

The U.S.-Colombia Free Trade Agreement

**Report of the
Labor Advisory Committee for Trade Negotiations and Trade Policy
(LAC)**

October 4, 2006

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**Labor Advisory Committee for Trade Negotiations and Trade Policy
Report to the President, the Congress and the United States Trade Representative
on the U.S.-Colombia Free Trade Agreement**

October 4, 2006

I. Purpose of the Committee Report

Section 2104(e) of the Trade Act of 2002 (TPA) requires that advisory committees provide the President, the U.S. Trade Representative (USTR), and Congress with reports required under Section 135(e)(1) of the Trade Act of 1974, as amended, not later than 30 days after the President notifies Congress of his intent to enter into an agreement. Under Section 135(e) of the Trade Act of 1974, as amended, the report of the Advisory Committee for Trade Policy and Negotiations and each appropriate policy advisory committee must include an advisory opinion as to whether and to what extent the agreement promotes the economic interests of the United States and achieves the applicable overall and principle negotiating objectives set forth in the Trade Act of 2002. The committee report must also include an advisory opinion as to whether the agreement provides for equity and reciprocity within the relevant sectoral or functional area of the committee. Pursuant to these requirements, the Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC) hereby submits the following report.

II. Executive Summary of the Committee Report

This report reviews the mandate and priorities of the LAC, and presents the advisory opinion of the Committee regarding the U.S.-Colombia Free Trade Agreement (FTA). It is the opinion of the LAC that the Colombia FTA fails to meet the negotiating objectives laid out by Congress in TPA and will not promote the economic interest of the United States.

The labor provisions of the Colombia FTA, as with all of the other FTAs negotiated by the Bush Administration, will not protect the fundamental human rights of workers in either country. Rather, the provisions represent a big step backwards from the Jordan FTA and our unilateral trade preference programs, including the Generalized System of Preferences (GSP) and the Andean Trade Preferences Act (as amended by the Andean Trade Promotion and Drug Eradication Act), which currently apply to Colombia. The complete lack of effective measures is particularly troubling given the well-documented violations of trade union rights in Colombia, up to and including the torture and murder of trade unionists by state actors or paramilitary groups that enjoy, at the very least, the tacit support of the military.¹

The Colombia FTA's dispute settlement procedures completely exclude enforceable obligations for the government to meet international standards on workers' rights. The

¹ See, e.g., Human Rights Watch, *The "Sixth Division": Military-paramilitary Ties and U.S. Policy in Colombia* (2001).

Colombia FTA also contains no enforceable provisions preventing countries from waiving or weakening existing labor laws in order to increase trade.

The agreement's provisions on investment, procurement, and services constrain both governments' ability to regulate in the public interest, pursue responsible procurement policies, and provide public services. Rules of origin and safeguards provisions invite producers to circumvent the intended beneficiaries of the trade agreement and fail to protect workers from the import surges that may result.

III. Brief Description of the Mandate of the Labor Advisory Committee

The LAC charter lays out broad objectives and scope for the committee's activity. It states that the mandate of the LAC is:

To provide information and advice with respect to negotiating objectives and bargaining positions before the U.S. enters into a trade agreement with a foreign country or countries, with respect to the operation of any trade agreement once entered into, and with respect to other matters arising in connection with the development, implementation, and administration of the trade policy of the United States.

The LAC is the most broadly representative committee established by Congress to advise the administration on U.S. trade policy. The LAC is the only trade advisory committee that includes labor representatives from the manufacturing and high-tech sectors, in addition to the service, transportation, and government sectors. The LAC includes representatives from unions at the local and national level, together representing more than 13 million American working men and women.

IV. Negotiating Objectives and Priorities of the Labor Advisory Committee

As workers' representatives, the members of the LAC judge U.S. trade policy based on its real-life outcomes for working people in America. Our trade policy must be formulated to improve economic growth, create good jobs, raise wages and benefits, and allow all workers to exercise their rights in the workplace. Too many trade agreements have had exactly the opposite result.

Since NAFTA went into effect, for example, our combined trade deficit with Canada and Mexico grew from \$9 billion to more than \$127 billion, leading to the loss of more than one million job opportunities in the United States. Under NAFTA, U.S. employers took advantage of their new mobility and the lack of protections for workers' rights in the agreement to shift production, hold down domestic wages and benefits, and successfully intimidate workers trying to organize unions in the U.S. with threats to move to Mexico. Furthermore, the North American Agreement on Labor Cooperation (NAALC) has proved to be an ineffective tool to improve labor conditions in the U.S., Mexico or Canada given the lack of political will to see it work.

In order to create rather than destroy jobs, trade agreements must be designed to reduce our unsustainable trade deficit by providing fair and transparent market access, preserving our ability to use domestic trade laws, and addressing the negative impacts of currency manipulation, non-tariff trade barriers, financial instability, and high debt burdens on our trade relationships. In order to protect workers' rights, trade agreements must include enforceable obligations to respect the core labor standards of the International Labor Organization (ILO) – freedom of association, the right to organize and bargain collectively, and prohibitions on child labor, forced labor, and discrimination – in their core text and on parity with other provisions in the agreement.

The LAC is also concerned with the impact that U.S. trade policy has on other matters of interest to our members. Trade policy must protect our government's ability to regulate in the public interest; to use procurement dollars to create good jobs, promote economic development and achieve other legitimate social goals; and to provide high-quality public services. Finally, we believe that American workers must be able to participate meaningfully in the decisions our government makes on trade, based on a process that is open, democratic, and fair.

V. Advisory Committee Opinion on the Agreement

The Colombia FTA fails to meet the basic goals above. Instead, the FTA largely replicates the NAFTA, which has cost the U.S. more than one million jobs, allowed violations of core labor standards to continue, and resulted in numerous challenges to laws and regulations designed to protect the public interest. In the past five years, American workers have lost almost 3 million manufacturing jobs, many due to the failures of our trade policy. These same policies resulted in another record-breaking trade deficit last year, of \$726 billion. The U.S. ran a \$3.4 billion trade deficit with Colombia last year, and, if history is any guide, the FTA will likely further erode our trade balance.

The LAC is not opposed in principle to expanding trade with Colombia, if a trade agreement could be crafted that would promote the interests of working people and benefit the economies of both countries. Unfortunately, the U.S. Trade Representative failed to reach such an agreement with Colombia. The labor provisions of the Colombia FTA make little progress beyond the ineffective NAFTA labor side agreement and actually move backwards from the labor provisions of our unilateral trade preference programs and the Jordan FTA. Meanwhile, the commercial provisions of the agreement do more to protect the interests of U.S. multinational corporations than they do to promote balanced trade and equitable development.

A. Trade Impacts of the Colombia FTA

In several prominent cases in which the United States has concluded a comprehensive "free trade agreement" with another country, the impact on our trade balance has been negative, despite promises to the contrary. Our combined trade deficit with Canada and Mexico is now more than ten times what it was before NAFTA went into effect. Since

granting China Permanent Normal Trade Relations in 2000, the U.S. trade deficit with China has almost tripled, hitting a staggering \$202 billion last year – making it the largest bilateral trade deficit between any two countries in the history of the world. The U.S. has even managed to rack up a trade deficit with tiny Jordan, with whom we had a surplus when we entered into a free trade agreement in 2001. Our overall trade deficit continues to rise as we reach new trade deals.

While the trade relationship with Colombia is small relative to the economy of the United States, it is expected that the agreement will result in a deteriorating trade balance in sectors such as textiles and apparel - one of our largest legal imports from Colombia in 2005 (along with coffee, fruits, oil and coal). Even where the market access provisions of the agreement themselves may not have much of a negative impact on our trade relationship, these provisions when combined with rules on investment, procurement, and services could further facilitate the shift of U.S. investment and production overseas, harming American workers.

One should also consider that the agreement could likely have a negative impact on certain agriculture sectors in Colombia. In the absence of equal or better paying, stable employment in other sectors that will absorb the jobs lost, and the unemployment and training policies necessary to retrain displaced workers, the average Colombian worker and farmer will not likely have the purchasing power to buy the majority of goods and services we will export.

B. Labor Provisions of the Colombia FTA

The Colombia FTA's combination of unregulated trade and increased capital mobility not only puts jobs at risk, it places workers in both countries in more direct competition over the terms and conditions of their employment. High-road competition based on skills and productivity can benefit workers, but low-road competition based on weak protections for workers' rights drags all workers down into a race to the bottom. Congress recognized this danger in TPA, and directed USTR to ensure that workers' rights would be protected in new trade agreements. One of the overall negotiating objectives in TPA is "to promote respect for worker rights ... consistent with core labor standards of the ILO" in new trade agreements. TPA also includes negotiating objectives on the worst forms of child labor, non-derogation from labor laws, and effective enforcement of labor laws.

The labor provisions of this agreement fall far short of these objectives, particularly in light of the extreme labor conditions in Colombia – where industrial conflicts are at times "resolved" by torture or murder. Unfortunately, labor was not a focus during the two years of intense negotiations and thus did not result either in an improved labor chapter, an agreement to change a single labor law, or a commitment to take truly effective measures to prevent the murder of or threats to trade unionists and end impunity for those labor-related crimes.

In the Colombia FTA, only one labor rights obligation – the obligation for a government to enforce its own labor laws – is actually enforceable through dispute settlement. All of the other obligations contained in the labor chapter, many of which are drawn from Congressional negotiating objectives, are explicitly not covered by the dispute settlement system and thus completely unenforceable.

Like the DR-CAFTA and Peru FTA, the Colombia FTA:

- Does not contain enforceable provisions requiring that the government meet its obligations under the ILO core labor standards.
- Does not prevent Colombia from “weakening or reducing the protections afforded in domestic labor laws” to “encourage trade or investment.” Under the agreement, Colombia could roll back its labor laws without threat of fines or sanctions. This is not an abstract or academic concern, as Colombia passed several reforms to “flexibilize” the labor market in 2002 – including expanding the causes for dismissal, cutting the notice period for employment termination and drastically reducing severance benefits.² In 2005, the government introduced pension reforms that, *inter alia*, prohibit unions and employers from negotiating pension benefits in collective bargaining agreements.
- Does not require that Colombia effectively enforce its own laws with respect to employment discrimination, a core ILO labor right.

Contrary to TPA, the dispute settlement mechanisms in the Colombia FTA are wholly inadequate and much weaker than those available to settle commercial disputes arising under the agreement.

- The labor enforcement procedures cap the maximum fine at \$15 million and allow Colombia to pay those fines to itself with little oversight. This directly violates TPA, which instructs our negotiators to seek provisions in trade agreements that treat all negotiating objectives equally and provide equivalent dispute settlement procedures and equivalent remedies for all disputes.
- Not only are the fines for labor disputes capped, but the level of the cap is so low that the fines will have little deterrence effect. The cap in the Colombia agreement is \$15 million – about one-tenth of one percent of our total two-way trade in goods with Colombia last year.
- Finally, the fines are robbed of much of their punitive or deterrent effect by the manner of their payment. While the LAC supports providing financial and

² World Bank, *Doing Business in 2005: Removing Obstacles to Growth* (Wash., D.C., 2005), p. 29. The 2006 edition of the report urged Colombia to take additional measures to make hiring and firing decisions more flexible. See, Bakvis, Peter, *How The World Bank & IMF Use The Doing Business Report To Promote Labour Market Deregulation In Developing Countries*, ICFTU (June 15, 2006).

technical assistance to help countries improve labor rights, such assistance is not a substitute for the availability of sanctions in cases where governments refuse to respect workers' rights in order to gain economic or political advantage. In commercial disputes under the Colombia FTA, the deterrent effect of punitive remedies is clearly recognized – it is presumed that any monetary assessment will be paid out by the violating party to the complaining party, unless a panel decides otherwise. Yet for labor disputes, the violating country pays the fine to a joint commission to improve labor rights enforcement, and the fine ends up back in its own territory. No rules prevent a government from simply transferring an equal amount of money out of its labor budget at the same time it pays the fine. And there is no guarantee that the fine will actually be used to ensure effective labor law enforcement, since trade benefits can only be withdrawn if a fine is not paid. If the commission pays the fine back to the offending government, but the government uses the money on unrelated or ineffective programs so that enforcement problems continue un-addressed, no trade action can be taken.

The labor provisions in the Colombia FTA are woefully inadequate, and clearly fall short of the TPA negotiating objectives. They will be extremely difficult to enforce with any efficacy, and monetary assessments that are imposed may be inadequate to actually remedy violations.

The U.S. again lost a valuable opportunity to promote better labor laws and practices and thus greater participation in the workplace and the opportunity to distribute the benefits of trade more evenly. Importantly, the U.S. also failed to take a much needed stand on human rights, giving its imprimatur to a government that has committed well-documented violations of trade union rights in Colombia, up to and including torture and murder.³ Moreover, the Colombian government has given varying levels of support to paramilitary groups that have committed similar atrocities in the name of defending commerce. In turning a blind eye to this staggering violence, the U.S. has sent a strong message that commercial trade concerns supersede all other interests.

Labor Rights in Colombia

Colombia does not meet International Labor Organization (ILO) criteria for compliance with core labor standards, and the weak and inadequate labor rights protections in this agreement will allow these deficiencies in Colombia's labor laws to persist.

³ The most notorious recent atrocity against trade unionists occurred on August 5, 2004, when soldiers from the Revéz Pizarro Mechanized Group of the 18th Brigade of the Colombian army killed three trade labor leaders in the province of Arauca. Two others were detained, including the regional president of the Central Unitaria de Trabajadores (CUT). The three who were killed—Jorge Prieto of the medical workers' union ANTHOC, Héctor Alirio Martínez of the rural workers' union ADUC, and Leonel Goyeneche of the Arauca section of the CUT—were well-known labor activists. Two of them, Mr. Prieto and Mr. Martínez, had been granted protective measures by the Inter-American Commission on Human Rights to ensure their safety. Following an investigation into the killings, and facing considerable international pressure, the Colombian attorney general acknowledged that the trade unionists did not die in combat, as previously alleged, but were shot at close range.

In Colombia, workers continue to face legal and practical obstacles to the exercise of their rights to freely associate, join a trade union and bargain collectively. Trade unionists also continue to live under the constant threat of death, with several thousand leaders and rank and file members brutally murdered over the last 20 years.⁴ As a result of these and other human rights violations, the number of unionized workers has fallen to below 4% of the workforce and workers covered by collective bargaining agreements fell from 409,918 in 1994-95 to 176,774 in 2002.⁵

Deficiencies in Colombia's Labor Laws

1. Freedom of Association⁶

Denial or Delay of Union Registration

Under the Constitution and Article 44 of Law 50 of 1990, a new union is to have legal status upon coming into existence. Thereafter, a union need only file a specified set of documents with the Ministry of Social Protection (MSP) to complete its registration, normally a pro forma process. Article 46 of Law 50 of 1990 directs the MSP to review the application within 15 days and either accept, deny or object to the application. An application is to be denied only if the union does not have a minimum number of members, if a union already exists in the same enterprise representing the same class of workers, or if the constitution or by-laws violate the law. However, the Ministry often invokes reasons not found within the statute and thus arbitrarily delays or denies the recognition of a union. Indeed, the State Department found that the registration of new unions often takes years.⁷ As a union cannot legally undertake any function until it is registered, under Article 50, the government can effectively prevent the union from existing legally. The MSP also permits employers to challenge the registration of a union, which impermissibly interferes with workers' right to associate freely.

The problems faced by unions in attaining legal recognition are best illustrated by the recent case of *Splendor Flowers*.⁸ In November 2004, workers at Dole's Splendor Flowers formed an independent union, Sintrasplendor, with the support of UNTRAFLORES, an independent industrial union of flower workers. They signed up hundreds of members despite threats to fire union supporters and intimidation by police that prevented the union from meeting at their hall in 2004. Since the inception of the

⁴ The Escuela Nacional Sindical estimates that 2,028 trade unionists were killed from 1992 to 2003. According to ENS statistics, another 164 were murdered in 2004 and 2005. The CUT (Central Unitaria de Trabajadores) puts the figure at over 3,000 murdered in the last decade and over 4,000 since the formation of the CUT in 1986.

⁵ State Department, Country Reports on Human Rights Practices (2003) Feb. 25, 2004.

⁶ ILO, CEACR: Individual Observation Concerning Convention No. 87, Freedom of Association and Protection of the Right to Organize, 1948 Colombia, 2006

⁷ U.S. State Department, Country Reports on Human Rights Practices— Colombia, Mar. 8, 2006, available online at <http://www.state.gov/g/drl/rls/hrrpt/2005/61721.htm>.

⁸ Narrative of Sintrasplendor case drawn from U.S./LEAP, available online at www.usleap.org.

union, workers report that Dole has conducted a vigorous anti-union campaign that has included bringing in a company-backed union, firing union leaders, challenging the union's legal registration with the Colombian government, and refusing to reinstate fired union leaders despite court orders to do so. The union received its legal registration in March 2005, the first democratic union to receive legal recognition on a Dole flower plantation in Colombia. Dole immediately challenged the registration on technical and specious grounds and temporarily won a controversial reversal of the registration in early July. After an international and national campaign exposed the lack of validity in the government's reversal of its previous ruling, the union's legal registration was reissued in late August 2005 by the MSP.

However, the company refused to bargain in good faith with the union. In response to the company's refusal to bargain, the union called for a secret ballot election to determine which union represented the most workers. Dole agreed in April 2006 to a fair process to determine union representation. However, it delayed two months before sitting down with Sintrasplendor. In June, Dole reversed course again, telling Sintrasplendor to resolve the matter with the company union – Sintraflor. Most recently, Dole agreed to work with both unions on a joint collective bargaining process but Sintraflor has refused to proceed with a joint bargaining process or support a secret ballot election.

Use of Temporary or Indirect Employment Schemes

Laws that allow and encourage the hiring of workers indirectly through employment service agencies, cooperatives, or on temporary or commercial contracts can be found with growing regularity in Latin America. The effect (and purpose) of these laws has been to negate the workers' right of free association. In Colombia, the legal framework for the use of temporary contracts is found at Law 50 of 1990. Under this law, employers can and do hire workers on a temporary basis, and may continue to renew such contracts indefinitely – often for years. While such workers technically have the right to join unions, they are not rehired when their contracts expire.

Law 79 of 1988 and Law 10 of 1991 permit the establishment of cooperatives and service agencies to provide workers to perform the normal, every-day activities of the company, which are used to supplant permanent employees. Indeed, directly employed workers have been told to resign and join the cooperative or be dismissed. As there is no direct employment relationship, these workers have no guaranteed legal right to organize and collectively bargain with the companies benefiting from their labor. This is particularly troubling, as many cooperatives are formed and controlled by the primary employer. The U.S. State Department has also confirmed these facts, finding that,

The superintendent of economic cooperatives estimates “the number of such cooperatives at 1,500 and the number of associated workers at 150 thousand...Investigators discovered that most cooperatives engaged in subcontracting and, in some cases, that private sector employers had forced workers to form cooperatives and were themselves managing the

cooperatives' daily operations. The government has the authority to fine violators but has no recourse to shut down repeat offenders. In practice nominal fines assessed by the government did little to dissuade violators.”⁹

Colombia claimed to have prepared draft legislation to prevent abuses in the use of cooperatives, but none has yet been provided. Furthermore, there is no indication that the issue will come before the Colombian congress in the near future.

2. Right to Organize and Bargain Collectively

Direct Bargaining with Non-Union Employees

Article 69 of Law 50 of 1990 law permits collective agreements (pactos colectivos) to be directly “negotiated” with non-unionized workers where the union represents less than one-third of the workforce. The agreements are used to encourage non-union workers to refrain from joining the union or to otherwise confer upon them special benefits. In some cases, the employer will use the promise of an agreement to entice workers to resign from the union such that membership falls below the 1/3 threshold, making such agreements legal. The ILO has repeatedly criticized this practice.

The Committee recalls once again Article 4 of the Convention, respecting the full development and utilization of machinery for voluntary negotiation with workers' organizations with a view to the regulation of terms and conditions of employment by means of collective agreements, and emphasizes that direct negotiations with workers should only be possible *in the absence of trade union organizations* (emphasis added).¹⁰

A High Bar to Industry-wide Bargaining

Under Colombian law, the terms of a collective bargaining agreement that cover 2/3 of an industry may be extended to the entire industry. However, Article 376 of the Labor Code provides that an industrial union must represent over 50% of the workers in each firm in order to bargain. This high hurdle is inconsistent with ILO Convention 98.

Public Sector Bargaining

Public sector workers in Colombia do not have the right to bargain collectively; instead, public sector workers are allowed only to submit “respectful petitions.” The Colombian government has argued that the restriction is based on a constitutional limitation. However, the Office of the Procurator-General has argued in an advisory opinion to the

⁹ State Department Report 2005. The ILO continues to raise concerns about this practice. See, ILO CEACR, Individual Observations concerning Freedom of Association and Protection of the Right to Organize, Convention 87, Colombia, 2006.

¹⁰ ILO, CEACR: Individual Observation concerning the Right to Organize and Collective Bargaining, Convention 98, Colombia, 2006.

Constitution Court that no such limitation exists. Moreover, Convention 98, as well as Convention 151, provides that public employees who are not engaged in activities involving the administration of the state should enjoy the right to collective bargaining.¹¹

Blacklisting

A review of recent cases filed before the ILO Committee on Freedom of Association demonstrates that the blacklisting of union leaders is widespread in Colombia. The ILO High Level Mission also confirmed the use of blacklisting in an interview with the Deputy Procurator-General. The mission report found that, “There were some cases of trade unionists being blacklisted in some public enterprises in the framework of secret plans to eliminate those trade unionists supposed to be members of the guerrilla. These operations were often carried out by isolated members of intelligence services, or other similar state agents.”¹²

Ban on Collective Negotiation over Pension Benefits

In 2005, Colombia reformed its Constitution to eliminate collective bargaining on the subject of pensions. Legislating certain conditions of work out of the scope of bargaining is inconsistent with Convention 98. For example, the ILO has found that legislation granting the government the power to regulate wages, working hours, leave and conditions of work and thus exclude these from the field of collective bargaining “is not in harmony with Article 4 of Convention No. 98.”¹³

3. Right to Strike

The ability of unions to undertake a strike, a necessary tool in defending or promoting collective rights and interests, is heavily restricted. The ILO has found that the Labor Code runs afoul of international norms in the following ways:¹⁴

1. The prohibition on the calling of strikes by federations and confederations (Section 417(i) of the Labor Code)
2. The prohibition on strikes, not only in essential services in the strict sense of the term, but also in a wide range of services which are not necessarily essential (Section 450(1)(a) of the Labor Code and Decrees Nos. 414 and 437 of 1952, 1543 of 1955, 1593 of 1959, 1167 of 1963, 57 and 534 of 1967).
3. The possibility of dismissing trade union officers who have intervened or participated in an unlawful strike (Section 450(2) of the Labor Code), even where the unlawfulness of the strike rests on requirements which are contrary to the

¹¹ Id. See also, ILO Mission Report (Oct. 2005) para. 144.

¹² ILO Mission Report, para. 77.

¹³ Digest of Decisions of the Committee on Freedom of Association, para. 811.

¹⁴ See, ILO CEACR, Individual Observations, Convention 87, Colombia (2006), supra n. 6.

principles of freedom of association

4. The authority of the Minister of Labor to refer a dispute to mandatory arbitration when a strike exceeds a certain period (Section 448(4) of the Labor Code) (60 days).
5. The ability of the Ministry of Social Protection to determine the legality of a strike. The ILO's Committee of Experts stated that "a declaration of illegality of a strike should be made by the judicial authority or an independent authority, not by the Ministry of Labor.

Perhaps the best illustration of how these flawed laws directly affect the rights of workers is the case of *ECOPETROL*. On April 22, USO, a union representing workers in the oil sector, declared a strike against the state-owned oil company - *ECOPETROL*. This strike was the result of the failure of the parties to reach an agreement after a year and a half of collective negotiations over the government's restructuring plan for the company. The following day, the Colombian government declared the strike illegal on the grounds that petroleum refining is an essential service, a finding that contradicts ILO jurisprudence on the scope of essential services. Moreover, the determination as to whether the strike was illegal was made by the state, here the employer, constituting a clear violation of the right to strike. As a result, 253 workers were dismissed, including 22 USO leaders. Following the persistent advocacy of the union, the parties agreed to arbitration. The arbitration panel resulted in the reinstatement of all but 33 of the fired workers.¹⁵

4. Violence Against Trade Unionists As a Tactic to Prevent the Exercise of Fundamental Labor Rights

Colombia continues to be the most dangerous place in the world to be a trade unionist, accounting for more assassinations than the rest of the world combined. Indeed, during the two years that the U.S. and Colombia negotiated the trade agreement, nearly 200 trade unionists were murdered and many more were threatened with death. Especially troubling is the fact that trade unionists are not victims of the generalized violence that affects so many people in the country, but instead are specifically targeted for their trade union activity. These human rights violations often occur during the organization of a union, collective negotiations, strikes or some other form of legal, concerted activity in defense of the interests of Colombian workers.

In 2004, when the FTA negotiations commenced, the Medellín-based *Escuela Nacional Sindical* (ENS, National Union School) found an overall increase in the number of human rights violations against trade unionists, including an increase in the number of homicides

¹⁵ In 2005, the ILO Committee on Freedom of Association reviewed the case and recommended that the legislation be amended to allow for strikes in the oil sector, to shift the responsibility for declaring a strike illegal to an independent body, and review of the dismissal of the workers in light of the fact that the strike was not properly declared illegal. See, Case No. 2355, Report No. 337 (Colombia).

over the previous year, from 91 to 94. They also found a sharp rise in the number of reported death threats during the same time, from 296 to 445. According to the report, the Colombian government was directly responsible for 12 % of all human rights violations against unionists, including arbitrary detentions, break-ins and at least three assassinations. The ENS report for 2005 reflected a decline in the number of assassinated trade unionists, to 70. Other serious violations, such as death threats, continued apace.

The slight drop in assassinations cannot be attributed to the adoption of serious measures taken by the state to combat violence and impunity. Rather, observers believe that it is a result of the change in tactics by the responsible parties, primarily the paramilitaries. Given the need to at least appear supportive of the demobilization process, many paramilitaries have opted to threaten trade unionists and their families with death—an act which has a similar chilling impact, but that sadly provokes less concern from the international community. Although state-sponsored protection schemes may have contributed slightly to the decline, the protection schemes have failed to provide adequate protection, or any protection at all, to trade unionists in a number of cases. Further, as the state is responsible for some of the human rights violations, there is considerable distrust in the state-sponsored system.

As of September 14, 2006, 54 trade unionists have been murdered in Colombia this year. A complete list of their names, including their union affiliation and date of death, is attached hereto.

5. Impunity for Crimes Contributes to an Anti-Union Environment

In Colombia, most human rights cases are not investigated or prosecuted, allowing the situation of impunity to continue. The ILO has frequently condemned the alarming level of impunity in Colombia. In the most recent report of the ILO Committee on Freedom of Association, the ILO again denounced the government of Colombia for its failure to investigate the murders or prosecute the perpetrators of these crimes.

With regard to the lists of investigations submitted, the Committee observes that although the Government provides details of the large number of investigations already launched, it cannot help but notice, once again, that for the most part these investigations have progressed no further than the preliminary stage (84 investigations), have been dismissed for lack of evidence (55 investigations) or have been suspended (four) and that only 14 investigations are currently at the pre-trial stage, some involving persons being held in custody, while seven are at the trial stage, with persons being held in custody, and that there have been only 15 convictions. The Committee observes that although the number of convictions has increased in relation to previous examinations of the case,

the situation regarding impunity is still extremely serious, since very little progress has yet been made to improve it.¹⁶

In October 2005, an ILO high-level mission confirmed that impunity continued to be a serious problem.

“While noting the detailed information provided by the Government to combat impunity and improve the safety and security of trade union leaders and members, the members of the visit further note the concerns still expressed by several sectors of society including the Procurator-General, the Constitutional Court and the Deputy Minister of Defense, that trade unionists are still targeted by the armed groups and little progress had been made in reducing impunity.”¹⁷

The government has claimed that the new penal system, which relies more upon oral presentation, will speed up proceedings generally. However, the new system only applies to crimes committed after January 1, 2005, meaning only 124 of the thousands of assassinations could be heard under the new system. The Colombian government has also touted the Justice and Peace Law, adopted in June 2005, which ostensibly creates a framework for the demobilization of paramilitary forces, the party most responsible for the murder of trade unionists. However, the law was harshly criticized by human rights organizations for all but ensuring that guilty parties would face minimal justice. As explained by the Washington Office on Latin America,

The “Justice and Peace” law, passed by the Colombian Congress in 2005, offers reduced sentencing for paramilitaries who opt to participate in the demobilization. Unfortunately, it does not require full confession of past crimes and human rights violations, and does not require individuals to turn over all illegally obtained assets. The law gives the Attorney General’s office an unfeasibly short amount of time to bring charges and to bring cases to trial. Despite modifications made in December 2005 in the codes governing the application of the law, serious flaws remain.¹⁸

On May 18, 2006, the Colombian Constitutional Court issued a ruling that modified several of the law’s worst provisions. However, the government has yet to pass the laws necessary to implement these new provisions. Even more troubling is that the law has not resulted in the demobilization of paramilitaries. The OAS has documented that demobilized paramilitaries have continued their participation in armed activities, in some cases forming new paramilitary groups or strengthening existing structures.

¹⁶ Report No. 340, Case(s) No(s). 1787 para 611.

¹⁷ ILO Mission Report, para. 132.

¹⁸ WOLA, *Need For Careful Congressional Monitoring Of Paramilitary Demobilization In Colombia*, available online at <http://www.wola.org/publications/Demob%20Hill%20Drop%20FINAL.pdf>.

Emblematic Cases of the Violence and Impunity in Colombia

1. Drummond Company

In March 2001, the United Steelworkers (USW) sent a delegation to Colombia to better understand the human rights situation in Colombia. The delegation heard the testimony of scores of workers who had suffered all types of abuses for attempting to engage in lawful union activity – abuses including threats of violence and death, forced exile, kidnapping and torture. On the second night of this mission, two trade unionists working for the Drummond Company, an Alabama-based coal company, were dragged off a company bus and brutally murdered.

The two assassinated unionists-- Valmore Locarno and Victor Orcasita, the president and vice-president of the local Sintramienergetica union, respectively – had been subjected to threats by paramilitaries for many months preceding their assassination. Drummond had been alerted to those threats, but had refused to take measures to protect these employees (e.g., to allow them to stay overnight at the mines when they had back-to-back shifts so they did not have to travel the dangerous, paramilitary-controlled roads at night) despite their incessant pleas. Even after these murders, the Drummond Company failed to take any protective steps in response to the pleas of the mining union’s new president, Gustavo Soler. Shortly after Gustavo Soler publicly announced that he believed that someone at Drummond must have tipped off the paramilitaries as to which bus Mr. Locarno and Mr. Orcasita were traveling on the night they were killed, Gustavo Soler was himself taken off a bus by paramilitaries on his way home from work and murdered. In the face of these brutal killings, the USW joined with the International Labor Rights Fund in filing an Alien Tort Claims Act (“ATCA”) against the Drummond Company.¹⁹

2. SINTRAEMCALI and Operación Dragón

In 2001, the government attempted the privatization of EMCALI, a municipal services provider in Cali, without consulting the workers regarding the decision or the impact of the move on the workers. The Cali Municipal Enterprise Workers' Union (SINTRAEMCALI) opposed the privatization and staged various peaceful protests and the occupation of the administrative offices in defense of the employer. Immediately, members of the union were threatened and killed. Over the following three years, the union and the government negotiated, but failure on the part of the government to comply with agreements reached led to further occupations and, in turn, further assassinations.

¹⁹ As the Miami Herald reported in a May 19, 2006 article, a former DAS intelligence agent, Rafael Garcia – who is also a key witness in the case against the DAS’s collaboration with the paramilitary killing of trade unionists – has come forward and given sworn testimony that he witnessed Augusto Jimnez, the President of Drummond’s Colombian mining operations, give money to a paramilitary representative of AUC leader Rodrigo Tovar Pupo (a/k/a Jorge 40) with the express order to give the money to Jorge 40 who was to then assassinate Valmore Locarno and Victor Orcasita. Mr. Locarno and Mr. Orcasita were killed shortly thereafter. Recently, Rodrigo Tovar Pupo himself was apprehended by Colombian authorities, opening up the possibility that he may give further details of these murders and their connection with the Drummond Company.

Between 2001 and 2005, a total of sixteen SINTRAEMCALI members were murdered. As of December 2005, no one had been arrested for any of the killings of union leaders, and the conflict at EMCALI remained unresolved.

A plan named "Operation Dragon", promoted by EMCALI management to eliminate several SINTRAEMCALI leaders as well as a congressman, Alexander López Maya (a former SINTRAEMCALI leader), and human rights defenders such as Berenice Celeyta Alayón, came to light in August 2004. Investigations have produced substantial evidence linking the management of EMCALI, the military, the internal security agency (DAS),²⁰ members of various government ministries and a private security firm (composed of members of the armed forces) to the assassination plot. The government denies the existence of a plan to eliminate the trade union or its officials. To date, there has been no prosecution of persons linked to the plot.²¹

6. Child Labor & Forced Child Labor

Colombia's constitution and labor code provides that children under 14 are prohibited from working in most occupations; however, 12- and 13-year-olds can be employed with permission from their parents and the labor authorities in certain cases. According to the Colombian Family Welfare Institute, at least 2.5 million children were working in Colombia in 2005. Only 500,000 were believed to be working legally. Despite prohibitions against the employment of children in the mining and construction sector, children can be found in these jobs. The Colombian Institute for Children and Families reports that 300,000 children work in illegal mining operations. Forced child labor, though not common in the formal economy, is found in certain sectors of the informal economy such as prostitution and coca leaf picking. There are also reports of children being forced to serve as combatants for the paramilitaries and the guerrillas.²²

C. Other Issues in the Colombia FTA

In addition to the very serious problems with the labor provisions of the Colombia agreement outlined above, commercial provisions of the agreement also raise serious concerns for the LAC. These issues have been discussed in detail in previous LAC reports. Unfortunately, the Colombia FTA contains many of the same provisions as these previous agreements, and raises many of the same concerns, summarized in brief below.

Investment: In TPA, Congress directed USTR to ensure “that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States.” Yet the investment

²⁰ A sub-unit of DAS is responsible for assessing the seriousness of threats to trade unionists and for providing for their protection.

²¹ A complete summary of the Operacion Dragon case is found in ILO CFA Report No. 340, Case No. 1787 (2006), paras. 462-501.

²² To read more, see Solidarity Center, *Justice for All: The Struggle for Worker Rights in Colombia* (Wash., D.C. 2006), pp. 52-55.

provisions of the Colombia FTA contain large loopholes that allow foreign investors to claim rights above and beyond those that our domestic investors enjoy. The agreement's rules on expropriation, its extremely broad definition of what constitutes property, and its definition of "fair and equitable treatment" are not based directly on U.S. law, and annexes to the agreement clarifying these provisions also fail to provide adequate guidance to dispute panels. As a result, arbitrators could interpret the agreement's rules to grant foreign investors greater rights than they would enjoy under our domestic law. In addition, the agreement's deeply flawed investor-to-state dispute resolution mechanism contains none of the controls (such as a standing appellate mechanism, exhaustion requirements, or a diplomatic screen) that could limit abuse of this private right of action. Finally, the marked difference between the dispute resolution procedures and remedies available to individual investors and the enforcement provisions available for the violation of workers' rights and environmental standards flouts TPA's requirement that all negotiating objectives be treated equally, with recourse to equivalent dispute settlement procedures and remedies.

Intellectual Property Rights: In TPA, Congress instructed our trade negotiators to ensure that future trade agreements respect the declaration on the Trade Related Aspects on Intellectual Property Rights (TRIPs) agreement and public health, adopted by the WTO at its Fourth Ministerial Conference at Doha, Qatar. The Colombia FTA contains a number of "TRIPs-plus" provisions on pharmaceutical patents, including on test data and marketing approval, which could be used to constrain the ability of a government to issue compulsory licenses as permitted under TRIPs and the Doha Declaration.

In 2005, the Pan American Health Organization published a study on the potential impact of the intellectual property provisions on public health in Colombia. The report concluded that by 2020, the public health system would have to pay an additional \$940 million per year to cover the costs of medicines made more expensive by the FTA. If the government were unable to cover that expense, roughly six million people would have no access to life-saving medicines.

Agriculture: In preparation for negotiations in agriculture, the Colombian Ministry of Agriculture released a report entitled "Colombian Agriculture and the FTA with the United States" in July 2004. The report found that the country would experience a 35 percent reduction in agricultural employment in the production of nine basic crops if tariffs were reduced to zero and stabilization mechanisms were eliminated. The U.S. did obtain the substantial reduction of those tariffs and forced Colombia to eliminate its price band that, in the absence of subsidies, was an important mechanism to protect farmers from steep variations in market prices or dumping. As the report explains, "[I]n as much as the necessary expansion in the exportation of nontraditional crops and other potential products is not achieved, the rural sector will be the victim of the FTA if a stabilization system like the SAFP is not preserved." Especially troubling for the U.S. is the report's most dire warning. "[If]...Colombia [does not take] adequate measures in defense and support of agricultural producers, rural problems could worsen and many of its inhabitants would have no more than three options: migration to the cities or to other

countries (especially the United States), working in drug cultivation zones, or affiliating with illegal armed groups.”

Government Procurement: The FTA’s rules on procurement restrict the public policy aims that may be met through procurement policies at the federal level. These rules could be used to challenge a variety of important procurement provisions including domestic sourcing preferences, prevailing wage laws, project-labor agreements, and responsible contractor requirements. Growing concern among state governors and legislators has led many states to refuse to be bound by the FTA. The LAC believes that governments must retain their ability to invest tax dollars in domestic job creation and to pursue other legitimate social objectives, and that procurement rules which restrict this authority are inappropriate.

Safeguards: Workers have extensive experience with large international transfers of production in the wake of the negotiation of free trade agreements and thus are acutely aware of the need for effective safeguards. The safeguard provisions in the Colombia agreement, which offer no more protection than the limited safeguard mechanism in NAFTA, are not acceptable. A surge of imports from large multinational corporations can overwhelm domestic producers very quickly, causing job losses and economic dislocation that can be devastating to workers and their communities. For many American workers losing their jobs to imports, it may be their own employer that is responsible for the surge of imports. In such a case, and similar situations in which an international sourcing decision has been made on the basis of a free trade agreement, the usual remedy of restoration of the previous tariff on the imports will not be enough to reverse the company’s decision to move production abroad. U.S. negotiators should have recognized that much faster, stronger safeguard remedies are needed. The Colombia FTA has failed to provide the necessary import surge protections for American workers.

Services: NAFTA and WTO rules restrict the ability of governments to regulate services – even public services. Increased pressure to deregulate and privatize could raise the cost and reduce the quality of basic services. Yet the Colombia agreement does not contain a broad, explicit carve-out for important public services. Public services provided on a commercial basis or in competition with private providers are generally subject to the rules on trade in services in the Colombia FTA, unless specifically exempted. The specific exemptions for services in the Colombia agreement fall short of what is needed to protect important sectors. There are, for example, no U.S. exceptions for energy services (except atomic), water services, sanitation services, public transportation, education or health care. Even for those services the U.S. did make exceptions for, the exemption only applies to some of the core rules of the FTA, not all. These partial exceptions are particularly worrisome given the tendency of trade dispute panels to interpret liberalization commitments expansively, and to interpret exceptions to those commitments narrowly. One manifestation of this problem is the recent WTO decision against the U.S. on gambling services – the U.S. argued unsuccessfully that gambling was not covered by the WTO’s General Agreement on Trade in Services, and now potentially faces the prospect of facing challenges to our state and federal gambling regulations.

VI. Conclusion

The LAC recommends that the President not sign the Colombia agreement. The LAC believes that the United States must be guided by minimum standards in choosing its partners in international trade, including respect for the rule of law and fundamental human rights. As numerous, well-researched reports from international organizations have indicated, the government of Colombia has committed or is complicit in the commission of egregious human rights violations. Members of the internal security apparatus (DAS) have been recently linked to election fraud, and members of the military have been linked to narco-trafficking, assassinations and most recently attacks against civilian targets that it later blamed on guerillas in order to collect reward monies. Indeed, corruption throughout the state is reaching alarming levels.

If the President does send the agreement to Congress in its current form, Congress should reject the agreement, and send a strong message to USTR that: 1) future agreements must make a radical departure from the failed NAFTA model in order to succeed, and 2) the United States should not negotiate with governments that have shown so little regard for the rule of law and human rights.

The LAC recommends that USTR reorder its priorities before continuing with negotiations toward new free trade agreements with Korea and Malaysia, both of which are more economically significant (and thus potentially more disruptive) than the agreements negotiated so far in Latin America. American workers are willing to support increased trade if the rules that govern it stimulate growth, create good jobs, and protect fundamental rights. The LAC is committed to fighting for better trade policies that benefit U.S. workers and the U.S. economy as a whole. We will oppose trade agreements, including the U.S.-Colombia Free Trade Agreement, that do not meet these basic standards.

VII. Membership of the Labor Advisory Committee*

Captain Tim Brown, IMMP
R. Thomas Buffenbarger, IAMAW
Ann Burger, CTW **
Kenneth Chuck Canterbury, FOP **
Larry Cohen, CWA **
John Connelly, AFTRA **
Ron Davis, MEBA
Leo Gerard, USW **
Ron Gettelfinger, UAW **
Vincent Giblin, IUOE
Joseph T. Hansen, UFCW **
Cheryl Johnson, UAN **
Gregory Junemann, IFPTE
Thomas Lee, AFM
Douglas McCarron, UBC **
Terence O'Sullivan, LIUNA **
Bruce Raynor, UNITE HERE
Michael Sacco, SIU
Andrew Stern, SEIU **
John J. Sweeney, AFL-CIO
Duane Woerth, ALPA

*As of October 4, 2006

** Invited