTRAINAGRO said that they were intimidated, threatened, and harassed by the company and the subcontractors, frustrating their attempts to exercise their rights. The Canadian NAO points out that the misuse of subcontractors resulted in a stifling climate in which subcontracted workers may have been reluctant to unionize as they felt unprotected from unfair dismissals or discriminatory practices. Although the letter of Colombian labour legislation recognizes the rights to freedom of association and collective bargaining, the reluctance of workers in precarious working conditions to unionize has in practice negatively impacted the genuine exercise of collective rights.

As mentioned in this report, the widespread abuse of worker cooperatives led the Colombian Government to issue regulations aimed at addressing the misuse of third-party contracting arrangements. Among others, these regulations defined "permanent core business functions" and prohibited contracting out through any other form of subcontracting. But the absence of regulatory requirements as to what specifically constitutes "other form of subcontracting", increased the use of other contractual arrangements through civil-law contracts (e.g. SAS, associated work cooperatives, union contracts) to contract out permanent core business functions and activities, and thus disguise the direct employment relationship.

In that context, Decree 583 was adopted in 2016 with a view to putting an end to the misuse of subcontracting by listing a number of indicative elements to support labour inspectors in the imposition of sanctions. The original intent behind Decree 583 was laudable in that it sought to bring clarity to various aspects of Colombian laws related to the misuse of sub-contracting, thus facilitating the work of inspectors.

Nevertheless, after numerous discussions with various stakeholders involved in the drafting of Decree 583, the Canadian NAO has come to the conclusion that the accommodation of commercial interests resulted in the watering down of the original text during the drafting process and led to a situation where, by the admission of the Colombian labour ministry following a survey of its various labour directorates, confusion among inspectors is greater than ever as to what constitutes the misuse of subcontracting.[188] Decree 583 contributed to this confusion by weakening important measures designed to protect workers against improper subcontracting under Article 63 of Law 1429. First, it opened the door to subcontracting of permanent core business functions, which had previously been strictly prohibited. Second, it limited the ability to sanction illegal subcontracting in certain situations. Not surprisingly, Decree 583 is currently being challenged by the CUT (*Central Unitaria de Trabajadores de Colombia*) before the Council of State (*Consejo de Estado*).[189]

This also means that, in its current form, the Decree may derogate from Colombian labour law and may violate Article 2 (Non-Derogation) of the CCOALC. Article 2 of the CCOALC commits the Parties not to derogate from their labour laws in a manner that weakens or reduces adherence to certain internationally recognized labour principles as an encouragement for trade between the Parties, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

Overall, and based on a legal and factual analysis, the Canadian NAO believes that the Colombian Government needs to fill the regulatory gaps in its regulations and policies regarding the misuse subcontracting, including by making efforts to ensure that these regulations are effectively enforced. The misuse of subcontracting has essentially served to disguise the actual employment relationships which, ultimately, undermine workers' individual and collective rights.

Union Contracts

Union contracts are agreements between unions and employers in which a union provides the employer with the labour required to perform a specific task. While technically the union and its members are partners in the union contract, in practice, the union is the prime financial beneficiary and acts as an intermediary between its member-workers and its customer, the business owner. Workers must remain members of the union to benefit from the union contract and receive their salary directly from the union. The union contract is to be distinguished from a closed shop union arrangement where the union is the source from which the employer obtains its labour. In the latter situation, the employee is directly employed by the business owner while in the former the employee is in practice an employee of the union assigned to perform services

[188] Canadian National Administrative Office's Second mission from September 26 to October 1, 2016 Bogota-Colombia. Discussions with officials from the Ministry of Labour.
[189] Annulment Action by *Central Unitaria de Trabajadores de Colombia* (CUT) before the highest administrative tribunal, the Council of State, Case N. 2016448, filed on May 31 2016.

for the business owner. Furthermore, under a closed shop union situation workers can at any time decide to change their representative union without an impact of their employment, whereas under a union contract employees effectively lose their freedom of association to decide collectively on their representative union since a change in union means the end of the union contract and loss of employment for all its members.

Like other forms of subcontracting, the use of union contracts has undermined workers' collective rights by preventing workers from asserting their rights under the law vis-à-vis their *de facto* employer. In fact, when workers cooperatives were prohibited for purposes of labour intermediation, some cooperatives were reborn as trade unions with the purpose of continuing their operations using union contracts.

Union contracts also present additional risks to freedom of association and the independence of the participating unions. Nothing in the law prevents unions from having both a union contract and a separate collective agreement with the same employer and therefore engaging in collective negotiations to represent the interest of one group of workers while at the same time knowing that the employer could refuse to extend or renew an existing union contract on which the union depends financially. The terms of the union contract between UTEN and Pacific Rubiales provide an illustration of such a situation. Union contracts, therefore, distort the essential function of a union of protecting and defending the interests and rights of trade union members.

During its second mission to Colombia, at the request of the Colombian Government and in order for Canadian NAO officials to learn first-hand about the alleged benefits of the union contract for Colombian workers, the Canadian NAO met with a trade union representative of a trade union that holds union contracts. While the union representative acknowledged that union contracts are not collective agreements, he stated that union contracts have helped curtail subcontracting, provided workers with decent working conditions, allowed the realization of workers' rights and protected the exercise of trade unionism. However, following a close analysis of that union contract, Canadian NAO officials concluded that even such a 'model' union contract clearly impaired the main function and independence of that particular trade union, a conclusion not refuted by Colombian officials.[190]

The Canadian NAO also notes that, in a situation where a union holds both a union contract and a collective bargaining agreement with the same employer, the union has a vested interest in being as "employer-friendly" as possible in order to secure/renew union contracts with the employer. The employer, on the other hand, can choose which union to extend the union contract to and is therefore given the power to prefer certain unions over others in a manner not available through regular collective bargaining. Conversely, workers may be required to join or maintain membership in a particular union in order to have continued access to work.

As such and notwithstanding possible benefits, the union contract still compromises the ability of the union to advocate on behalf of its members. Union contracts, or any other civil-law contract between a union and an employer, are inconsistent with the essential nature and function of trade unions, understood as collective organizations aimed at protecting and defending the interests and rights of their members. While the Colombian Government issued regulations to prevent the

[190] Canadian National Administrative Office's Second mission from September 26 to October 1, 2016 Bogota-Colombia. Discussions with officials from the Ministry of Labour.

misuse of union contracts as mentioned earlier in this report, the Canadian NAO is of the view that the right to collective bargaining can only be realized through direct and genuine process of collective negotiation between the employer and independent workers representatives. Such collective agreements provide the basis for sound and effective labour relations, where the employer also benefits in the form of engaged employees and increased productivity.

Collective Pacts

The use of collective pacts has also challenged fundamental rights, particularly the negotiating power of unionized workers in a company. As indicated earlier in the report, collective pacts are agreements between employers and non-unionized workers. The issue of collective pacts was raised during the review process and strongly impacts the right to collective bargaining which was raised by submitters and is central to this report.

Colombian labour law allows employers to negotiate collective pacts with non-unionized workers if trade unions represent less than one-third of the company's workforce. While employers are not allowed to offer better conditions than those contemplated in collective agreements with the trade unions in the company, the reality is that collective pacts have been embraced by employers as a way to discourage union activities or simply to prevent the formation of a trade union. The Canadian NAO notes that there is also a consensus among domestic and international observers[191] that the misuse of collective pacts has had a negative impact on the right of workers to bargain collectively. A 2016 report of the OECD indicates that some employers have used the promise of collective pacts to encourage workers to renounce their union membership. By doing so, employers have ensured that the membership in workplace unions remains below the one-third threshold and therefore preserving their ability to enter into a collective pact. In addition, notwithstanding the introduction of criminal penalties for the misuse of collective pacts in 2011, the number of collective pacts has not declined since that time. The Canadian NAO concludes, therefore, that union contracts and collective pacts have damaging effects on authentic collective bargaining and the role and independence of trade unions.

Labour Inspectorate

The work of the labour inspectorate is also criticized by the submitters in both cases. As mentioned earlier, it seems that a number of inspections and on-site visits were conducted by labour authorities to inquire into the alleged violations denounced by USO and SINTRAINAGRO and to assess the compliance with labour standards of both Pacific Rubiales and Ingenio La Cabaña. Documentary and testimonial evidences were also collected when relevant. As reported in the Public Communication, USO and SINTRAINAGO expressed their serious concerns about the inadequate labour inspections and the lack of sanctions in cases of non-compliance. Based on the analysis of the information provided by the Colombian Government, the Canadian NAO finds it difficult to determine whether the inspections

[191] OECD Reviews of Labour Market and Social Policies: Colombia 2016, OECD Publishing, Paris, pp.20-21, available at http://dx.doi.org/10.1787/9789264244825-en; International Labour Organization, *Freedom of Association Digest of the Freedom of Association Committee of the Governing Body of the ILO,* Geneva, International Labour Office, Fifth (revised) edition, 2006; Escuela Nacional Sindical, *Collective Pacts Undermining the Exercise of Freedom of Association*, November 2016.

conducted were effective or had a real impact in addressing the alleged violations or improving the labour situation in both cases.

However, what it is clear from the analysis and discussions is that, despite the efforts to improve the functioning of the labour inspectorate in recent years, the processes and tools are still burdensome and not completely effective. There are still challenges regarding the non-respect of the established timelines for the enforcement processes. The process for the collection of fines has yet to demonstrate its effectiveness following the recent agreement between SENA and CISA. Despite changes in the labour inspectorate system to improve the enforcement of Colombian labour law, including the increase of imposed fines, the measures in place may not produce the desired results if the deterrent effect of increased penalties is not accompanied by an effective collection processes. In addition, in order to properly fulfil their functions, labour inspectors require adequate training and resources including clear and consistent direction on the application of the law. This is particularly important in cases with a high level of complexity

Violence against Trade Unionists

Last but not least is the prevailing climate of violence, hostility, intimidation, and threats against trade union leaders and labour activists in Colombia.[192] The role played by government institutions to tackle impunity by investigating and prosecuting those responsible for violence against union members is essential. The strengthening in recent years of the National Protection Unit has been critical in the fight against violence affecting trade unionists. But these efforts and the progress achieved could be compromised if the institution is not provided with sufficient and sustained financial resources to effectively address the urgent needs of those workers that put their own safety at risk to defend legitimate rights.

The work of the Attorney General's Office is also key for protecting workers against violence and prosecuting their attackers. The Government of Colombia reported 152 cases of labour homicides from 2011 to September 2016. Eighteen of these cases reached conviction by way of trial.[193] However, in light of the analysis of materials during the review process, the Canadian NAO notes with concern that no case of trial and subsequent conviction under Article 200 of the Criminal Code has been reported by the Colombian Government. Undue delays in the administration of justice may lead to the closing of files without criminal prosecution ultimately increasing the climate of impunity and lack of trust in the judicial system by workers. The high number of files in the pre-investigative phase point to the need for substantial reforms either in the Criminal Code or in the investigative practices.

Furthermore, the Canadian NAO is concerned that the calls for investigation of the excessive use of the force by police authorities have not been answered. As noted earlier, there are serious concerns at the national and international levels regarding brutal police aggressions by the ESMAD, which has in some instances seriously injured workers.

In conclusion, the Canadian NAO believes that clear and coherent labour policy instruments and legislation and their effective enforcement are critical to prevent abuse and discriminatory practices, and eliminate legal or practical barriers to the exercise of association and collective

[192] International Trade Union Confederation (ITUC), The 2016 Global Rights Index: The World's Worst Countries for Workers, 2016, pp. 24, 54-55.
[193] Government of Colombia November 2016 response, p.41.

bargaining rights by workers and employers. The Canadian NAO shares the views that sound industrial relations is critical to improve the working conditions of workers and their productivity, for the benefit of both employers and employees.

4. RECOMMENDATIONS

The Canadian NAO acknowledges the collaboration provided by the Colombian NAO throughout the review process, including the report it provided concerning the efforts made by Colombian authorities to resolve the labour violations alleged in the Public Communication. As was noted in this report, the Government of Colombia has made strides in recent years in developing norms and mechanisms with a view to creating an enabling policy and institutional environment for sound industrial relations and a functional labour administration. It is also in that context that the Governments of Canada and Colombia, under the CCOALC in 2011, accepted binding and enforceable obligations to maintain high labour standards and to effectively enforce their labour law.

Despite the progress achieved to date and the Colombian Government's commitment to urgent action, further action is required to guarantee and promote workers' fundamental rights. In particular, the Colombian government's profession of urgency must now translate into concrete and ambitious actions to: (a) ensure that Colombian labour law embodies and provides protection for internationally recognized labour rights, and that such law is effectively enforced, as required by Articles 1 and 3 of the CCOALC; and (b) ensure that Colombian workers have appropriate access to fair, equitable and transparent proceedings before a tribunal to seek appropriate sanctions or remedies for violations of labour law, in line with the obligations under Articles 4 and 5 of the CCOALC. Furthermore, attention is required to ensure that the Colombian Government does not waive or derogate from its labour law as an encouragement for trade or investment in contravention of Article 2 of the CCOALC.

The two cases presented in the Public Communication, as well as the analysis of additional informational resources, illustrate the ongoing, serious and systemic precarious labour conditions for Colombian workers. The available evidence suggests that:

(a) unfair and discriminatory labour practices persist;
(b) the ability of workers to defend their rights to associate and bargain collectively is undermined by distorted subcontracting practices;
(c) many employers are able to engage in unethical practices by exploiting weaknesses and loopholes in the law;
(d) industrial relations are affected by the prevalent stigma surrounding trade unions and their activities;
(e) the long delays in administrative and judicial proceedings increase the sentiment of injustice among workers whose rights are violated; and
(f) measures to reduce threats, impunity and violence are only partially effective.

The Canadian NAO is, however of the view that Colombia can build on recent reforms to bring its labour law into compliance with the obligations of the CCOALC for the protection of basic workers' rights, in particular the right to freedom of association and collective bargaining. The preferred approach to labour relations should be based on collaboration, respect and engagement. A system of collective bargaining, guided by core labour principles, serves the interest of both employers and workers.

Against this background, the Canadian NAO offers, in the spirit of cooperative discussions, the following recommendations to the Government of Colombia aimed at addressing the issues and concerns identified during the review process:

1. In order to protect workers' fundamental rights to freedom of association and collective bargaining, remove legal vehicles used to undermine these rights by making the following changes:

    - Eliminate union contracts. These contracts have become a platform for abusive labour practices and bad faith bargaining. The use of these contracts has also had significant negative impact on the independence of trade unions and their ability to fulfill their primary purpose;

    - Eliminate collective pacts. These pacts undermine the ability of independent trade unions to organize and negotiate authentic collective agreements thereby unduly interfering with the balance of power in labour relations;

    - Eliminate the misuse of short-term contracts.[194] Repeatedly renewed short-term contracts are being used to disguise permanent employment relationships and thereby denying workers legal protection. The resulting high degree of job insecurity significantly impedes the ability of trade unions to organize and operate;

    - Implement measures to reduce the widespread and systematic practices of illegal labour intermediation and subcontracting[195] including:

        - Repealing Decree 583 (which has, in practice, enabled the subcontracting of permanent core business functions) and replacing it with a legal instrument that unambiguously empowers labour inspectors to combat the misuse of intermediation and subcontracting;

        - ensuring that labour inspectors are empowered to identify and address situations where intermediation or subcontracting is being used to disguise a direct employment relationship regardless of the formalities associated with the relationship;

[194] Specifically, the same rights should accrue to employees who have been employed by the employer for more than three years regardless of the specific term of their contracts.[195] The widespread and systematic misuse of intermediation and subcontracting in Colombia are acknowledged in a recent public statement by the Minister of Labour of Colombia: http://www.mintrabajo.gov.co/noviembre-2016/6526-por-intermediacion-laboral-ilegal-mintrabajo-impone-mayor-numero-de-sanciones.html.

[195] The widespread and systematic misuse of intermediation and subcontracting in Colombia are acknowledged in a recent public statement by the Minister of Labour of Colombia: http://www.mintrabajo.gov.co/noviembre-2016/6526-por-intermediacion-laboral-ilegal-mintrabajo-impone-mayor-numero-de-sanciones.html.

- developing guidelines for labour inspectors that identify permanent core business functions in specific economic sectors;

- directing enforcement resources at ensuring that civil law contracts (e.g. SAS, associated work cooperatives) are not used to deny workers social and labour protections provided under the law;

- Consider the creation of a specialized quasi-judicial regulatory body to make decisions on union registration and dissolution and to hear complaints of unfair labour practices and discrimination by unions and employers. This body would be independent of the government and tripartite with appointees representing employers, unions and neutrals with specialized knowledge of law and labour standards.[196]

2. Strengthen compliance with and enforcement of labour law through a labour inspectorate that focuses on preventive measures, provides effective advice, and establishes and efficiently collects penalties by:

    - ensuring that workers have timely access to justice in a manner that workers can claim labour rights, such as reinstatement or severance for dismissals, in the ordinary judicial process;

    - streamlining the administrative process for more effective imposition of fines, including considering the harmonization of existing sanctions in both the Substantive Labour Code and other labour law;

    - ensuring that Colombia's public collector (CISA) effectively collects the fines and makes the achieved results known in the short and medium term, including an analysis of whether the fines imposed have a sufficient deterrent effect;

    - providing labour inspectors the appropriate training and resources to perform effectively their duties, including preventive and proactive labour inspections;

    - investigating multiple complaints filed against a particular employer under a single process;

    - increasing the supervision and monitoring of labour formalization agreements negotiated with companies that obtained a reduction or remission of a fine for illegal labour intermediation or subcontracting to ensure that these companies offer permanent contracts rather than fixed-term contracts to workers through the implementation of these agreements.

[196] The Canadian NAO found keen tripartite interest for such a body, which exists in Canada in the form of the Canadian Industrial Relations Board, in the context of its discussions with Colombian government, employers and workers representatives.

3. Strengthen efforts to fight impunity and violence in the country by bringing those responsible to justice by:

    - evaluating the effectiveness of the mandatory conciliation phase (a precondition for the investigation to start) as required by the criminal proceedings for Article 200 of the Criminal Code and ensuring that existing procedures do not curtail the timeliness and efficiency of the administration of justice;

    - reviewing active files for violations under Article 200 of the Criminal Code, in particular those that may not be pursued due to timelines and for which immediate measures would be required;

    - providing the National Protection Unit sufficient and permanent financial resources to operate effectively;

    - ensuring that inter-institutional coordination mechanisms (between the Ministry of Labour and the Office of the Attorney General) are in place for the exchange of information and sharing of relevant evidence;

    - critically and independently examining the role of the ESMAD, whose actions and interventions have been strongly criticised by Colombian and international stakeholders for excessive use of force;

    - effectively advancing the investigation of violations under Article 347 of the Criminal Code, including by ensuring that guilty parties are brought to trial when warranted; and

    - ensuring that reassignments of files are done in accordance with proper investigative practices to avoid unreasonable delays; and

4. Evaluate and report on efforts to promote freedom of association and free collective bargaining in the country.

In conclusion, and pursuant to Article 12 of the CCOALC which provides that a Party may request in writing consultations with the other Party at the ministerial level regarding any obligation under the Agreement, the Canadian NAO recommends that the Minister of Employment, Workforce Development and Labour seeks consultations with the Minister of Labour of Colombia related to the above-mentioned recommendations.

ANNEX A

Table 1 – Chronology of Events at Pacific Rubiales as described by the submitters

Events	Date
Workers began to organize at Pacific Rubiales oilfields.	February 2011
1,110 workers took part in a work stoppage. All workers were then dismissed.	June 20, 2011
USO filed complaints with Attorney General, General Ombudsman, and Ministry of Defence.	June 30, 2011
Colombia civilian police and ESMAD forcibly broke up protests.	July 6, 14, 2011
4,000 workers at Pacific Rubiales engaged in work stoppage.	July 18, 2011
150 ESMAD officials fired rubber bullets, percussion bombs, tear gas, attacked workers.	July 19, 2011
USO filed a complaint with Colombia Ministry of Social Protection.	July 25, 2011
On at least seven occasions, army and police forces working with Pacific Rubiales prevented USO leaders from communicating with their members.	July – September 2011
Mass dismissals of workers affiliated with USO begins, continues throughout year.	July – September 2011
USO notifies Minister of Social Protection that Pacific Rubiales was terminating contracts with workers who had participated in work stoppages.	August 22, 2011
Membership with USO grew to 3,493.	September 2011
The Colombian Government convenes meeting with Pacific Rubiales and USO.	September 2011
Pacific Rubiales and USO agree to meet for negotiations Oct 6 & 25, stop work stoppages.	September 21, 2011
Pacific Rubiales signs "Labour Normalization Agreement" with UTEN. Pacific Rubiales refuses to negotiate with USO.	October 6, 2011
Pacific Rubiales states it will no longer negotiate with USO, cites agreement with UTEN. The Colombian Government accepted.	October 25, 2011
Pacific Rubiales terminated contracts with employees affiliated with USO, and with sub-contractors, then began hiring back workers affiliated with UTEN. Workers were pressured to leave USO and sign up with UTEN if they wanted jobs.	October 2011
Checkpoints established, prevents USO members from accessing Pacific Rubiales oilfields, even with proper contracts in place.	November 2011
USO filed administrative complaint with Ministry of Labour alleging illegal labour intermediation.	February 2, 2012
Pacific Rubiales signs two contracts with UTEN.	May – July 2012
The complaint filed by USO alleging illegal labour intermediation was dismissed by the Ministry of Labour.	April 2013
USO appeals twice the dismissal of the complaint alleging illegal labour intermediation. Both appeals were dismissed.	April 2013
USO filed criminal complaint with the Office of the Attorney General.	May 17, 2013
Case re-assigned multiple times from July 2013-July 2015.	May 2013 – July 2015
Death threats made against workers, pamphlets making death threats appear.	October –December 2013

Attorney General issues arrest warrants for three USO leaders.	December 2013
USO presented a list of demands to Pacific Rubiales to negotiate a contract for employees of the company who affiliated to USO.	June 16, 2015

Table 2 – Chronology of Events at Ingenio La Cabaña as described by the submitters

Events	Date
Complaint filed with Ministry of Labour, allegations of illegal labour intermediation, refusal to engage in collective bargaining, anti-union discrimination and retaliation. (Complaint A)	December 28, 2012
Ministry of Labour broke complaint into two processes – freedom of association (no. 157) (Complaint A1) and collective bargaining (no. 136) (Complaint A2).	December 2012 – January 2013
Complaint B (illegal labour intermediation) filed with Inspectorate of Ministry of Labour.	January 17, 2013
Updated info sent on complaints. Information sent to Labour Inspectorate at Santander de Quilichao.	February 11, 2013
Complaint C, also allegations of illegal labour intermediation, filed with the Ministry of Labour.	June 4, 2013
Labour Inspector assigned, carried out inspection.	June 18, 2013
Complaints A1 and A2 are dismissed by Ministry of Labour.	September 2013
Complaint A2 dismissed by the Labour Inspector.	September 17, 2013
Union files motion with Inspector to reconsider Complaint A2.	October 16, 2013
Union receives notification that Complaint A1 is closed.	November 12, 2013
Union re-submits Complaint A1 as new complaint, Complaint D.	November 27, 2013
Labour Inspector declines application to reconsider Complaint A2.	November 27, 2013
Union files motion for the Labour Inspector to reconsider Complaint A1.	December 5, 2013
Union files appeal for Complaint A2.	2013-2014 – Unknown
Labour Inspector denies motion to reconsider Complaint A1.	March 6, 2014
Union files appeal for Complaint A1.	2014 – Unknown date
The Regional Coordinator for Prevention, Inspection, Monitoring, Control and Conflict Resolution for the Cauca Ministry of Labour dismissed the appeal for Complaint A2.	April 10, 2014
The Regional Coordinator for Prevention, Inspection, Monitoring, Control and Conflict Resolution for the Cauca Ministry of Labour dismissed the appeal for Complaint A1.	September 22, 2014
Complaint C is pending.	April 14, 2015