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PETITION REGARDING ECUADOR'S ELIGIBILITY FOR ATPDEA DESIGNATION

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

In March 2003, Human Rights Watch submitted comments summarizing Ecuador's shortcomings in these areas and providing recommendations to help bring Ecuador into compliance. In several critical respects, the information and recommendations in those comments, attached here as Appendix I, are still relevant. This petition updates the March 2003 submission by describing recent events that demonstrate Ecuador's continued failure to protect workers' rights to freedom of association and to organize and bargain collectively, and by highlighting the inadequacy of measures taken to address violations of these rights as well as the worst forms of child labor.

Human Rights Watch believes that Ecuador continues to fall far short of meeting the ATPDEA eligibility criteria, as it fails to uphold internationally recognized workers' rights. Human Rights Watch further believes that Ecuador has not adequately demonstrated good-faith intention to take the steps necessary to satisfy the criteria; most significantly, Ecuador has failed to fully implement the labor rights provisions of agreements it reached with the United States in October 2002 prior to receiving ATPDEA beneficiary status. These agreements address both Ecuador's inadequate legislation on freedom of association and its failure to effectively enforce existing laws governing child labor and the right to organize. We believe that the U.S. government should make Ecuador's continued designation as an ATPDEA beneficiary country conditional upon its immediate fulfillment of the workers' rights benchmarks articulated below. Ecuador's failure to meet these conditions should result in total or partial suspension of ATPDEA benefits.

Harmful Child Labor

Having ratified International Labor Organization (ILO) Convention 182 concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labor, Ecuador has

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

assumed the international obligation to "take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency."[2] To be eligible for ATPDEA beneficiary status, Ecuador must implement this commitment, which requires the elimination of "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children."[3]

As elaborated in Human Rights Watch's March 2003 comments and April 2002 report, *Tainted Harvest: Child Labor and Obstacles to Organizing on Ecuador's Banana Plantations*, Ecuador does not effectively enforce its laws governing the worst forms of child labor. In May 2001, Human Rights Watch interviewed forty-five children who had worked or were working on banana plantations in Ecuador, forty-one of whom began working in the sector between the ages of eight and thirteen and fewer than 40 percent of whom were still in school at age fourteen. They described workdays of twelve hours on average and hazardous conditions that violate ILO Convention 182. Most of these human rights abuses occurred in violation of Ecuador's domestic labor legislation, which the Ministry of Labor's Labor Inspectorate fails to adequately enforce. With too few staff to carry out meaningful preventative inspections, the Labor Inspectorate must rely on complaints to drive its enforcement of child labor laws, resulting in a system in which inspectors are unable to evaluate effectively, even less to address and prevent, the human rights violations suffered by children working on banana plantations.

In October 2002, before being granted ATPDEA beneficiary status, Ecuador agreed to strengthen protections for childrens' rights and fully comply with its ILO Convention 182 obligations. The positive steps taken by the Ecuadorian government between October 2002 and March 2003, though commendable, were not sufficient to meet Ecuador's obligations to eliminate immediately harmful child labor in the banana sector. The measures failed to adequately address the primary impediment to eradicating hazardous child labor—insufficient child labor law enforcement (see Appendix I for a full description of these actions). Additional steps the Ecuadorian government has taken between March 2003 and the present are also insufficient, as explained below.

For example, the government is reportedly collaborating with the United Nations Children's Fund (UNICEF) to develop inspection tools and methodology for the System for the Inspection and Monitoring of Child Labor (Child Labor Inspection System). The Child Labor Inspection System was created by decree in October 2002 within the National Committee for the Progressive Elimination of Child Labor (CONEPTI). A complementary mechanism by which civil society representatives monitor the Child Labor Inspection System's inspection activities and report to system authorities incidents of illegal child labor reportedly has also been established. Nonetheless, at this writing, the Child Labor Inspection System has only three inspectors and, reportedly, has yet to conduct inspections of child labor in the banana sector, despite engaging in preparatory and capacity-building activities. The three inspectors are the only three inspectors in the country dedicated exclusively to child labor, though Ecuadorian law requires at least one labor inspector for minors in each of the country's twenty-two provinces. Although the government of Ecuador informed the U.S. government in May 2003 that eight labor inspectors would soon dedicate half their time exclusively to the enforcement of child labor laws, an Ecuadorian children's rights advocate reports that these inspectors have only received preliminary training on the issue, and "are not working part time, nor any time to enforce child labor laws."[4] Human Rights Watch is deeply concerned that, with only three child labor inspectors, the Ministry of Labor still lacks the capacity to effectively enforce Ecuador's child labor laws. Similarly, we are concerned that CONEPTI's Child Labor Inspection System is incapable of adequately monitoring

[2] ILO Convention concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labor (ILO Convention 182), 38 I.L.M. 1207, June 17, 1999, Article 1.
[3] ATPDEA, Sec. 204(b)(6)(B)(4).
[4] Electronic communication from Andrés Dueñas, director, Program for the Protection and Education of Child Workers of the National Institute for Children and Families (INNFA), to Human Rights Watch, September 9, 2003

compliance with the banana industry agreement on child labor, reached on July 23, 2002. That agreement includes not only child labor laws but additional industry commitments, and charges CONEPTI with overseeing its implementation.

In addition, there have been delays in the ILO's International Program for the Elimination of Child Labor's (IPEC) activities. While not attributable to the government, the delays are reportedly impeding progress towards the elimination of harmful child labor in Ecuador's banana sector. IPEC's baseline survey to assess the scale and scope of harmful child labor in the banana sector was scheduled to be concluded before the end of 2002, but actually only finished in February 2003. It was presented to the Banana Industry Forum in August 2003, but has reportedly yet to be issued as an official report.[5] The banana industry agreement on child labor establishes a one-year period from the "finalization of the [IPEC] study" for the elimination of all illegal child labor in the sector. Without an official report of the study's findings, however, the banana industry could argue that this period has yet to commence. Furthermore, although IPEC received funding to undertake a Time-Bound Program in the banana sector,[6] IPEC has reportedly yet to undertake any banana-sector specific programs in Ecuador.

The Rights to Freedom of Association, to Organize, and to Bargain Collectively

Despite general provisions in Ecuadorian law safeguarding workers' rights to freedom of association, to organize, and to bargain collectively, weak enforcement and critical weaknesses and loopholes in the laws render the protections virtually meaningless for banana workers and facilitate anti-union discrimination in the sector (see Appendix I for a description of these problems).

For example, with only the threat of minimal fines, employers who engage in anti-union discrimination face few, if any, significant repercussions. Anti-union hiring discrimination is not explicitly prohibited by law, and a worker dismissed for union activity has no right to reinstatement. Moreover, employer interference in the establishment or functioning of workers' organizations is not explicitly banned. Employers exploit ambiguous provisions in the Labor Code regarding employment contracts, stringing together consecutive short-term contracts to hire workers year-round to perform everyday tasks, creating a vulnerable and precarious "permanent temporary" workforce excluded from even the weak legal protections governing freedom of association. And, as discussed below, employers take advantage of legal loopholes that allow the unlimited use of subcontracted labor to erect often prohibitive obstacles to workers' exercise of their rights to , organize, form unions, and bargain collectively.

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

Roughly eleven months later, the government of Ecuador has not fully met any of these commitments. No labor law reforms have been introduced in Ecuador's legislature to address any of the fundamental weaknesses, identified in Human Rights Watch's March 2003 comments, that prevent workers from fully enjoying their right to freedom of association. A proposed executive regulation would increase

[5] The Banana Industry Forum, allegedly led by an executive committee composed of banana industry, government, international organization, and civil society representatives, was created by the banana industry agreement on child labor and is charged with developing policies for the elimination of child labor in the sector and creating a plan for the agreement's implementation.

[6] IPEC's Time-Bound Programs are designed to "address the root causes of child labour" through "a set of tightly integrated and coordinated policies and programmes to prevent and eliminate a country's worst forms of child labour within a defined period of time." ILO, IPEC. (February 12, 2002). *Time-Bound Programmes.* [Online]. Available: http://www.ilo.org/public/english/standards/ipec/ governments/index.htm [September 3, 2002].

monitoring and supervision of subcontractor activities, reiterate the Constitutional and Labor Code principle that companies and their third-party contractors have joint and several liability for labor law violations suffered by subcontracted workers,[7] and limit the percentage of subcontracted workers in any workplace to a maximum of 40 percent of the total workforce. While adoption of this regulation would be a first step toward protecting the human rights of subcontracted workers, legislative reforms are necessary to close definitively the legal loopholes that allow widespread use of subcontracted labor to impede workers' right to organize. And although the government reportedly requested an ILO technical assistance to suggest general labor-related reforms, the ILO assistance has yet to produce any concrete proposal to reform Ecuador's inadequate labor legislation on freedom of association.

The government of Ecuador also committed to the U.S. government in October 2002 to improve enforcement of its weak labor laws. The impediments to exercising the right to freedom of association, however, are still so great that banana workers rarely attempt to organize. In the few instances when they do, they continue to face reprisals and dismissals, as discussed in detail below.

In particular, Ecuador pledged in October 2002 to take steps to address labor rights abuses allegedly suffered in 2002 by workers on the seven Los Alamos banana plantations. As described in detail in Human Rights Watch's March 2003 comments, the Los Alamos workers began a union organizing drive in February 2002 and were subsequently the victims of alleged anti-union dismissals, anti-union violence, employer interference in the functioning and operation of the workers' organizations, and the unlawful use of strikebreakers. Ecuador committed to investigate thoroughly the May 16, 2002, anti-union violence on the Los Alamos plantations and press charges against the responsible parties. It promised to establish a high-level commission to investigate the police response prior and subsequent to the anti-union violence, the role of all parties in the arbitration and conciliation process convened to address the labor conflict, and the procedures adopted to handle the striking workers' complaints.

Approximately eleven months later, Ecuador has failed to fully uphold these commitments. The Ecuadorian government has not fully investigated nor prosecuted the perpetrators of the anti-union violence. Instead, sixteen of the roughly 200 hooded, armed men who allegedly perpetrated the violence were prosecuted based on a fundamentally flawed investigation, described in Human Rights Watch's March 2003 submission, that omitted one of the two violent confrontations of May 16; failed to mention who might have conceived and planned the alleged crimes; and omitted eight of the nine workers injured, indicating only that one policeman and one worker were shot.[8] The sixteen were convicted in January 2003 of illegal fire arms possession, carrying a prison term of between six months and one year.[9] They are not in custody and have appealed their convictions to the Fifth Superior Court, where the case is stalled. None of the three third-party operators employing the Los Alamos workers has been sanctioned for their anti-union activity nor have any government officials faced repercussions for their alleged inadequate response. Although the above-described high-level commission that Ecuador promised to establish submitted to the United States a report with its conclusions and recommendations, the recommendations have not been implemented, no meaningful steps have been taken to do so, and, in May 2003, Ecuador indicated to the United States that it would implement "several," rather than all, of the recommendations. While an internal review of the police response to the 2002 Los Alamos labor conflict has reportedly commenced, it has yet to be concluded.

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[7] See Constitution, article 35(11); Labor Code, article 41. These provisions have not been interpreted to allow subcontracted workers to organize and negotiate collectively with the person or company employing the subcontractor and directly benefiting from the workers' labors.

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

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

Case Study: Los Alamos 2003 Labor Conflict

The events that have unfolded in 2003 on the Los Alamos banana plantations epitomize Ecuador's continued failure to uphold workers' rights to freedom of association, organize, and bargain collectively. Weak labor laws and even weaker enforcement allow employers in the banana sector to flout these fundamental labor rights with impunity.

Violation of the Right to Bargain Collectively

On June 19, 2003, unionized Los Alamos workers employed by the third-party operators Nenro, S.A., Beducorp, S.A., and Cliadi, S.A., presented three collective bargaining proposals—one for each employer—to the Labor Inspectorate. The next day, all seventy union members were reportedly barred from the plantations. On June 24, a labor inspector visited the worksites, confirmed that the workers had been fired, and recorded their testimonies that they had been dismissed on June 20, 2003. Because they were fired after presentation of the collective contract proposals, these seventy workers were legally entitled to a year's salary, in addition to the legally mandated severance pay for unjust dismissals.[10] Nonetheless, on June 24, Nenro, Beducorp, and Cliadi deposited with the Labor Ministry the severance pay due for unjustified dismissals of union members and leaders, without the additional one-year's salary, alleging that the seventy workers were fired on June 18, rather than June 20.

The fired workers and their legal representatives met numerous times with Labor Ministry representatives, including the labor minister and the undersecretary of labor for the coastal and Galápagos region, to request that the Labor Ministry order the employers to reinstate the workers and clarify that they were fired after collective contract proposal presentation. In response, on July 7, the Labor Ministry issued a document asking the three operators to reinstate the workers and vaguely suggesting that, if they failed to do so, the workers could be entitled to a year's salary in addition to the severance due for illegal firing.[11] On August 12, the Labor Ministry issued a stronger legal document explicitly stating that the fired workers "have the right to demand all indemnity established for those cases of firing after presentation in the Labor Inspectorate of a Collective Contract Proposal."[12] At no time, however, did the Ministry of Labor demand reinstatement of the seventy fired workers, correctly explaining that it is not authorized to do so under Ecuadorian labor law. As discussed in Human Rights Watch's March 2003 submission, the ILO Committee of Experts on the Application of Conventions and Recommendations has stated that because the remedy for anti-union dismissal should "compensate fully, both in financial and in occupational terms, the prejudice suffered by a worker as a result of an act of anti-union discrimination . . . [t]he best solution is generally the reinstatement of the worker in his post with payment of unpaid wages and maintenance of acquired rights."[13]

Despite the July 7 and August 12 Labor Ministry documents, Nenro, Beducorp, and Cliadi continued to refuse to reinstate the fired workers or pay them a year's salary, as required by law. Instead, the companies bargained, starting with an offer of an additional one month's pay above that due for illegal dismissals, rising to a final offer of only 3.5 months extra. On August 22, unemployed for over two months and in dire economic straits, the seventy fired workers accepted this offer and signed waivers of all future legal claims against their employers—sacrificing their rights to freedom of association, to organize, and to bargain collectively to be able to provide, if only temporarily, for their families.

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[10] Labor Code, article 239.

[11] Regional Labor Inspectorate of Guayas, legal document, July 7, 2003.

[12] Regional Labor Inspectorate of Guayas, legal document, August 12, 2003.

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

Use of Subcontractors to Undermine Workers' Right to Organize

In early 2002, the Los Alamos banana plantations employed roughly 1,000 workers and functioned using three third-party operators—Nenro, Beducorp, and Cliadi. By early 2003, while these three operators still directly employed between 150 and 200 workers each, an additional sixteen operators were reportedly added, each with between twenty-three and twenty-nine workers—just short of the thirty required under Ecuadorian law for union formation. By June 2003, additional third-party operators were created, and Nenro's, Beducorp's, and Cliadi's workforces were reduced to fewer than thirty workers each. With the late June firing of the seventy union members at Nenro, Beducorp, and Cliadi, who had unionized prior to the reductions and were therefore legally still able to maintain their union with fewer than thirty members,[14] little possibility now exists for worker organization in the operations of any of the Los Alamos plantations' many subcontractors.

As discussed in detail in Human Rights Watch's March 2003 submission, as well as in *Tainted Harvest*, subcontracted workers have no legal right to organize and collectively bargain with the companies or employers benefiting from their labor. Though the companies may determine their wages, benefits, and working conditions, such workers are able to organize and negotiate collectively only with their subcontractors. If there are fewer than thirty workers employed by a subcontractor, as is now the case on the Los Alamos plantations, they lose even this right.

Benchmarks for Reform and Enforcement of Laws on Freedom of Association

In order to achieve compliance with ATPDEA, Human Rights Watch believes that all labor law reforms and enforcement recommendations enumerated in Human Rights Watch's March 2003 submission, attached as Appendix I, should be fully adopted without delay. In particular, the 2003 Los Alamos labor conflict, detailed above, highlights the special importance of adopting the following key recommendations:

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

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

- That the Labor Code be amended to explicitly limit the percentage of subcontracted workers in any workplace to a maximum of 20 percent of the total number of workers; and

- That the Labor Code be amended to reduce from thirty the minimum number of workers required to form a union, pursuant to the ILO's recommendations.

Benchmarks for the Los Alamos 2002 Labor Conflict

To maintain ATPDEA beneficiary status, Human Rights Watch believes that Ecuador must expeditiously implement the recommendations contained in the high-level commission report on the Los Alamos labor conflict, referenced above. Ecuador should also conclude, without delay, its internal review of the allegedly inadequate police response to the Los Alamos workers' explicit requests for police protection during the labor conflict. If the investigation concludes that the police failed to sufficiently protect the striking workers, appropriate measures should be taken, including sanctioning responsible parties, establishing new internal police procedures for handling such labor conflicts, and compensating the affected striking workers.

[14] Labor Code, article 471.

In addition, Human Rights Watch believes that to maintain its designation as an ATPDEA beneficiary, Ecuador must also fulfill, without delay, the benchmarks set forth in Human Rights Watch's March 2003 comments with respect to the initiation of a new criminal investigation into the May 16, 2002, anti-union violence and the prosecution of those found responsible.

Benchmarks for the Worst Forms of Child Labor

In order to achieve compliance with ATPDEA, Human Rights Watch believes that Ecuador must meet the benchmarks articulated by Human Rights Watch in our March 2003 submission, attached in Appendix I, and understood as encompassed in Ecuador's October 2002 commitment to the United States to defend the rights of children and fully comply with ILO Convention 182. As discussed above, it is particularly important that the Ministry of Labor, as required by Ecuadorian law, designate at least one labor inspector for children in each province—a total of at least twenty-two inspectors—to guarantee effective implementation of child labor laws through proactive monitoring and unannounced on-site inspections, rather than reliance on a complaint-driven enforcement strategy.

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APPENDIX I

March 2003

COMMENTS REGARDING ECUADOR'S ELIGIBILITY FOR ATPDEA DESIGNATION

Human Rights Watch welcomes this opportunity to present views regarding whether Ecuador meets the eligibility criteria provided for in section 204(b)(6)(B) of the Andean Trade Promotion and Drug Eradication Act (ATPDEA) to qualify for enhanced trade benefits. In determining whether to designate a country an ATPDEA beneficiary, the President must consider "[t]he extent to which the country provides internationally recognized worker rights, including . . . [t]he right of association . . . [and] [t]he right to organize and bargain collectively," and "[w]hether the country has implemented its commitments to eliminate the worst forms of child labor, as defined in section 507(6) of the Trade Act of 1974."[15] We believe that Ecuador fails meet to these requirements of ATPDEA. This document summarizes those shortcomings and provides recommendations that would help bring Ecuador into compliance.

On September 19, 2000, Ecuador ratified International Labor Organization (ILO) Convention 182 concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labor, thereby assuming the international obligation to "take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency."[16] To be eligible for ATPDEA beneficiary status, Ecuador must implement this commitment, which requires the elimination of "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children."[17]

As described in the attached document, despite its obligations under international law to secure the elimination of harmful child labor, Ecuador does not effectively enforce its laws governing the worst forms of child labor in its banana sector. In an April 2002 report, *Tainted Harvest: Child Labor and Obstacles to Organizing on Ecuador's Banana*

[15] Trade Act of 2002, Title XXXI, "Andean Trade Promotion and Drug Eradication Act," Sec. 204(b)(6)(B).
[16] ILO Convention concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labor (ILO Convention 182), 38 I.L.M. 1207, June 17, 1999, Article 1.
[17] ATPDEA, Sec. 204(b)(6)(B)(4).

Plantations, Human Rights Watch found that children in Ecuador's banana sector work long hours, are exposed to toxic pesticides, use sharp tools, haul heavy loads of bananas from the fields to the packing plants, lack sanitary water and access to restroom facilities, and, in at least a few cases, experience sexual harassment. Furthermore, based on general government statistics assessing child labor in Ecuador; Human Rights Watch interviews with seventy current and former child and adult banana workers in May 2001, most of whom described laboring on plantations alongside other child workers; and the ease with which child banana workers can be found in villages near plantations, Human Rights Watch concluded that the problem of hazardous child labor in Ecuador's banana sector is widespread.[18] Since the release of the Human Rights Watch report, the government of Ecuador and the Ecuadorian banana industry have taken positive steps to address this problem. These steps will not ensure that Ecuador upholds its obligation to eliminate immediately hazardous child labor in the banana sector, however, as they fail to address adequately the problem of ineffective enforcement of child labor laws.

Ecuador's performance with respect to workers' rights to freedom of association and to organize also falls short of ATPDEA requirements. Ecuadorian law intended to protect workers' right to freedom of association and to organize, even if enforced, is inadequate and fails to deter employers from engaging in anti-union conduct, as described in the attached memo. Employers who retaliate against workers for exercising their right to organize face few, if any, meaningful repercussions under domestic law, as worker reinstatement is not required and fines for illegal dismissals, usually totaling less than $400 in the banana sector, in most cases, are insignificant. Furthermore, if employers interfere with workers' organizing efforts or attempt to place workers' organizations under employer control, in violation of article 2 of ILO Convention 98 concerning the Right to Organize and Collective Bargaining, the employers face no legal repercussions, as Ecuadorian labor law fails to explicitly prohibit such interference. Moreover, legal loopholes allow employers to string together short-term or "project" contracts to create a vulnerable, "permanent temporary" workforce, excluded from benefits and protections due workers recognized as permanent in the eyes of the law. And the use of subcontracted temporary work teams in the banana sector is widespread, creating a group of workers also lacking employment stability and with no legal right to organize and bargain collectively with the companies benefiting from their labor. Though the companies may determine the workers' employment terms and conditions, the workers are able to organize and negotiate collectively only with their subcontractors. These factors have combined to create a climate of fear among banana workers in Ecuador and have largely prevented them from organizing, resulting in a banana worker union affiliation rate of roughly 1 percent, far lower than that of Colombia or any Central American banana-exporting country.

The impediments to exercising the right to freedom of association are so great that banana workers have rarely attempted to organize. In the few instances when they do attempt to organize, they face reprisals, dismissals and even violence. For example, in February 2002, workers on the seven Los Alamos banana plantations began an organizing drive. The Los Alamos workers, whose three unions were recognized by the Ministry of Labor in April and who implemented their strike declaration on May 6, 2002, were the victims of alleged anti-union dismissals, anti-union violence, employer interference in the functioning and operation of the workers' organizations, and the unlawful use of strikebreakers. At this writing, the Ecuadorian government has failed to investigate fully and prosecute the perpetrators of the anti-union violence or sanction the employers for anti-union activity. Thus, the Ecuadorian government has failed to protect the Los Alamos workers' right to freedom of association, as required by international law as well as the ATPDEA.

Human Rights Watch believes that Ecuador has not fully met the eligibility criteria under ATPDEA Sec. 204(b)(6)(B)(3), (4) because the government has so far failed to uphold its general commitments to eliminate the worst forms of child labor in the banana sector and to ensure that banana workers can freely exercise their right to freedom of association and to organize. Moreover, Human Rights Watch believes that

[18] The government of Ecuador fails to keep data documenting the scope and scale of child labor in the banana sector.

Ecuador has not demonstrated good-faith intentions to take the steps necessary to satisfy the ATPDEA Sec. 204(b)(6)(B)(3), (4) eligibility criteria because Ecuador has also failed to implement the specific agreements it reached with the United States in October 2002 prior to receiving ATPDEA beneficiary status. These agreements address both Ecuador's inadequate legislation to protect freedom of association and its failure to effectively enforce existing laws governing child labor and the right to organize. We believe that the U.S. government should make immediate fulfillment of the following workers' rights benchmarks, that are implicitly recognized in Ecuador's October 2002 commitments, as conditions for Ecuador's continued designation as an ATPDEA beneficiary country.

Benchmarks on Freedom of Association and the Right to Organize

In October 2002, prior to receiving ATPDEA beneficiary country designation, the government of Ecuador committed to the U.S. government to improve enforcement of labor laws and review existing laws in order to assess their compliance with international standards, particularly in the area of freedom of association. Ecuador pledged to apply ILO recommendations and to consider submitting to its Congress for approval revised legislation to improve protection for the right to organize, possibly after requesting and receiving ILO technical assistance. Roughly five months later, the government of Ecuador has not fulfilled any of these commitments. Equally troubling is that it has not taken any meaningful steps towards making such improvements. No labor law reforms have been introduced. An ILO technical assistance mission has not been requested. Human Rights Watch believes that Ecuador should immediately take steps to uphold these October 2002 commitments and fully implement them within a reasonable time period, not to exceed three months, as a condition of maintaining ATPDEA beneficiary status. In order to achieve compliance with ATPDEA, Human Rights Watch believes the following benchmarks should be met.

- Ecuadorian law should be amended to explicitly prohibit employer interference in the establishment or functioning of workers' organizations. In particular, employers should be barred from engaging in any acts which would promote the establishment of employer-dominated workers' organizations, activities that are prohibited by article 2 of ILO Convention 98 concerning the Right to Organize and Collective Bargaining. Until the law is so amended, current law should be liberally construed to include this prohibition and be vigorously enforced.

- Labor law should be amended to require reinstatement of all workers—permanent workers, temporary workers, or workers with project contracts—who are fired for engaging in union activity and payment of lost wages during the period when the workers were wrongfully dismissed.

- In accordance with the ILO Committee on Freedom of Association finding that international law protection against anti-union discrimination covers the dismissal, recruitment, and hiring periods, the Ecuadorian Labor Code should be amended to prohibit explicitly employer failure to hire a worker due to her involvement in or suspected support for organizing activity and should establish adequate penalties to deter employers from engaging in anti-union discrimination. The Ministry of Labor should ensure that these protections are effectively enforced.

- The Ministry of Labor should strictly enforce the requirement that a temporary contract negotiated to meet an "increase in demand for production or services" not exceed 180 days, and the burden of proof should be placed on the employer to demonstrate a "meaningful" increase. In particular, employers should be explicitly prohibited from asserting the existence of such an increase for more than 180 consecutive days and from using consecutive, short-term temporary contracts adding up to more than 180 days to satisfy alleged demand increases. To these ends, as short-term contracts are often executed for less than full five-day work weeks, contracts for "180 consecutive days" should be understood as employment, for any number of days per week, for roughly twenty-six consecutive weeks.

• The Labor Code should be amended in order to allow subcontracted workers to organize and bargain collectively with the person or company for whose benefit work is realized if that person or company, in practice, has the economic power to dictate, directly or indirectly, the workers' terms and conditions of employment.

• The Labor Code should be amended to explicitly limit the percentage of subcontracted workers in any workplace to a maximum of 20 percent of the total number of workers.

• The Labor Code should be amended to reduce the minimum number of workers required to form a union, pursuant to the ILO's recommendations. Currently, a minimum of thirty workers is required.

• The Ministry of Labor should vigorously enforce both the letter and the spirit of the law that prohibits hiring replacement workers when a minimum of 20 percent of striking agricultural workers return to perform essential services. Although Ecuadorian law states that "*the employer* may contract substitute personnel" (emphasis added) only when workers refuse to perform these necessary services, the law fails to explicitly prohibit the hiring of such replacement workers by subcontractors or other third parties, who are not, legally, the striking workers' "employer." The law should be broadly construed to bar not only direct employment of replacement workers by "the employer" but employment of any replacement workers in a "workplace" where strikers have agreed to perform essential services.

• The Ministry of Labor should enforce the requirement that all project contracts for the performance of regular workplace activities, such as the everyday tasks of banana workers in packing plants and banana fields, last, at a minimum, for one year.

• In the few cases in which collective bargaining agreements have been negotiated on banana plantations, the Ministry of Labor should ensure that the terms and conditions of the agreements are applicable to all workers, temporary and permanent, regardless of whether they are affiliated with the workers' organizations party to the agreements, as required by Labor Code article 224 and a Supreme Court of Justice resolution that establish that a collective agreement protects all workers in a workplace.

Benchmarks in the Los Alamos Case

Prior to receiving ATPDEA beneficiary country designation in October 2002, the government of Ecuador committed to the U.S. government to establish a high-level commission to investigate the police response prior and subsequent to the anti-union violence on the Los Alamos plantations. The government also agreed to investigate the role of all parties in the arbitration and conciliation process convened to address the Los Alamos labor conflict; and the procedures adopted to address the striking Los Alamos workers' complaints.

Some four months after making this commitment, the high-level commission was constituted at the end of February 2003. However, the government failed to allocate funds for its operation; provided no full- or part-time staff to work exclusively for the commission; and failed to empower the commission with essential investigative tools, such as the power to subpoena individuals allegedly involved in the events or those who witnessed them. The governmental decree creating the high-level commission contemplated the inclusion of the Ministers of Labor, Interior, Foreign Affairs, and Social Welfare, in addition to civil society delegates. However, the Ministers of Interior, Foreign Affairs, and Social Welfare subsequently withdrew and left the commission with only one governmental and two active civil society representatives. Human Rights Watch believes that the commission has not been provided the human or financial resources necessary to undertake a serious and comprehensive investigation. Even with these limitations, we are concerned that the government of Ecuador will consider the matter closed once the commission concludes its work and will not act on its findings. To maintain ATPDEA beneficiary status, Human Rights Watch

believes that Ecuador must not only implement the recommendations contained in any high-level commission report, but meet the following benchmarks related to the Los Alamos labor conflict within a reasonable time period, not to exceed three months.

Illegal Use of Strikebreakers

• Ecuadorian law prohibits agricultural employers from hiring substitute personnel unless workers refuse to send a minimum of 20 percent of strikers back to work to perform essential services. This did not occur in this case. The Ministry of Labor should investigate whether the replacement workers laboring on the Los Alamos plantations were hired in violation of the law and, therefore, were illegal *rompe-huelgas*, literally translated as "strikebreakers." If, as alleged, the law was not upheld, the Ministry of Labor should ensure that the employers are sanctioned accordingly. Similarly, the Ministry of Labor should determine whether the Labor Directorate's order that roughly 31 percent of strikers resume work to perform necessary minimum services was enforced and, if not, take appropriate action to redress this violation of the law.

Employer Interference in Workers' Organizations

• The Ministry of Labor should investigate what methods were used by the Los Alamos employers in their failed attempt to form alternative pro-employer Special Committees, to obtain signatures to meet the quorum necessary to convene workers' assemblies to elect new Special Committee leadership, and, after resolution of the Labor Conflict, to pressure workers to renounce union membership. Such an investigation should examine whether legally employed workers were influenced by employers to sign their support for the alternative Special Committees or for convening new assemblies and whether any of the signatures obtained were those of illegally employed strikebreakers, ineligible to sign the petitions. If the investigation determines that the employers' actions violated the right of workers' associations to function free of employer interference, the Ministry of Labor should interpret such actions as violating Ecuadorian law and sanction the offending employers accordingly.

Police Response to Strikers

• An investigation should be undertaken to determine whether the police responded adequately to Los Alamos workers' explicit requests for police protection after they implemented their strike declaration on May 6, 2002 and to subsequent requests thereafter. The investigation should assess whether, overall, the police upheld their duty, set forth in Labor Code article 506, to "take all measures necessary to ensure order, guarantee the workers' and employers' rights, and prohibit the entry into the workplace of agitators and strikebreakers." If the investigation concludes that the police failed to sufficiently protect the striking workers, appropriate measures should be taken and striking workers should be compensated.

Criminal Investigation

In October 2002, prior to receiving ATPDEA beneficiary country designation, the government of Ecuador committed to the U.S. government to investigate thoroughly the May 16, 2002 anti-union violence on the Los Alamos plantations and to press charges against the responsible parties. The sixteen defendants arrested and prosecuted in connection with the May 16, 2002 anti-union violence have reportedly been convicted and the convictions appealed to a division of the Supreme Court. This prosecution and these convictions were based on a fundamentally flawed investigation, however, described in detail in the attached document. Even if the convictions of these sixteen defendants are upheld, justice will not have been served unless a new investigation takes place. Instead, those who may have contracted the roughly two hundred alleged perpetrators of the violence and all but sixteen of those perpetrators will enjoy impunity. Human Rights Watch believes that to maintain ATPDEA beneficiary status, Ecuador must meet the following benchmarks with regards to the criminal investigation into the anti-union violence and the prosecution of those responsible, understood as encompassed in Ecuador's October 2002 commitments to the United States.

• A new and comprehensive investigation of the anti-union violence should be initiated that, in contrast to the first investigation, examines the violence that unfolded at approximately 2:00 a.m., not solely at roughly 5:30 p.m.; the shooting injuries of at least nine banana workers, not solely the police officer; the roughly two hundred other perpetrators of the crimes and the possible contractors of the perpetrators, not solely sixteen men.

• A new and comprehensive investigation should include interviews with Los Alamos workers witness to the May 16, 2002 violence. The failure to include information from workers in the first investigation strongly suggests that none were interviewed.

• Those found responsible after a new investigation, should be prosecuted without delay and brought to justice

Benchmarks on the Worst Forms of Child Labor

Before receiving ATPDEA beneficiary country designation in October 2002, the government of Ecuador committed to the U.S. government to defend the rights of the child and fully comply with ILO Convention 182. The government of Ecuador, as well as the Ecuadorian banana industry, have taken several positive steps to address this problem. These steps, however, will not ensure that Ecuador's obligations to eliminate immediately harmful child labor in the banana sector are fulfilled because they do not adequately address the primary impediment to eradicating hazardous child labor in the banana sector—insufficient child labor law enforcement. Human Rights Watch believes that to maintain ATPDEA beneficiary status, Ecuador must meet the following benchmarks, understood as encompassed in Ecuador's October 2002 commitments to the United States.

• The Ministry of Labor, as required by Ecuadorian law, should designate at least one labor inspector for children in each province—a total of at least twenty-two inspectors. These Ministry of Labor, and, in particular, the recently created System for the Inspection and Monitoring of Child Labor, should receive sufficient funding and other resources to guarantee effective implementation of child labor laws through proactive monitoring and unannounced on-site inspections rather than reliance on a complaint-driven enforcement strategy. The child labor inspectors should receive specialized training to enforce child labor laws and should be hired in addition to, not in lieu of, existing labor inspectors.

• The Labor Code and new Code for Children and Adolescents should be amended to require that a portion of the fine assessed for violating child labor laws be dedicated to the rehabilitation of displaced child workers.

• In accordance with the proposal in the ILO Recommendation concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour that countries keep "detailed information and statistical data on the nature and extent of child labour," keep such information "up to date," and "[a]s far as possible, . . . include data disaggregated by sex [and] occupation," the Ministry of Labor, should commit to regularly update the data regarding the scope and scale of child labor in Ecuador's banana sector to be collected by IPEC through its baseline survey of that sector. Sufficient resources should be allocated, in particular to the System for the Inspection and Monitoring of Child Labor, to allow for the gathering, processing, and updating of this sector-specific data.

• The government should show progress in the implementation of the constitutional and Code for Children and Adolescents. In particular, there should be progress in implementing the provisions that mandate free and compulsory education for all children under fifteen. Mandatory school, book, and uniform fees should be waived or scholarship programs developed and made widely available for children whose families are

unable to afford them. Funds for such activities could, in part, be derived from the increased fines levied for violations of child labor laws.

LABOR RIGHTS ABUSES IN ECUADOR'S BANANA SECTOR

Harmful Child Labor

Introduction

Upon ratifying ILO Convention 182, Ecuador committed to eliminate "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children."[19] According to ILO Convention 182, such hazardous work shall be defined by "laws, regulations, or competent authority of the beneficiary developing country involved," considering "relevant international standards," including ILO Recommendation 190 concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour. ILO Recommendation 190 provides that, in determining the types of work to be considered hazardous, consideration should be given to:

a) work which exposes children to physical, psychological or sexual abuse;
b) work underground, under water, at dangerous heights, or in confined spaces;
c) work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads;
d) work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health;
e) work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer.[20]

Despite Ecuador's obligations under ILO Convention 182, Human Rights Watch found that, in Ecuador's banana sector, children labor in conditions described in ILO Recommendation 190, Article 3 (a), (c), (d), and (e)—evidence of Ecuador's failure to fulfill its international commitment to eliminate harmful child labor in that sector.

The Worst Forms of Child Labor

In May 2001, Human Rights Watch interviewed forty-five children who had worked or were working on banana plantations in Ecuador. Forty-one of them began working in the sector between the ages of eight and thirteen, most starting at ages ten or eleven. Fewer than 40 percent were still in school at age fourteen. They described workdays of twelve hours on average and hazardous conditions that violated their rights, as established in ILO Convention 182.

Seventeen of the forty-five children told Human Rights Watch that they handled insecticide-treated plastics used in the fields to cover and protect bananas, and fourteen reported that they directly applied fungicides to bananas being prepared for shipment in packing plants. Thirty-eight of the forty children with whom Human Rights Watch discussed aerial fumigation reported that they continued working while fungicides were sprayed from planes flying overhead. According to the U.S. Environmental Protection Agency, however, the minimum restricted entry interval (REI) —the time after aerial pesticide application when entry into the treated area should be banned— is four hours,[21] and three of the six most commonly

[19] ILO Convention 182, Article 3(d).
[20] ILO Recommendation concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour (Worst Forms of Child Labour Recommendation) (ILO Recommendation 190), June 17, 1999, Article 3.
[21] Penn State Pesticide Education Office. (No date). *EPA Worker Protection Standard for Agricultural Pesticides.* [Online]. Available: http://www.pested.psu.edu/act12.htm [August 4, 2001]; *2002 Midwest Commercial Small Fruit & Grape Spray Guide.* [Online]. Available: htttp://www.hort.purdue.edu/hort/ext/ sfg/default.html [February 4, 2002].

applied pesticides in Ecuador's banana sector have REIs of twenty-four hours, and one an REI of twelve.[22] In some cases, these children exposed to toxic pesticides were provided protective equipment; most often, they were not. They described the various adverse health effects that they suffered shortly after pesticide exposure, including headaches, fever, dizziness, red eyes, stomachaches, nausea, vomiting, trembling and shaking, itching, burning nostrils, fatigue, and aching bones.

Children also described to Human Rights Watch working with sharp tools, one reportedly using a knife, five using machetes, and fifteen using short curved blades. Twelve of these children stated that they had cut themselves with these sharp tools at least once. In addition, four boys explained that they hauled heavy loads of bananas, attaching harnesses to themselves, hooking themselves to pulleys on cables from which banana stalks hung, and using this pulley system to drag approximately twenty banana-laden stalks, weighing between fifty and one hundred pounds each, over one mile from the fields to the packing plants five or six times a day. Two of these boys stated that, on occasion, the iron pulleys came loose and fell on their heads, making them bleed.

In addition, three pre-adolescent girls, aged twelve, twelve, and eleven, described to Human Rights Watch the sexual harassment they allegedly experienced at the hands of the administrator of two packing plants where they worked. Their accounts were corroborated by an adult working in the same packing plants, who explained that there was "no respect" for the young girl workers.

Many of these same children also reported that the facilities in which they labored were unsanitary, lacking bathrooms and potable water. Eighteen children told Human Rights Watch that at least one of the plantations on which they had worked did not have a bathroom for workers to use. Boys explained that, in such situations, if they had to urinate, they went to the banana fields to do so, while several girls explained that they urinated in canals running through the plantations. Although most children stated that in the packing plants they had access to water they believed to be potable, some stated that there was no potable water for them to drink while working in the fields. Several explained that when they were thirsty, they went home to get water, and four reported that when they wanted water, they had to purchase water from small plantation stores. A few children described drinking water from the plantations' runoff canals, which drain excess water from the fields and catch plantation runoff, including pesticides, fertilizers, and human and animal waste.

Domestic Laws and Lack of Enforcement

Most of these human rights abuses suffered by children laboring in Ecuador's banana sector occurred in violation of Ecuador's domestic labor legislation. Ecuadorian law limits the number of hours minors can work, bars child workers from handling toxic substances or engaging in dangerous or unhealthy tasks, sets a maximum weight that can be transported by children,[23] and states that children have the right to protection from the State "from labor or economic exploitation and from any form of slavery, servitude, forced labor, or work harmful to their health, physical, mental, spiritual, moral or social development or that can interfere with the exercise of their right to education."[24] If applied and enforced with meaningful

[22] *2002 Midwest Commercial Small Fruit & Grape Spray Guide.* [Online]; Product Label. (October 9, 1998). *Benlate.* [Online]. Available: http://oaspub.epa.gov/pestlabl [August 9, 2001]; Product Label. (February 28, 2001). *Tilt.* [Online]. Available: http://oaspub.epa.gov/ pestlabl [August 9, 2001]; Extension Toxicology Network. (March 1, 2001); *Pesticide Information Profile: Mancozeb.* [Online]. Available: http://www.pmep.cce.cornell.edu/profiles [July 31, 2001]; see also Information Ventures, Inc., for the USDA, Forest Service. (November 1995). *Mancozeb Fact Sheet.* [Online]. Available: http://infoventures.com/e-hlth/pesticide/mancozeb.htm [August 3, 2001]; International Programme on Chemical Safety. (1993). *Mancozeb.* [Online]. Available: http://www.inchem.org/documents/icsc/ icsc/eics0754.htm [August 4, 2001].

[23] Labor Code, Articles 136, 138, 139.

[24] Code for Children and Adolescents, Article 81. The Labor Code similarly prohibits children from working in jobs that "constitute a grave danger to the moral or physical development" of children. Labor Code, Article 138.

sanctions, Ecuadorian laws governing child labor, therefore, could go a long way to preventing the worst forms of child labor. Nonetheless, the Ministry of Labor and the juvenile courts fail to fulfill their legally mandated responsibility to enforce child labor laws.

Under Ecuadorian law, the Ministry of Labor, through regional Labor Inspectorates, is responsible for ensuring that employers comply with child labor and other labor laws.[25] To these ends, the Ministry of Labor is required to designate one or more labor inspectors for minors in each province, which "may inspect, at any moment, . . . the conditions in which the work of minors is carried out."[26]

The new Code for Children and Adolescents, published in the Federal Register on January 3, 2003, increased the penalties that can be imposed for violation of any of the protections and prohibitions regarding child labor contained in the Code. Under the new Code, employers who violate child labor laws can face a fine of between U.S. $200 and U.S. $1,000.[27] More importantly, the Code provides for the closure of facilities that repeatedly violate those laws.[28]

Nonetheless, in May 2001, the director of labor inspectors for the coastal and Galápagos regions, Ecuador's banana-producing zone, explained to Human Rights Watch that, not only are there no inspectors for child labor but there are only thirteen labor inspectors for the entire banana producing region. Too understaffed to carry out meaningful preventative inspections, the Labor Inspectorate must rely on complaints to drive its enforcement of child labor laws. Furthermore, in March 2003, despite commitments made by the Ecuadorian government to increase and improve enforcement of child labor laws, there are allegedly still no inspectors for child labor.[29] Such a system does not enable the Labor Inspectorate to evaluate, even less to address and prevent, the human rights violations suffered by children working on banana plantations. The result of this institutional failure is the almost complete breakdown of the government bureaucracy responsible for preventing the worst forms of child labor in the banana sector.

Recent Developments

National Plan of Action for the Elimination of Child Labor 2003-2006 and IPEC

In November 2002, the National Committee for the Progressive Elimination of Child Labor (CONEPTI), in coordination with the ILO's International Program for the Elimination of Child Labor (IPEC), the United Nations Children's Fund (UNICEF), and others completed a draft of the National Plan of Action for the Elimination of Child Labor, 2003-2006 (Plan), which will be analyzed and revisited in light of the new Code for Children and Adolescents. To support and reinforce the implementation of the Plan, IPEC is formulating a Time Bound Program (TBP) proposal for Ecuador for 2003-2006,[30] allegedly yet to be submitted for funding. To formulate the TBP, IPEC has undertaken surveys of Ecuador's social policies and programs, child labor laws, and educational system, as well as baseline surveys to assess the scale and scope of harmful child labor in a number of sectors, including the banana sector. Although the banana sector baseline study was reportedly scheduled to conclude before the end of 2002, it has allegedly experienced delays and has yet to be concluded.

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[25] Labor Code, Article 553.
[26] Labor Code, Article 151.f.
[27] Code for Children and Adolescents, Art. 95.
[28] Ibid.
[29] Electronic communication from Andrés Dueñas, director, Program for the Protection and Education of Child Workers of the National Institute for Children and Families (INNFA), to Human Rights Watch, March 12, 2003.
[30] IPEC's TBPs are designed to "address the root causes of child labour" through "a set of tightly integrated and coordinated policies and programmes to prevent and eliminate a country's worst forms of child labour within a defined period of time." ILO, IPEC. (February 12, 2002). *Time Bound Programmes*. [Online]. Available: http://www.ilo.org/public/english/standards/ipec/ governments/index.htm [September 3, 2002].

Human Rights Watch applauds such efforts by IPEC and CONEPTI to address child labor and encourages IPEC to complete its proposed surveys and studies and develop and fully implement a TBP for Ecuador, with a special focus on the banana sector. Nonetheless, Human Rights Watch cautions that such programs only complement but do not replace effective government enforcement of child labor laws and notes that without the appointment of sufficient inspectors for child labor and the allocation of adequate resources for the System for the Inspection and Monitoring of Child Labor, neither the Plan nor IPEC's activities in Ecuador will, by themselves, ensure that Ecuador fulfills its obligations under ILO Convention 182.

Banana Industry Agreement on Child Labor

On July 23, 2002, the Ecuadorian banana industry signed an agreement committing to abide by existing child labor laws, create a Banana Industry Forum to develop policies for the elimination of child labor and work plans for the agreement's implementation, allow periodic visits to assess child labor in the sector, launch an information and education campaign to prevent child labor and promote children's health and education, and advance the reach and quality of education in the sector. While Human Rights Watch welcomes the drafting of an agreement to address the problem of child labor in Ecuador's banana sector, Human Rights Watch is deeply concerned about the substance of this agreement, the provisions for its implementation, and the process by which it was reached.[31]

For example, several of the substantive commitments in the agreement merely reiterate employers' current obligations under Ecuadorian child labor law. This is the case in paragraphs 2, 4, and 5, as well as paragraph 6, in which the industry promises to adopt an Ethical Social Code—whose requirements are already established law—compliance with which will be certified by a "social seal." Human Rights Watch believes that the agreement should clearly indicate when new commitments are being made and when the industry has agreed to abide by current laws. Moreover, any agreement to safeguard human rights should include provisions to report illegal acts to the appropriate authorities.

Human Rights Watch also has concerns regarding the agreement's overall implementation as well as administration of the "social seal." The CONEPTI is charged with monitoring compliance with the agreement. Yet until CONEPTI, in practice, is provided adequate resources and sufficient labor inspectors to effectively implement child labor laws, the CONEPTI will not likely have the capacity to monitor the agreement's implementation, which includes not only child labor laws but additional industry commitments. Therefore, an alternative, independent, objective oversight mechanism—such as a panel, including worker representatives, of independent experts on child labor and the banana industry—should be created to monitor and ensure compliance with the agreement until the CONEPTI can effectively do so. This oversight body should also be responsible for awarding the "social seal" through a transparent process that includes independent monitoring and unannounced inspections.

In addition, Human Rights Watch is concerned about allegations that workers' representatives were not adequately consulted when the agreement was negotiated nor invited to participate meaningfully in the drafting process. Human Rights Watch believes that this agreement has been compromised by the lack of worker involvement, as workers' full participation is essential to ensuring the success of any such initiative.

Human Rights Watch believes that unless the banana industry takes the necessary steps to address these shortcomings, the agreement could be an effective public relations exercise rather than a strong effort to safeguard human rights.

Creation of the System for Inspection and Monitoring of Child Labor

[31] Although banana industry representatives are the agreement's signatories, the Ministry of Labor, the Ministry of Education and Culture, IPEC, UNICEF, among others, signed as honorary witnesses.

In October 2002, the Ministry of Labor decreed the creation of a System for the Inspection and Monitoring of Child Labor (System) to be located within the CONEPTI. The decree mandates that the Ministry of Labor transfer to the System labor inspectors to focus solely on the enforcement of child labor laws and that the System's operations be financed through the national budget and other national and international contributions. The functions of the System include monitoring and enforcing compliance with child labor laws; gathering, updating, and processing general information, laws, and statistics on child labor; processing complaints and cases of child labor law violations and issuing case-specific resolutions to be submitted to the relevant authorities; and engaging in information and education campaigns on the dangers of child labor and the laws governing the problem.

Human Rights Watch applauds the creation of the System but is concerned by reports that, at this writing, the System still has no inspectors, no budget, and is still not operating. Human Rights Watch urges that the System begin immediately to fulfill its mandate, amended to address the following concerns. Human Rights Watch is concerned that the decree provides for the "transfer" of child labor inspectors from the Ministry of Labor's Labor Inspectorate, which, as discussed above, is already severely understaffed. Human Rights Watch urges the hiring of new labor inspectors for children. Human Rights Watch is also concerned that while the System is required to collect data on child labor, the data need not be disaggregated by occupation. Without reliable statistics defining the scope and scale of child labor by sector, it is difficult to design programs and allocate sufficient resources to effectively address the problem.

Adoption of New Code for Children and Adolescents

On January 3, 2003, the new Code for Children and Adolescents was published in the Official Register. The new Code raises the minimum age of employment to fifteen; increases the maximum fine for violating child labor laws, providing for the closure of facilities that repeatedly violate those laws; and generally establishes more specific and comprehensive norms for regulating child labor. Human Rights Watch applauds the adoption of the new Code and urges its full implementation.

Human Rights Watch is troubled, however, that the supervisor of the National Court for Minors and the lower juvenile courts—Dr. Oswaldo A. Moncayo Aguilar—has initiated a constitutional challenge to the new Code, asserting, among other claims, that the limitations on child labor, such as the establishment of a minimum age of employment of fifteen and work authorization requirements, violate children's "right to work" and to "have a future and better quality of life," as protected in the Constitution. As the juvenile courts and the National Court for Minors are charged, in part, with enforcing the new Code, Human Rights Watch is concerned that failure of Dr. Moncayo to support the Code's child labor provisions could lead to their ineffective enforcement.

Freedom of Association

Inadequate Domestic Laws and Lack of Enforcement

Despite the general language safeguarding workers' right to freedom of association, weak enforcement of existing laws and a number of crucial weaknesses and loopholes in those laws, including a thirty-worker minimum for workers' organizations, render these protections, in practice, virtually meaningless for banana workers and facilitate anti-union discrimination in the sector.

Employers who engage in anti-union discrimination face few, if any, significant repercussions. If an employer violates a worker's right to form a union or company committee or fails to respect a workers' organization but does not fire the worker for engaging in organizing activity, the employer's conduct can only be sanctioned with a fine of up to U.S. $200 if imposed by the regional Labor Directorate and up to

U.S. $50 if imposed by labor inspectors or labor courts.[32] Furthermore, only if Labor Code prohibitions of such conduct are liberally construed, is anti-union discrimination in hiring prohibited under Ecuadorian law. The ILO, however, has clearly stated that anti-union hiring discrimination violates worker' right to organize.[33]

In addition, if an employer dismisses a worker for union activity, the Labor Code does not require that the worker be reinstated. Instead, the law establishes a specific list of causes for which a worker can legally be terminated and requires that any worker fired for a reason not enumerated therein receive three months' pay if she has worked three years or less for the same employer and one month's pay for every year worked thereafter.[34] As union activity is not on the list of permissible causes for dismissal, an anti-union dismissal must be compensated with that same fine. Thus, there is no specific prohibition against an employer firing workers for engaging in union activities. Moreover, the ILO Committee of Experts on the Application of Conventions and Recommendations (ILO Committee of Experts), however, has explicitly found such a sanctions regime to be inadequate to protect freedom of association, explaining that the imposition of a fine "provided for by law in all cases of unjustified dismissal, when the real motive is . . . trade union membership or activity" is inadequate under international law.[35] Instead, the Committee of Experts has stated that because the remedy for anti-union dismissal should "compensate fully, both in financial and in occupational terms, the prejudice suffered by a worker as a result of an act of anti-union discrimination . . . [t]he best solution is generally the reinstatement of the worker in his post with payment of unpaid wages and maintenance of acquired rights."[36]

Furthermore, with only the threat of a minimal fine based on workers' wages and an estimated average monthly salary of between U.S. $110 and U.S. $150 for adult banana workers, the low fines can create a perverse incentive in favor of dismissing possible union supporters and paying the fine—often less than U.S. $400—as a cost of business instead of allowing unions to form.[37] These minimal penalties and others established for other anti-union employer conduct fall short of those recommended by international legal bodies and fail to deter employers from retaliating against workers who exercise the right to organize.

In addition, although article 2 of ILO Convention 98 concerning the Right to Organize and Collective Bargaining, which Ecuador ratified on May 28, 1959, states that "workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration," and, "[i]n particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to

[32] Labor Code, Article 626. The IMF has also noted that in Ecuador, "the punishment for noncompliance with labor legislation is relatively low." IMF, "Ecuador: Selected Issues and Statistical Annex," *IMF Staff Country Report No. 00/125* (October 2000), p. 57.

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

[34] Labor Code, Article 188.

[35] International Labour Conference, *1994, Freedom of association and collective bargaining: Protection against acts of anti-union discrimination, Report of the Committee of Experts on the Application of Conventions and Recommendations*, 81st Session, Geneva, 1994, Report III (Part 4B), paras. 220, 21.

[36] Ibid., paras. 219.

[37] Labor Code, Articles 459, 462. The indemnity for dismissing a union organizer is only greater if the dismissed worker is a member of a union's elected leadership or if the workers at her workplace have just organized and notified the Labor Inspector but not yet selected union leadership. In such cases, the worker enjoys special union protection, *fuero sindical*, and the fine due is one year's salary, averaging roughly U.S. $1,300 for banana workers. However, reinstatement is still not required. Ibid., Article 187.

constitute acts of interference,"[38] Ecuadorian law does not explicitly prohibit such conduct. The Labor Code states in article 42 (1) that employers must "respect workers' associations" and in article 44(f), (j) that employers must not "obligate a worker, by any method, to withdraw from the association to which he belongs or to vote for a determined candidate" and must not violate the right to free realization of union activities, yet these proscriptions do not explicitly prohibit the actions described in ILO Convention 98, article 2. To cover such actions, these articles would have to be construed very broadly, and, Human Rights Watch has learned that, in practice, they are not.

Employers also exploit ambiguous provisions in the Labor Code regarding employment contracts and use consecutive short-term contracts and multiple "project contracts," one after the other, for many months or years on end, to hire workers year-round to perform everyday tasks on plantations. A vulnerable and precarious "permanent temporary" workforce is thereby created, excluded from even the weak legal protections governing freedom of association. Because they are not permanent, they have no legal expectation that their jobs will extend beyond the few days or weeks for which they are officially hired. Therefore, their employers are not bound by Labor Code provisions that prohibit anti-union dismissals—if temporary workers are suddenly told not to return to work the following day or week, they have not technically been fired; they have simply not been rehired. And, as discussed, the Labor Code does not explicitly prohibit anti-union discrimination in rehiring.

Plantations also make prolific use of subcontracted temporary labor, erecting often prohibitive obstacles to workers' exercise of their right to freedom of association. Subcontracted temporary workers generally labor in work teams, frequently with fewer than the thirty workers required for organization, and, unlike "permanent temporary" workers, are employed by a third-party contractor rather than the corporate or individual owner of a plantation. Like "permanent temporary" workers, temporary subcontracted workers lack employment stability. In addition, however, subcontracted workers have no legal right to organize and then collectively bargain with the companies or employers benefiting from their labor—though the companies may determine their wages, benefits, and working conditions. These subcontracted workers are, instead, able to organize and negotiate collectively only with their subcontractors.

Together, these factors have largely stifled organization of banana workers in Ecuador and rendered the constitutionally and internationally protected right to organize a fiction for most in the sector. Workers with whom Human Rights Watch spoke understood that their right to freedom of association is not, in practice, protected by the Labor Code. The risks inherent in organizing were very clear to workers, particularly temporary workers, and they described a pervasive climate of fear in the sector that deterred them and others from organizing—fear of dismissal, of being labeled "troublemakers," and of being blacklisted.

So great are this deterrent and the impediments to and risks in exercising the right to freedom of association, that organizing efforts in the sector have been rare. Prior to the Los Alamos organizing drive, which began in February 2002 and involved seven banana plantations and roughly 1,400 workers, the last concerted attempt to organize banana workers occurred more than five years ago. Workers had successfully

[38] ILO Convention concerning the Right to Organize and Collective Bargaining (ILO Convention 98), 96 U.N.T.S. 257, July 18, 1951, Article 2.

organized on only roughly five of the more than 5,000 registered banana plantations in Ecuador,[39] and only about 1,650 of the roughly 120,000 to 148,000 banana workers were affiliated—approximately 1 percent.[40]

The Los Alamos Case

In February 2002, workers on the Los Alamos banana plantations began an organizing drive, and in early March, they petitioned the Ministry of Labor to recognize their recently formed union. Shortly thereafter, approximately 123 Los Alamos workers were reportedly fired illegally, among them over a dozen union organizers. Although some workers were eventually allowed to resume their posts, others, including the union organizers, were reportedly not rehired. In late April, after workers had successfully addressed the Ministry of Labor's concerns with their union recognition petitions, the Ministry of Labor recognized three trade unions of Los Alamos workers, one union for each plantation operator—Nenro S.A., Beducorp S.A., and Cliadi S.A. As legally required, the Labor Inspectorate notified the three plantation operators of the workers' official demands, which had been submitted with their requests for union recognition. The plantation operators allegedly refused to negotiate in good faith with the unions, however, claiming that the demands were not supported by over 50 percent of the workers and were therefore invalid. On May 6, largely in response to these circumstances, the workers of Los Alamos implemented their strike declaration, which had been submitted on March 26. Though a workers' organization supporting the striking banana workers allegedly requested police protection for the striking workers, none arrived until violence erupted on May 16.

At approximately 2:00 a.m. on the morning of May 16, roughly 200 hooded, armed men entered the Los Alamos plantation group, where workers living on the plantations were sleeping. Several eyewitnesses claimed to have seen a vehicle from another plantation also owned by the Noboa corporation accompanying the hooded men. Reports indicate that the men banged on workers' doors with rifle butts, dragged roughly eighty of them from their homes, hit many with rifle butts, insulted them, looted their homes, and told many that they would be killed and dumped into the river. The hooded men also fired at at least one striking worker, injuring him critically and causing the subsequent amputation of his leg. Approximately six hours later, about six policemen reportedly arrived at the plantations. The armed men remained on the Los Alamos premises throughout the day on May 16 and into the early evening, at which time they allegedly told all striking workers to leave the premises by 6:30 p.m. or be forcibly evicted. Shortly after 6:00 p.m., with the workers showing no sign of leaving, the armed men allegedly began shooting, critically injuring one worker and injuring several others and a policeman. Roughly nine workers suffered gunshot wounds that day. Reports indicate that by 8:00 p.m., police reinforcements finally arrived and arrested sixteen of the armed men. Workers report that a police presence remained on the plantations for roughly one month.

The sixteen men arrested were detained and held in jail in the town of Milagro, roughly forty miles east of Guayaquil. They were released twenty-four hours later pursuant to writs of habeas corpus.[41] On May 20, three employees of Cliadi filed a complaint with the prosecutor's office in the canton of Naranjal, where the Los Alamos plantations are located, recounting the events of May 16 and requesting a thorough investigation and the arrests and prosecution of not only the direct perpetrators but also the intellectual authors of the crimes.

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[39] Human Rights Watch interview, Franklin Zambrano, secretary general, National Federation of Free Farmworkers and Indigenous Peoples of Ecuador (FENACLE), Naranjal, May 20, 2001; Human Rights Watch interview, Guillermo Touma, president, FENACLE, Quito, May 8, 2001; Human Rights Watch interview Patricio Contreras, Ecuador representative, AFL-CIO's Solidarity Center, Washington, DC, April 24, 2001

[40] Guillermo Touma and Franklin Zambrano provided Human Rights Watch with estimates of the number of affiliates in each of the five workers' organizations. Human Rights Watch interview, Franklin Zambrano; Human Rights Watch interview, Guillermo Touma.

[41] According to Ecuador's Code of Criminal Procedure, articles 161 and 165, respectively, an individual detained in the act of committing a crime must be turned over to a judge within twenty-four hours and an individual detained pursuant to a criminal investigation must be charged within twenty-four hours.

In October, the prosecutor of Naranjal finished his criminal investigation and, pursuant to article 225 of the Code of Criminal Procedures, submitted to a criminal judge an order determining that "the results of the investigation produce relevant information regarding the existence of a crime." The trial of the sixteen accused reportedly went forward, resulting in convictions, which have been appealed to a division of the Supreme Court, where they are reportedly pending.

The convictions, however, were based on the incidents and charges set forth in the prosecutor's order, which omits the violent incidents that unfolded at approximately 2:00 a.m., referring only to incidents that occurred at roughly 5:40 p.m. on May 16; names only sixteen perpetrators, though reports from workers allege that roughly two hundred hooded, armed individuals invaded the Los Alamos plantations and engaged in the illegal activities described above; fails to mention any possible intellectual authors of the crimes alleged; omits eight of the nine workers injured, indicating only that one policeman was injured and that, according to a Guayaquil newspaper, one worker was also shot[42]; and fails to include any information gathered from Los Alamos workers, strongly suggesting that none were interviewed. As a result, unless another case is opened and the prosecutor initiates another investigation, those who may have organized the roughly two hundred persons involved in the violence and all but sixteen of the perpetrators will enjoy impunity.

On June 6, 2002, according to workers' representatives, the Ministry of Labor's Labor Directorate, under its authority defined in Labor Code article 522, ordered roughly 31 percent of the striking workers back to work to perform the minimum services necessary to ensure that the fruit on the Los Alamos plantations was harvested, as required by law, which states that a minimum of 20 percent of striking workers must return to perform such essential services.[43] Employers reportedly failed to follow the Labor Directorate's order and, instead, permitted only roughly 60 of the approximately 1400 striking workers to return to work—only about 4.3 percent of striking workers. In addition, the three plantation operators reportedly had hired new substitute workers shortly after the commencement of the strike. Article 522 of the Labor Code, which governs this issue, however, states that "the employer may contract substitute personnel" only when striking workers refuse to send a minimum of 20 percent back to work to perform necessary services. As the replacement workers on Los Alamos were allegedly hired by the striking workers' employers—Cliadi, Nenro, and Beducorp—they were illegally hired and, therefore, are illegal *rompe-huelgas*, literally translated as "strikebreakers." An organization supporting the striking workers reportedly requested that police remove the *rompe-huelgas*, and, when they failed to do so, submitted the request to the Ministry of Interior. Neither request was allegedly honored, however.

Several weeks after the May 16 violence described above, the Labor Inspectorate convened three arbitration and reconciliation panels, one each for Cliadi, Nenro, and Beducorp, each composed of two worker representatives, two employer representatives, and one representative from the Labor Inspectorate, to facilitate the negotiation of agreements between the workers and their employers with respect to the terms and conditions under which collective bargaining would commence. Under Ecuadorian law, the worker and

[42] Ecuador's former Attorney General stated that she was not aware that any workers were injured in the case. She also claimed to have little to no knowledge of the case's details, explaining that it is a minor case and only one of many under her jurisdiction.

[43] The former head of the Labor Directorate argued that the workers illegally occupied the plantations before ensuring that the minimum essential services were regulated and an inventory taken of the plantations, as required by law. Nonetheless, the Labor Code places the responsibility on the Labor Ministry to fulfill these conditions, requiring in article 506 that, after strike declaration, the Labor Inspectorate take an inventory of the premises on which the strike will be realized and, in article 522, requiring the Labor Directorate to regulate the minimum essential services. The former head of the Labor Directorate explained, however, that the workers, in fact, are responsible for pressuring the Ministry of Labor to ensure that these requirements are met.

employer representatives are to reach an agreement with regards to such terms and conditions, which will be binding and which will then lead to good faith collective negotiations.

Shortly after the commencement of the arbitration and reconciliation panel process in June, the three employers attempted to form alternative "Special Committees"—committees that represent workers' interests before the panels. Unconfirmed worker reports indicate that, to obtain signatures in support of the alternative Special Committees, employers required workers to sign blank pieces of paper in order to receive their weekly salaries and used signatures from individuals not legally employed by the Los Alamos plantations, such as strikebreakers. Notarized petitions were submitted to the panels, requesting that the Special Committees, allegedly formed pursuant to June 14 assemblies, replace the original Special Committees and that the workers' demands be withdrawn. All three panels rejected the petitions requests, however, on the grounds that, as three Special Committees already existed to represent workers, alternative committees could not legally be formed to supplant the pre-existing committees.

The three plantation operators reportedly then facilitated the convening of three new workers' assemblies to elect new leadership for the pre-existing Special Committees. Workers allege that the assemblies were never held. Nonetheless, notarized documents were again prepared alleging that on August 2, over 50 percent of the workers from each workplace held assemblies and elected new Special Committee leaders. According to unconfirmed reports from workers' representatives, the employers, in some cases, pressured workers into signing the petitions supporting August 2 assemblies. In addition, many of the signatures obtained were reportedly those of illegal *rompe-huelgas* ineligible to sign such petitions. Furthermore, the newly elected leaders of the three Special Committees were, reportedly, also *rompe-huelgas* and also ineligible to be Special Committee leaders. Nonetheless, the notarized documents were submitted to the panels, requesting that the newly elected leaders be recognized as the Special Committee leadership and that the workers' March 11 demands against their employers be withdrawn.

The striking workers challenged these requests before the panels. The workers argued that to convene new assemblies to elect new Special Committee leadership, 50 percent plus 1—a quorum—of those original workers who initiated the conflict through the submission of the demands against their employers must have signed petitions supporting the new assemblies and that, in this case, this had not occurred. On August 30, two of the three arbitration and reconciliation panels described above rejected the new leaders' petitions, allegedly on these grounds. On September 13, the third panel did the same.

According to Los Alamos workers, after these panel determinations, the nine leaders of the Special Committees and their families were allegedly repeatedly threatened that they would face dire consequences if the leaders did not support the withdrawal of negotiating demands. Workers explained that the leaders were offered large sums of money, up to $3,000, to reject the demands. Workers also allege that employers pressured workers to sign blank sheets of paper, converting these signatures into requests to withdraw support for the March 11 negotiating demands.

On September 19, the three panels declared the Los Alamos workers' demands against their employers null and void on the grounds that workers failed to demonstrate majority support for the demands, as required by Ecuadorian law. The workers appealed the panels' rulings, though they reported that their efforts to gather signatures in support for their appeals were impeded by employers representatives, who were also circulating papers for the workers to sign, stating "sign here if you are with the company," and "if you are with the workers' union, out." During the week of October 21, superior arbitration and reconciliation panels, convened to address the workers' appeals, upheld the lower panels' decision to nullify the workers' demands, based on failure to demonstrate majority support.

Despite the panels' rulings to the contrary, however, workers claim that the Special Committees formed to support the March 11 demands demonstrated majority worker support. Specifically, workers

report gathering signatures from 160 of the 304 workers employed by Cliadi; 177 of the 292 workers employed by Beducorp; and 197 of the 340 workers employed by Nenro. To determine the number of total workers employed by each Los Alamos employer, the workers relied on Ecuadorian Social Security Institute (IESS) employee lists from January 2002, registered in February, which they claim were the most recent lists available to them at the time.

In contrast to the workers' claims, the panels ruled that the workers presented roughly 179 signature in support of the demands against Cliadi, but that only fifty-one were among the 399 Cliadi employees; presented 177 signatures in support of the demands against Beducorp, but that only sixty-five were among the 397 Beducorp employees; and presented roughly 142 signatures in support of the demands against Nenro, but that only forty-five were among the 387 Nenro employees.[44] In reaching their determination, the panels relied on IEES employee lists from February 2002, registered in March.

The panel presidents admitted that the January IESS lists were likely the most recent lists available to the workers at the time they submitted their demands and, therefore, the only lists on which they could have relied when attempting to gather signatures to form Special Committees. The panel presidents explained, however, that the discrepancy between the two lists is minimal and could in no way be a factor in the workers' alleged failure to gather sufficient signatures. The panel presidents also noted that, according to their lists, Cliadi employed 366 workers in January, as compared to 399 in February; Beducorp employed 366 workers in January, as compared to 397 in February; and Nenro employed virtually the same number of workers in both months, roughly 387. The presidents emphasized that regardless of whether the January or February IESS lists were used as reference, the workers had failed to gather signatures from 50 percent plus one of the workers employed by each operator.

[44] Many of the signatures submitted by the workers were also invalid due to failure to include workers' identification numbers and failure to obtain fingerprints when workers were unable to sign their names. Also, in some cases, no signatures accompanied the listed names, and, in others, several signatures appeared to have been signed by the same person.