BEFORE THE UNITED STATES
TRADE REPRESENTATIVE

PETITION TO SUSPEND ECUADOR FROM THE LIST OF BENEFICIARY DEVELOPING COUNTRIES UNDER THE ANDEAN TRADE PROMOTION AND DRUG ERADICATION ACT ("ATPDEA")

not gsp not in shea

SUBMITTED BY:
AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO)

SEPTEMBER 15, 2003

Introduction

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) submits this petition, pursuant to 15 CFR 2016.0, to suspend the designation of Ecuador as a beneficiary developing country under the under the Andean Trade Promotion and Drug Eradication Act (ATPDEA).

Pursuant to Section 203(e)(1) of the Andean Trade Preference Act (ATPA) as amended by the ATPDEA (19 U.S.C. §3202(e)(1)(B)), the President has the authority to:

> (i) withdraw or suspend the designation of any country as an ATPDEA beneficiary country, or
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> (ii) withdraw, suspend, or limit the application of preferential treatment under section 204(b)(1), (3), or (4) to any article of any country,
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> if, after such designation, the President determines that, as a result of changed circumstances, the performance of such country is not satisfactory under the criteria set forth in section 204(b)(6)(B).

Section 204(b)(6)(B) of the ATPA, as amended by the ATPDEA (19 U.S.C. §3203(b)(6)(B)), requires the President to take into account the following criteria in making such eligibility determinations:

> (iii) The extent to which the country provides internationally recognized worker rights, including- (I) the right of association; (II) the right to organize and bargain collectively; (III) a prohibition on the use of any form of forced or compulsory labor; (IV) a minimum age for the employment of children; and (V) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.
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> (iv) Whether 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.

Since Ecuador's designation as a beneficiary developing country under the ATPDEA, the Government of Ecuador (GOE) has failed to provide internationally recognized worker rights as required by U.S. law, by Ecuador's commitments under the International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work and ratified ILO conventions, and by its national Constitution.

The AFL-CIO submitted comments to USTR on September 16, 2002 regarding the proposed designation of Ecuador as a beneficiary developing country under the ATPDEA. Supplemental comments were submitted on March 27, 2003. Those comments are incorporated by reference into this petition.

Freedom of Association and the Right to Organize and Bargain Collectively

Extensive and systematic violation of freedom of association and of workers' rights to organize and to bargain collectively are documented in the comments submitted to USTR by the AFL-CIO and in the comments and materials submitted by Human Rights Watch and other organizations.

Prior to receiving designation as a beneficiary developing country in October 2002, the GOE committed to review its labor laws for compliance with ILO standards, particularly in the area of freedom of association.[1] The GOE indicated that it would submit legislation to reform its laws, possibly with technical assistance from the ILO.

In the intervening 11 months, the GOE has failed to fulfill even these weak promises. The GOE has failed to effectively investigate and prosecute the perpetrators of anti-union violence committed on the Los Alamos plantations in May 2002. As detailed in the petition of Human Rights Watch,[2] the investigation and prosecution of these crimes have been incomplete and deeply flawed, the perpetrators have not been jailed, and the recommendations of the high-level commission established by the GOE to investigate the matter have not been implemented.

The government has failed to pass and implement legislation to address the key obstacles to freedom of association and collective bargaining identified in the AFL-CIO and Human Rights Watch comments.

The GOE continues to disregard the repeated calls of the ILO Committee of Experts to reduce from 30 the minimum number of workers required to form a union or works committee (sections 450, 459, 466 of the Labor Code).[3] This unacceptably high statutory threshold denies organizing and bargaining rights to workers in more than 80% of the country's workplaces.[4]

Moreover, even this threshold continues to be routinely circumvented through subcontracting.[5] Legislation to apply freedom of association and collective bargaining

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[1] Ecuador has ratified International Labor Organization (ILO) Conventions 87 and 98. Under Article 163 of the Ecuadorian Constitution, ratified Conventions take precedence over provisions of national law.

[2] Human Rights Watch, *Petition Regarding Ecuador's Eligibility for ATPDEA Designation*, September 15, 2003. The AFL-CIO endorses and incorporates herein by reference the arguments set forth in the Human Rights Watch petition.

[3] ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), *Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise* (2003), para. 1.

[4] ILO, Multidisciplinary Technical Team for the Andean Countries, *Tendencias y contenidos de la negociacón colectiva: fortalecimiento de las organizaciones sindicales en los países andinos* (Lima, 1998), available at www.oitandina.org.pe/publ/regional/doc88

[5] "Some companies have taken advantage of the law that prohibits unions from organizing at companies that have less than 30 employees by sub-contracting with several shell companies, each of which has less than 30 workers. Under the Labor Code, these subcontracted workers have no legal right to freedom of association or right to bargain collectively with the companies that ultimately benefit from their labor, nor

obligations to subcontractors, a key recommendation of the high-level commission formed by the GOE in response to international condemnation of the attacks on banana workers at the Los Alamos plantations in May 2002, has not been introduced. A draft decree, provided to the U.S. government but not made public to, or subjected to consultations with, Ecuadorian unions, repeats existing language in the Constitution (Art. 35(11)) and Labor Code (Art. 41) that holds employers and subcontractors jointly liable for labor law violations suffered by employees of the subcontractors. However, Ecuadorian courts have hitherto not interpreted these provisions to give employees of subcontractors the right to bargain collectively with the primary employer, and the draft decree fails to explicitly guarantee these rights. The draft decree would also limit the percentage of subcontracted workers to 40% of the primary employer's total workforce.[6]

The use of subcontracting to impede union organizing was amply demonstrated at the Los Alamos plantations where unions were organized in 2002 at the three subcontractors of Noboa Corporation that managed the plantations (Beducorp, Cliadi, and Nenro). In addition to unleashing a campaign of violence and intimidation, Noboa responded by creating an additional 16 subcontractors, all under its direct control and each having fewer than 30 employees, effectively precluding further organizing attempts.

The GOE has done nothing to remedy the lack of effective sanctions for anti-union dismissals. Ecuadorian law lacks a reinstatement remedy, effectively allowing employers to dismiss union organizers at will provided they pay indemnification. This is exactly what occurred at Los Alamos in June of this year when the employees of Beducorp, Cliadi, and Nenro presented collective bargaining proposals to their employers. All 70 union members were locked out and subsequently dismissed. Despite a legal requirement that workers dismissed after presenting bargaining proposals receive a year's salary in addition to the required severance pay for unjust dismissals, and despite extensive intervention of the Labor Ministry, the workers ended up settling for 3.5 months rather than the required 12 months. The net result is that the employer has avoided collective bargaining, busted the unions, fired the members, and paid far less than the law requires – in a case that was closely monitored by both the Ecuadorian and US governments. Without a legal remedy of reinstatement for anti-union dismissals, employers will continue to act with impunity. In the words of an Ecuadorian Labor Ministry official, "this is the Third World - sometimes the law can't be enforced."[7]

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do they have legal protection against anti-union discrimination." USTR, *First Report to the Congress on the Operation of the Andean Trade Preference Act as Amended*, April 2003.

[6] In any case, the statute provides that a *country*, not a branch of government, has the obligation to provide internationally recognized worker rights to its citizens. Had the U.S. Congress considered the unilateral proposals of a single branch of government to meet the statutory standard, it could easily have said so in the ATPDEA legislation, but it did not. Rather, Congress placed the burden of compliance on the entire government of a country seeking beneficiary status. The Trade Policy Staff Committee's own precedents demonstrate that proposing or even enacting legal reforms is not necessarily sufficient to preclude the acceptance of a worker rights petition. For example, a 1992 Generalized System of Preferences (GSP) petition on Guatemala was accepted even after the passage of labor law reforms. (GSP Subcommittee of the Trade Policy Staff Committee, 1992 GSP Annual Review, Worker Rights Review Summary, Case no. 005-CP-92, Guatemala, July 1993).

[7] John Otis, "Ruled by Fear, Banana Workers Resist Unions," *Houston Chronicle*, September 14, 2003.

Similar repression of union organizing efforts has occurred in the cut flower industry, where there are only 300 unionized workers out of a total of some 50,000. Unions active in attempts to organize in the flower-producing region of Cayambe have reported violations of collective bargaining agreements (at Agrocapital and Rosas del Ecuador), non-payment of wages (at Aviflor S.A.), and dismissal of at least 424 workers without cause, payment of severance, or any kind of legal proceeding (at Inlandes, Nabila Flowers, Shamir Flowers, Malmaison Flowers, Florecal, Flores del Rocio, Meadow Flowers, D'Astro Flowers, and Floricola Santa Lucia).[8] At Floricultura Agrocapital, the works committee presented a collective bargaining demand in November of 2002. The company has refused to bargain, and the manager and president of the company resorted to submitting a false letter of resignation to avoid legal responsibility.

The GOE *has* introduced a labor law reform bill, but the effect of this legislation would be to undermine, not strengthen, worker rights. The ILO has repeatedly identified Ecuador's denial of the right to organize and to strike to public employees (Article 45(10) of the Constitution and sections 59(f) and 60(g) of the Civil Service and Administrative Careers Act) as a violation of Convention 87.[9] Yet the proposed reform legislation, introduced by the GOE as part of its agreement with the International Monetary Fund,[10] goes further in undermining the rights of public employees by prohibiting union activities during working hours (Art. 26(b)), banning strikes in public services including health care, education, social security, electrical energy, water, petroleum public transport and telecommunications (Art. 26(g)), and extending the probationary period to six months (Art. 72). In addition, the proposed civil service reform law would supersede existing collective bargaining agreements in state enterprises by imposing a $10,000 limit on severance payments (the chief legal mechanism used to deter firing without cause) and subjecting all collective agreements to review by the Attorney General. These provisions violate both Article 35(12) of the Ecuadorian Constitution and ILO Convention 98.

Without waiting for approval of this legislation, the GOE has already moved to dismantle the petroleum workers' unions that carried out a strike in June. The state petroleum corporation, Petroecuador, has refused to bargain with the unions since January over renewal of their collective agreements. When workers struck to protest this refusal, the government discharged 53 workers without severance, most of whom are leaders of the national petroleum workers' federation FETRAPEC and its affiliates CETRAPIN, CENAPECO, CETAPE, and CENAPRO. These dismissals expressly violated Articles 55-57 of the collective bargaining agreement, which require negotiation over disciplinary measures.[11]

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[8] *Informe de actividades de la coordinadora FETRALPI-CEOSL de Cayambe*, July 26, 2003.

[9] *See* ILO CEACR, *Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise* (2003), para. 3 and ILO Committee on Freedom of Association, Report No. 327, Case No. 2138 (2002), para. 541.

[10] The GOE committed to reduce employment in the public sector and achieve a lower nominal wage bill in 2004 compared with 2003. *See* Ecuador-Letter of Intent, Supplement to the Memorandum of Economic Policies, and Technical Memorandum of Understanding, July 23, 2003 (available at www.imf.org).

[11] Letter from FETRAPEC to Labor Commission of the National Congress, August 13, 2003. The GOE has stated to the IMF that it is "fully committed to a fundamental restructuring of the petroleum sector"

Other recent cases demonstrate the GOE's disregard for collective bargaining principles. In the case of Cerveceria Andina, S.A., the employer refused to pay wage increases required under clause 47 of the collective bargaining agreement, which requires that all government-mandated increases be matched by the employer. The Labor Ministry issued a resolution in June 2000 which ordered payment of only a part of the back wages. But when the enterprise committee took its complaint to the ILO Committee on Freedom of Association, the Government "simply stated that it knows unofficially of a conflict between the employers and the workers, but that it is not possible to provide the relevant information, since the agreements reached by the employers and workers have not been sent to the Ministry of Labour." Finding this response inadequate, in June 2002 the Committee asked the Government to take measures to investigate and, if the allegations are found to be true, to ensure that the relevant collective agreement is observed.[12]

In the case of the Municipal Water Company of Quito (EMAAP-Q), the employer attempted to unilaterally nullify a similar contractual clause requiring it to match government-decreed wage increases. The regional labor director ruled in favor of the employees, but the company refused to adhere to this ruling and the case was referred to an Arbitration and Conciliation Tribunal. However, rather than resolving the dispute as required by Article 35(13) of the Constitution and Article 475 of the Labor Code, the Tribunal in its first session ordered the immediate archiving of the complaint. The Tribunal cited Article 240 of the Labor Code, which gives the power to archive a complaint of violation of a collective agreement to the labor inspector, not the tribunal.[13]

The Ecuadorian Confederation of Free Trade Union Organizations (CEOSL) has presented a labor law reform proposal to the Labor Commission of the Congress that would rectify the most serious violations of freedom of association and collective bargaining rights. To date the Executive has not endorsed these reform proposals. The only significant legislative action that has occurred since October 2002 is the approval of a law that would substitute oral hearings for written proceedings in labor tribunals.[14] This reform, however, was drafted by the President of the Labor Commission with no involvement from the Executive Branch.

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through "efficiency improvements in the company" and increased private sector participation. Circumventing collective bargaining would appear to be one of the "efficiency improvements." *See* Ecuador-Letter of Intent, Supplement to the Memorandum of Economic Policies, and Technical Memorandum of Understanding, July 23, 2003 (available at www.imf.org).

[12] ILO Committee on Freedom of Association, *Complaint against the Government of Ecuador presented by the Ecuadorian Confederation of Free Trade Union Organizations (CEOSL)*, Report No. 327, Case No. 2138 (2002), para. 540.

[13] Article 240 has been criticized by unions on the grounds that it gives labor inspectors broad discretion to treat claims of violations of a collective bargaining agreement as proposals to modify the agreement that must be archived until the agreement is re-negotiated rather than resolved at the time the violation occurs.

[14] *Ley reformatoria del Codigo del Trabajo, mediante la cual se establece el procedimiento oral en los juicios laborales*, Registro Oficial, No. 146, August 13, 2003.

Child Labor

As described in the Human Rights Watch petition, the GOE has failed to take effective measures to enforce national laws and international obligations concerning child labor. Nearly 18 months after the Human Rights Watch report, the National System for Inspection and Monitoring of Child Labor has only three inspectors for the country's 22 provinces and has conducted no inspections in the banana industry.

Conclusion and Recommendations

For the reasons set forth above, the AFL-CIO calls on USTR to suspend the designation of Ecuador as an ATPDEA beneficiary country until such time as the GOE demonstrates that it has made substantial and meaningful progress to bring its labor laws and enforcement into compliance with the workers' rights requirements of the ATPDEA. At a minimum, such progress should include:

1. Reform of the Labor Code to provide for:
    a. Reinstatement of all workers fired for engaging in union activity and the payment of lost wages during the period when the workers were wrongfully dismissed;
    b. The right of 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;
    c. Limiting the percentage of subcontracted workers in any workplace to a maximum of 20 percent of the total number of workers; and
    d. Reducing from thirty to ten the minimum number of workers required to form a union.

The Government should endorse the reform proposal put forward by CEOSL and work to secure its approval in the Congress.

2. With regard to the Los Alamos conflict:
    a. Implementation of the recommendations of the high-level commission; and
    b. A complete investigation and effective prosecution of the parties responsible for the anti-union violence of May 2002.

3. With regard to child labor:
    a. Compliance with the legal requirement to have one child labor inspector per province; and
    b. Compliance with the other benchmarks set out by Human Rights Watch.