

# American Federation of Labor and Congress of Industrial Organizations



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## Testimony of Celeste Drake AFL-CIO Trade & Globalization Policy Specialist Hearing on “Human Rights in Colombia” Tom Lantos Human Rights Commission October 24, 2013

### I. Introduction

The AFL-CIO, on behalf of its 57 affiliated unions, appreciates this opportunity to testify on human rights issues in Colombia. We represent workers across all economic sectors, from manufacturing to mining to services. Collaborating with working people around the world, we work to improve labor laws, increase compliance with labor provisions of trade and preference agreements, and empower workers to improve their own lives and conditions of work.

The World Bank classifies Colombia, with nearly 48 million inhabitants, as an upper middle income country—but notes that more than 34 percent of its population lives at or below the poverty line.<sup>1</sup> The Department of State reports that its most significant human right abuses include “impunity, an inefficient judiciary, corruption, and societal discrimination” and that “[v]iolence, threats, harassment, and other practices against trade unionists continued to affect the exercise of the right to freedom of association and collective bargaining.”<sup>2</sup> Despite the issuance of new laws and decrees in the more than two years since the “Colombian Action Plan Related to Labor Rights,” (also known as the “Labor Action Plan”) came into force, the influential *Escuela Nacional Sindical* (National Union School, or *ENS*) reports that “[i]n spite of what the Colombian government does and says, labor intermediation is more alive than ever.”<sup>3</sup>

Reducing labor intermediation is one of the key points of the Labor Action Plan. Labor intermediation encompasses a variety of methods used by employers to avoid formalizing the employer-employee relationship—in other words, it is an attempt to absolve the employer of the legal responsibility to respect internationally recognized labor rights, including the rights to freedom of association, collective bargaining, and freedom from discrimination, forced labor,

<sup>1</sup> “Colombia: Data,” The World Bank, available at: <http://data.worldbank.org/country/colombia>.

<sup>2</sup> U.S. Department of State, “Country Reports on Human Rights Practices for 2012: Colombia,” available at: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204438>

<sup>3</sup> “Pese a lo que haga o diga el Gobierno, la intermediación laboral está más viva que nunca,” *ENS*, Aug. 30, 2013, available at: <http://www.ens.org.co/index.shtml?apc=Na--:1:-:;&x=20168028>.

and the worst forms of child labor. Labor intermediation has a long and disreputable history in Colombia. Unfortunately, the use of labor intermediation has not been reduced substantially as a result of the Labor Action Plan. Instead, employers have gotten more creative about how they engage in it. The Labor Action Plan contained commitments to crack down on illegal cooperatives, so that workers could be directly hired by employers and exercise their fundamental rights. To date, enforcement efforts by the Ministry of Labor have been delayed, weak, and primarily in response to worker agitation, rather than proactive.<sup>4</sup> In addition, even as the numbers of registered CTAs (cooperatives) have decreased, the use of other alternative intermediary relationships has increased.

Nor has violence against trade unionists abated. While the number of murders finally appears to be on a steady downward trend in recent years, other types of violence, including threats, are not. The number of threats against trade unionists increased from 2011 to 2012, sending a negative signal to workers attempting to exercise the rights promised by the Labor Action Plan. For example, on August 4, the paramilitary group Rastrojo Urban Commandos (*Los Rastrojos - Comandos Urbanos*) emailed an announcement of death threats, naming 30 individuals, most of them trade unionists, as well as their families and a few organizations, including the Union of Workers of the Mining, Petrochemical, Agro-Fuels and Energy Industries (*Sindicato Nacional de la Industria Minera, Petroquímica, Agrocombustible y Energética, SINTRAMIENERGETICA*), the United Federation of Mining and Energy Workers (*Federación Unitaria de Trabajadores Mineros y Energéticos, FUNTRAENERGETICA*) and the Union of Workers of the Metal Industry (*Sindicato de Trabajadores de la Industria del Metal, SINTRAIME*).<sup>5</sup>

Union leadership report that such threats are effective—given the history against trade unionists and land rights, indigenous, Afro-Colombian, and other human rights activists in Colombia, workers and advocates have no reason to discount the threats. Many workers involved in strikes, organizing efforts, and other collective actions immediately renounce union membership or leave the locale altogether in order to keep their families safe.<sup>6</sup>

In short, it is impossible to conclude that the Government of Colombia is making sufficient efforts to implement the Labor Action Plan and provide workers with the fundamental labor rights they are due as part of the commitments made in the Colombia Trade and Globalization Agreement.<sup>7</sup> As we concluded in October 2012, while limited progress has been made in some areas, most notably in the protection unit, the UNP, many key commitments remain unfulfilled, and workers report few or no meaningful changes in their ability to exercise fundamental labor

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<sup>4</sup> For example, the U.S. Department of State reported that, despite work by the Ministry of Labor to institute new inspection procedures to enforce the new regulations on CTAs [*cooperative de trabajo asociado*, known as associated work cooperatives or simply cooperatives, in English], by the end of 2012, “inspectors largely had not been trained on the use of this aspect of the inspection guide.” Country Reports on Human Rights Practices for 2012: Colombia,” *supra* note 2.

<sup>5</sup>“Document - Colombia: Paramilitaries threaten trade unionists,” Amnesty International, Aug. 8, 2013, available at: <http://www.amnesty.org/en/library/asset/AMR23/037/2013/en/29fce2c9-f67b-4e95-9eab-78af9b98d0a7/amr230372013en.html>.

<sup>6</sup>See, e.g., The Colombian Act ion Plan Related to Labor Rights: The View Through Workers’ Eyes,” AFL-CIO, July 2012, pp. 6-7, 10, available at: <http://www.aflcio.org/content/download/38251/594971/report+version+2+no+bug.pdf>.

<sup>7</sup> See Chapter Seventeen: Labor Rights, available at: [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset\\_upload\\_file993\\_10146.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file993_10146.pdf).

rights. The advances to date have been isolated and largely symbolic, leading some workers to—with good reason—doubt the sincerity of the entire Labor Action Plan endeavor. The AFL-CIO has found little evidence that systemic changes are being made in the relevant institutions or that new measures are being applied in a systematic way.

Nevertheless, we do not believe that what has not yet been accomplished through the Labor Action Plan must always remain out of reach. The Plan gave Colombian working families hope—for some, it was the first ray of hope they had experienced in a long time. The U.S. government must continue to monitor progress and use the diplomatic resources at its disposal to ensure that the promise of the Labor Action Plan delivers.

The remainder of this testimony will provide brief examples of specific failures under the Labor Action Plan and the Colombia Trade and Globalization Agreement to protect workers' lives and opportunities to formalize their employment relationships and exercise their fundamental labor rights.

## II. Threats and Violence

As mentioned in the introduction, murders of trade unionists have declined in recent years, but there has been an increase in the number of threats against union leaders. Violence and threats of violence against union leaders and activists and their families interfere with the free exercise of fundamental labor rights, particularly the rights to freedom of association and collective bargaining. When workers fear for their jobs, well-being, and the very lives of their loved ones, they are less likely to speak up for their workplace rights and join in collective actions to secure those rights. Intimidation continues to be a commonly used method to repress worker rights in Colombia. Though the Labor Action Plan recognized this connection between threats and violence and the free exercise of labor rights (for instance, by including commitments to criminalize employer actions to undermine labor rights, to improve protection programs for workers under threat, and to address impunity by ensuring action on the backlog of unionist homicides), the problem persists. *Somos Defensores* (We Are Defenders) even called the first half of 2013 “the most violent six-month period on record for humanitarian workers in the country,” according to *Colombia Reports*.<sup>8</sup>

- As the AFL-CIO previously reported,<sup>9</sup> on May 12, 2012, four union leaders from different sectors and in different parts of the country (Jhon Jairo Castro, *Union Portuaria*; Renet Morales, *SINTRAINAGRO-Minas*; Carlos Daniel Ardila, *SINTRAINAGRO–Puerto Wilches*; and Wilson Ferrer, *CUT-Santander* (regional)) received identical text messages, warning that they would be “put to sleep” for their trade union activity. To our knowledge, more than a year later, the origin of the threats has still not been investigated.
- In January 2013, at the *La Cabaña* sugar plantation, 100 sugar cane cutters affiliated to *SINTRAINAGRO* report that they were effectively fired, including the entire executive

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<sup>8</sup> Steven Cohen, “1st half of 2013 worst period on Colombia’s record for human rights workers,” *Colombia Reports*, Aug. 6, 2013, available at: <http://colombiareports.co/january-june-worst-period-on-record-for-safety-of-human-rights-workers-in-colombia/>.

<sup>9</sup> *Supra* note 6, p. 9.

leadership board of the union at the plantation. Approximately 500 other workers were reportedly forced to renounce their union affiliation in order to renew their work contracts. During this labor dispute, a union activist at *La Cabana*, Juan Carlos Munoz, was murdered on his way to work, on January 28, 2013. The union reports that none of its members has been contacted about the investigation, raising questions about the existence and quality of such an investigation.

- In July 2013, two leaders of the *SINALTRAINAL* union in Barrancabermeja, William Mendoza Gómez (Barrancabermeja President) and Juan Carlos Galvis (Member of the National Board of Directors), and their families received death threats. The threats were promptly reported to the *Fiscalía* (Attorney General).
- *USO* (a union in the oil industry in the priority mining sector) activist and community leader Hector Sanchez reported receiving a written death threat on July 16, 2013, two days after a hearing in Puerto Gaitan, Meta, and again on October 9, when a menacing flier was circulated in the region where he lives. Mr. Sanchez is working with allies to petition for protection, but has had to take his family out of the area for their safety. He has not been able to return to exercise his role as a union and community leader. The threat against Mr. Sanchez coincided with a break-in at the offices of the organization REDHER, which had helped to organize the hearing. These are just the latest in a number of threats he has received in the past year warning him to leave the zone or be killed. There has been no official response yet to his petition for protection.
- Community leader, Luisa Fernanda Cardenas, has been collaborating with *Sintraimagra* (an agricultural workers' union) and *CUT-Meta* to organize union activities. After two community meetings in August and September 2013, Ms. Cardenas reported receiving a threatening text message telling her to “stay out of what does not concern you” and reminding her that she had children and a husband. Four days later, on September 22, 2013, her partner Ancelmo Rubio was injured by gunshot in an apparent assassination attempt. Ms. Cardenas reported receiving new threats the following day. When Ms. Cardenas tried to file a report on the threats and the attack on her partner at the *Fiscalía*, the local office refused to receive the report—an action that runs counter commitments to protect workers and improve the responsiveness of the criminal justice system, as outlined in sections VIII and IX of the Labor Action Plan. In addition, failure to respond to threats targeted at worker rights advocates fails to protect the fundamental labor rights to freedom of association, as required by the Colombia Trade and Globalization Agreement.<sup>10</sup>

### **III. Formalization of Work**

Formalization of workers is not yet occurring on a systematic basis, and many obstacles remain to a true formalization of work and labor relations. Instead, as previously reported by the AFL-CIO and the *ENS*, employers continue to utilize creative means to avoid a direct employer-employee relationship with their workers. The measures enacted by the Government of

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<sup>10</sup> *Supra* note 7.

Colombia, including Decree 2025 and Law 1610, appear to have too many loopholes to be effective tools to create real change for workers. Reports from across economic sectors in Colombia indicate that the systematic use of various types of sham intermediaries and subcontractors to avoid employment obligations continues, and that true employers persist in acting with impunity to wrongfully interfere with Colombian workers' fundamental labor rights.

Another obstacle to achieving a greater rate of formalized work relationships is the lack of systemic change at the new Ministry of Labor. At present, it appears to lack both the institutional capacity and commitment to achieve the great strides necessary to make meaningful changes in industrial relations in Colombia.

### **A. Fines**

Of all the fines and sanctions reportedly assessed under the new instruments, which have been touted as proof of the success of the Labor Action Plan, the AFL-CIO understands that no funds have been collected. The Ministry of Labor has announced the imposition of 139 billion pesos (roughly \$73 million US dollars) in fines.<sup>11</sup> Most of these fines have been imposed on cooperatives, not on violating employers. Most cooperatives, being sham creations rather than real worker-driven organization, have no ability to formally hire workers, thus rendering the sanctions ineffectual at changing labor relations.

There is insufficient evidence to indicate that sanctioned employers have transitioned to direct, permanent hiring relationships with core employees, likely because they maintain their innocence and have not been compelled to pay their fines. As a result, the touted fines are not having the intended effect: the purpose of the fines is to incentivize employer compliance with internationally recognized worker rights and ensure formalized labor relations, so the non-collection of fines undermines the goals of the Labor Action Plan. The Ministry of Labor should be more assertive in efforts to collect fines, only relenting when true formalization of the entire workforce affected by the illegal use of labor intermediation is achieved.

### **B. Formalization**

To get around the prohibition on sham cooperatives while also avoiding a direct hire relationship with workers, there has been a marked increase in Simplified Stock Companies (known by their Spanish acronym, *SAS*) and "union contracts" (*contrato sindicales*), through which employees contract labor through "labor unions," most of which are sham unions created by employers and not truly representative of their members.

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<sup>11</sup>"Multas por \$139.000 millones por intermediación laboral," Portafolio.com, Jul. 24, 2013, available at: <http://www.portafolio.co/finanzas-personales/multas-139000-millones-intermediacion-laboral>.

Type of Agreement	2009		2010		2011		2012	
	Cases	%	Cases	%	Cases	%	Cases	%
Union Contract	46	7.36	50	9.62	131	28.48	261	40.03
Collective Bargaining Agreement	370	59.20	246	47.31	208	45.22	225	34.51
Collective Pact	209	33.44	224	43.08	121	26.30	166	25.46
<b>Total</b>	625	100	520	100	460	100	652	100

Source: ENS<sup>12</sup>

### C. Improper Use of Formalization Accords under Law 1610

Workers and their unions in Colombia report a variety of shortcomings in the current labor law regime and recommend amending Resolution 321 of Law 1610 so that it can provide an effective avenue for formalization of work. Although the government has reported signing formalization accords (*acuerdos de formalizacion*) using the 1610 process, workers report that they and their unions are not consulted during the process, and that the agreements do not fulfill the promise of the Labor Action Plan.

According to Ministry of Labor records, 25 formalization accords have been signed. However, the law and corresponding enabling legislation establishing the formalization accord process has very serious flaws, including the lack of worker consultation and no guarantee that the workers who have engaged in efforts to formalize their work actually benefit from the formalization accord.

The Ministry of Labor reported that in 2012, approximately 14,302 workers had been formalized through such accords,<sup>13</sup> and that in the first half of 2013, six accords benefited an additional 1,892 workers. However, an initial review of some of the formalization accords, using information provided by union partners, indicates that they do not cover nearly as many workers as reported. Furthermore, given that Law 1610 was not enacted until early 2013, it is not clear to which 2012 formalization accords the Ministry of Labor was referring. The AFL-CIO urges Congress to investigate these discrepancies regarding the number of workers formalized by the accords.

- On one palm oil plantation, agreements signed in November 2011 and ensuing inspections processes were supposed to affect 600 workers. Nevertheless, in July 2013, the Ministry of Labor announced a formalization accord covering only 45 workers; furthermore, the agreement employed these 45 workers through a *SAS*, with only 12 receiving permanent contracts. There has been no action to formalize the remaining 555 workers who expected to be affected by the November 2011 inspections, which found that the employer had been using illegal subcontracting. Certainly, this fractional improvement in conditions for a handful of workers is not the improvement envisioned

<sup>12</sup> ENS compiles these numbers annually, so partial statistics for 2013 are not available.

<sup>13</sup> See interview with Minister Pardo in *Portafolio.co*, available at: <http://www.portafolio.co/finanzas-personales/multas-139000-millones-intermediacion-laboral>.

by the Labor Action Plan's commitment to "promote compliance by the companies through a strategy of offering to waive fines, wholly or in part, when the employer agrees to create and maintain a **direct employment relationship with the affected workers.**"<sup>14</sup> (emphasis added). The union involved is seeking further clarification in the hope that the formalization accord offers more for workers than appears to be the case.

- In the port sector in Barranquilla, there are approximately 1,600 permanent workers in the port; 250 of them are direct hires, with work contracts and benefits. Approximately 150 workers are hired through temporary service companies. The other 1,200 workers are subcontracted, hired through what the union maintains are sham intermediaries. **However, the formalization accord in the Barranquilla port appears to cover only 18 workers.** This agreement was signed by Vice Minister of Labor José Noé Ríos. It is not clear how an accord covering so few workers was deemed acceptable to the Government of Colombia.
- The administration and provision of public transit services in Valle de Aburrá is performed through a subcontractor. The formalization accord was reached with the subcontractor, rather than the mass transit company itself, leaving open the question of whether any workers will be able to exercise their fundamental labor rights given that they lack a formal relationship with their ultimate employer.
- The airline Avianca reportedly has almost 6,500 workers, with 3,471 hired through four cooperatives, for which the company was fined 1,133,400 pesos. To commute this fine, the company presented a proposal for a "labor improvement" agreement, in which Avianca committed to hire 1,220 workers on fixed-term contracts. The union *ACAV* maintains that, included in the list of positions to be formalized through the plan, were workers already in direct, formalized jobs (in other words, some of the proposed improvements in the plan would not require any change at all). Avianca also continues its use of a "voluntary benefits plan" that *ACAV* has denounced as an illegal "collective pact" that violates Article 200.<sup>15</sup>

#### IV. Priority Cases

##### A. Priority Sector: Sugar

Unfortunately, there has been too little progress in the sugar sector. In November 2012, *SINTRAINAGRO* formed two new local unions at two sugar plantations, with 600 and 24 affiliated members respectively (all subcontracted workers). *SINTRAINAGRO* reports that management refused to recognize the new unions and began an anti-union campaign, going so far as to call workers at their homes to encourage them to disaffiliate. *SINTRAINAGRO* submitted a proposal to initiate collective bargaining with plantation management, but reports that the proposal was ignored. On January 3, 2013, *SINTRAINAGRO* reported that 87 workers at

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<sup>14</sup> Colombian Action Plan Related to Labor Rights, available at: [http://www.ustr.gov/webfm\\_send/2787](http://www.ustr.gov/webfm_send/2787).

<sup>15</sup> For more information on the failure of the Government of Colombia to act on the Labor Action Plan commitments to address the abuse of collective pacts, please see "The Colombian Action Plan Related to Labor Rights: The View Through Workers' Eyes," *supra* note 6.

the first plantation were effectively fired, including the entire executive board; another 24 workers were let go from the second. *SINTRAINAGRO* reported that at a union assembly held in the aftermath of the mass dismissals, two armed men arrived to videotape the event and warned the workers not to question them. All the remaining union members at the first plantation have since resigned from *SINTRAINAGRO* in order to keep their jobs. On January 28, the union reported the murder of union activist and organizer Juan Carlos Muñoz, who was on his way to work at one of the plantations.

Following two meetings in Bogotá in March, one with the Vice Minister of Labor, and the other with *CETCOIT* (the national commission on conflict resolution under the auspices of the ILO), the plantation management continued to reject formalization and recognition of the union. Thus, since March, no formal meetings or engagement have taken place. The Ministry of Labor has not responded to repeated union requests for assistance.

In addition, following the murder of Juan Carlos Muñoz, the union reports that criminal investigators have not interviewed any of its members, making any investigation incomplete and ineffective at addressing serious anti-union violence being used to intimidate workers. More than 100 workers remain out of work, and the workers who report being forced to resign from the union remain unable to exercise their right to join a union. The union filed two submissions to the Ministry of Labor to conduct inspections. **This month, the union reported that it discovered that its two submissions have been “archived,” or simply shelved, because inspectors determined that the events reported by the workers were false.** However, the union has reported that no inspectors or criminal investigators have been in touch with union representatives, and that to their knowledge, the inspectors did not conduct site visits to gather evidence. Certainly, a determination of the veracity of worker complaints requires a thorough investigation. The AFL-CIO believes that the failure to respond to criminal complaints as well as requests for inspection are inconsistent with the protection of fundamental labor rights required by the trade agreement, as well as Sections I and IX of the Labor Action Plan. The Government of Colombia must do much more in order to secure labor rights for its workers.

## **B. Priority Sector: Palm Oil**

In the palm oil sector, the palm workers’ unions in Magdalena Medio continue to press for application of the Law 1429 of 2010 and Decree 2025. The AFL-CIO understands that the 10 sanctions and fines that have been imposed against employers in the Puerto Wilches area remain unpaid and that the Ministry of Labor is not effectively enforcing Law 1610, which provides for forgiveness of the fines if the workers are appropriately formalized. While the inspections and sanctions processes languish, workers report that employers in the area are engaging in a campaign of defamation against the union and the pro-formalization workers at worksites and in the community. Meanwhile, workers maintain that none of the employers have complied with formalization requirements and that no new inspections are underway.

Disturbingly, workers report that local employers have initiated a new type of resistance to the new laws requiring formalization. Three of the largest employers in the region have presented plans for the “voluntary departure” of their directly hired, full-time employees. At one workplace, the company pressured workers with threats of firings with no severance benefits and

blacklisting them from further employment in the area if they did not accept the offer to quit their jobs. Of the about 160 direct-hire employees (there are roughly 400 workers on this particular palm oil plantation), about 130 eventually acceded to the pressures of the company and left, leaving the union with 27 members and nearly destroyed. The company is reportedly now seeking to hire the same number of workers, 130, through temporary contracts.

Two additional plantations in the area, both sanctioned for illegal subcontracting, are attempting to promote the same plan, but the workers are resisting and have been pressing for action by the Ministry of Labor to apply the sanctions and oversee a formalization process. In a surprise to the union that represents the workers, *SINTRAINAGRO*, Minister of Labor Rafael Pardo announced in an interview with *Portafolio* that a formalization accord had been negotiated at one of the plantations around July 4, with 45 workers being formalized. *SINTRAINAGRO* had not previously been informed of the existence of such an accord. A copy of the formalization accord shows that a SAS will be created and will hire 45 workers directly, with only 12 workers on permanent, “indefinite term” contracts, and the remainder under short-term contracts. However, the plantation in question subcontracts approximately 600 workers and has already been fined more than a million dollars for illegal use of labor intermediation. The union reports that forty percent of the formalized workers are new workers that had no previous relation to the company. The accord was signed by the Vice Minister of Labor, José Noé Ríos.

A similar situation is occurring in one of the largest employers in the palm sector just north of Puerto Wilches, in Minas, Cesar. There, the company has begun a plan to eliminate the various cooperatives employing some 700 workers, and rehire them through sub-contracting simplified stock companies, or SAS. Unions have been collecting information to present proposals for “formalization accords,” as set forth in Law 1610.

### **C. Priority Sector: Ports**

Unfortunately, workers report that there has been no tangible progress in the ports sector on the application of Law 1429 of 2010 or related Decree 2025 requiring the formalization of labor. The two important sanctions in the ports in Buenaventura, imposed in the first quarter of 2012, and in Cartagena, imposed in August, 2012, continue to be the only employer sanctions in the sector (sanctions have been imposed on cooperatives, but these sanctions can produce neither formalization of workers nor payment of fines). As a result of a number of meetings with the president of the *Unión Portuaria (UP)* seeking to put into effect the 2012 sanction levied on the Port Society of Buenaventura, the Ministry of Labor convened a meeting with the port workers and employers in Buenaventura on August 6, 2013. The Chief of Inspections and Control of the Ministry of Labor, representatives from the offices of Vice President Angelino Garzon and the Superintendent of Ports, the main port workers’ union, *UP*, and four minority unions participated in the meeting. The employers failed to attend the meeting. The *UP* proposed forgiveness of fines in exchange for a negotiated process for formalizing port workers in Buenaventura. The Labor Ministry asked for a comprehensive proposal, which the *UP* provided the following week. The next meeting was scheduled for September 4, 2013. This meeting was postponed by the Ministry, and has not yet been rescheduled. The workers in the Buenaventura ports are still waiting for the Government of Colombia to fulfill its commitments and protect their right to organize and bargain collectively.

At the port in Turbo, Antioquia, as promised by Director of Inspections and Control of the Ministry of Labor in Uraba appealed the November 2012 Ministerial Resolution that found no violations and indicated that a new inspections process would begin and would ensure input from the union. However, to date, the union in Turbo reports that it has not been contacted by inspectors, despite Ministry of Labor attendance at an August meeting in Turbo regarding the new legal framework requiring the formalization of labor.

## **V. Conclusion**

The AFL-CIO concludes that the Government of Colombia has fallen far short of compliance with the Labor Action Plan. More work must be done to achieve the systemic changes necessary to come into compliance with fundamental labor rights, or even to fulfill the commitments of the Labor Action Plan.