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Comments Regarding Ecuador's Eligibility for ATPDEA Designation

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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

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.”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

Nonetheless, 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 nor do the minimal penalties for violating those laws effectively deter employers in that sector from employing children in hazardous conditions. To the contrary, Human Rights Watch found that, in Ecuador’s banana sector, children 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 believes that the problem of hazardous child labor in Ecuador’s banana sector is widespread.⁴ Although the government of Ecuador and the Ecuadorian banana industry have recently taken positive steps, detailed in the attached document, to address this problem, these steps will not ensure that Ecuador upholds its obligation to eliminate immediately hazardous child labor in the banana sector, as they fail to address adequately the problem of ineffective enforcement of child labor laws and inadequate sanctions for their violation.

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

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

In contrast to child labor legislation, 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 the ILO Convention 98 concerning the Right to Organize and Collective Bargaining, the employers face no legal repercussions, as Ecuadorian 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.

Although the impediments to exercising the right to freedom of association are so great that banana workers have rarely attempted to organize, in February 2002, workers on the seven Los Alamos banana plantations began an organizing drive. As described in detail in the attached document, the Los Alamos workers, whose three unions were recognized by the Ministry of Labor in April and who began a legal strike on May 6, 2002, have been the victims of alleged anti-union dismissals, anti-union violence, government failure to investigate fully and prosecute the perpetrators of the violence, employer interference in the functioning and operation of their workers' organizations—Special Committees formed to represent the workers before government-convened arbitration and reconciliation panels, and the unlawful use of strikebreakers. Thus, the Ecuadorian government has failed to protect the Los Alamos workers' right to freedom of association and to organize, as required by international law as well as the ATPDEA.

As Ecuador has failed to uphold its 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, Human Rights Watch believes that Ecuador has not met the eligibility criteria under ATPDEA Sec. 204(b)(6)(B)(3), (4). Human Rights Watch recommends that the U.S. government make fulfillment of the following workers' rights benchmarks conditions for Ecuador's designation as an ATPDEA beneficiary country.

Benchmarks on Freedom of Association and the Right to Organize

- Ecuadorian law should be amended to explicitly prohibit employers from interfering in the establishment or functioning of workers' organizations, and, in particular, from engaging in any acts which are designed to promote the establishment of workers' organizations under the domination of employers, as 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. This law should 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 both the dismissal and the recruitment and hiring period, 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 reduce from thirty the minimum number of workers required to form a union, pursuant to the ILO’s recommendations.

- 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

Criminal Investigation

- The Ministry of Interior and the Attorney General should ensure that a comprehensive investigation of the violence against striking banana workers on the Los Alamos plantations on May 16, 2002 is conducted. Those responsible should be prosecuted without delay. A complete investigation should also examine

whether the perpetrators were hired and by whom, and if proven, those parties should also be prosecuted and brought to justice.

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 has not occurred in this case, and 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, are illegal *rompe-huelgas*, literally translated as “strikebreakers.” If, as alleged, the law has not been upheld, the Ministry of Labor should ensure that the violation ceases, the employers are sanctioned accordingly, and the Labor Directorate’s order that roughly 31 percent of strikers resume work to perform necessary minimum services is enforced.

New Special Committee Leadership

- 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 and, later, to obtain signatures to meet the quorum necessary to convene workers’ assemblies to elect new Special Committee leadership. 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.

Panel Rulings

- The Ministry of Labor should ensure that, when rulings are issued by the reconciliation and arbitration panels convened to address the workers’ demands in the Los Alamos case, if requests for clarification are filed, legal procedures, in particular the time limitations, are fully respected and, absent such requests or after conclusion of the clarification process, the final rulings are fully and immediately implemented.

Benchmarks on the Worst Forms of Child Labor

- 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 inspectors 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 should be amended to increase the penalty for violating child labor laws. The maximum fine of U.S. \$50 that can be imposed by labor inspectors and labor courts—the two entities most likely to penalize child labor law violations—is not sufficient to deter violations of child labor laws and should be increased. In addition, the law should require a portion of the punitive fine to 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 updating regularly 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 to allow for the gathering, processing, and updating of this sector-specific data.

- The government should show progress in implementing the constitutional and Minors' Code 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.
- The Ministry of Labor and its National Committee for the Progressive Elimination of Child Labor (CONEPTI) should give effect to the general regulation of the Minors' Code that recommends the establishment of programs "for the protection, defense, and promotion of the rights of child workers . . . in the rural sector." Such programs should include information and education campaigns on labor rights and, in particular, harmful child labor, for children and their parents.

LABOR RIGHTS ABUSES IN ECUADOR'S BANANA SECTOR

Harmful Child Labor

Introduction

Upon ratifying ILO Convention 182, Ecuador assumed the commitment 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.”⁵ 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.⁶

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,⁷ and three of the six most commonly

⁵ ILO Convention 182, Article 3(d).

⁶ 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.

⁷ 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: <http://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.⁸ 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,⁹ and states that "'the State will protect the minor from economic exploitation and from performing any work . . . that can interfere with [the child's] education or be harmful to [the child's] physical, mental, spiritual, moral, or social development."¹⁰ If applied and enforced with meaningful sanctions, Ecuadorian laws governing child labor, therefore, could go

⁸ 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.pnep.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].

⁹ Labor Code, Articles 136, 138, 139.

¹⁰ Minors' Code, Article 154. 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.

a long way to preventing the worst forms of child labor. Nonetheless, the Ministry of Labor and Human Resources (Ministry of Labor) and the juvenile courts fail to fulfill their legally mandated responsibility to enforce national child laws. Furthermore, even if the laws were effectively enforced, the available sanctions would likely not provide a sufficient deterrent to the laws' violation and would not ensure the successful rehabilitation of displaced child workers.

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.¹¹ 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."¹² Under the Minors' Code, the juvenile courts may also conduct such inspections.¹³

Violation of any of the protections and prohibitions regarding child labor can be punished with a fine of up to U.S. \$200 if imposed by the regional Labor Directorate—the body overseeing the regional Labor Inspectorate—and up to U.S. \$50 if imposed by labor inspectors or labor courts.¹⁴ Concurrently, a child or her legal representative can also bring a claim before a juvenile court for violation of the child's labor rights, and the court can sanction the violations with fines from one to three times the monthly minimum wage—roughly U.S. \$117 to U.S. \$351 in the banana sector.¹⁵

Nonetheless, 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. 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. Similarly, the juvenile courts also lack the institutional capacity to "inspect, at any moment" the conditions in which children are laboring, and, therefore, also cannot effectively address violations suffered. Without the infrastructure to make preventive site visits, the overburdened juvenile courts, like the understaffed Labor Inspectorate, rely on the submission of complaints to enforce child labor laws. Yet one judge told Human Rights Watch that in his seven years as a juvenile court judge, he has not seen one case "in which labor rights have been at issue."¹⁶ The result of these institutional failures is the almost complete breakdown of the government bureaucracy responsible for preventing the worst forms of child labor in the banana sector.

Recent Developments

Since the April 2002 release of Human Rights Watch's report, *Tainted Harvest: Child Labor and Obstacles to Organizing on Ecuador's Banana Plantations*, 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 address adequately the two primary impediments to eradicating hazardous child labor in the banana sector—insufficient child labor law enforcement and inadequate sanctions for the violation of those laws.

National Consultation on the Worst Forms of Child Labor

¹¹ Labor Code, Article 553.

¹² General Regulation to the Minors' Code, Executive Decree 2766, June 7, 1995, Article 64; Labor Code, Article 151.f.

¹³ Labor Code, Article 151.f

¹⁴ Ibid., Articles 156, 626

¹⁵ Minors' Code, Article 161; General Regulation to the Minors' Code, Article 67.

¹⁶ Human Rights Watch interview, Judge Arturo Márquez, Quito Juvenile Court, Quito, May 9, 2001.

On May 29 and 30, 2002, the Ministry of Labor's National Committee for the Progressive Elimination of Child Labor (CONEPTI), with the technical support of the ILO's International Program for the Elimination of Child Labor (IPEC), held meetings in Quito and Guayaquil, respectively, to define activities that should be prohibited as the worst forms of child labor and address the causes and effects of harmful child labor. The meetings were attended by representatives from the government; non-governmental organizations; international organizations, such as IPEC and the United Nations Children's Fund (UNICEF); business and industry; and organized labor. In particular, in Guayaquil, three banana industry representatives and four representatives from the National Federation of Free Farmworkers and Indigenous Peoples of Ecuador (FENACLE), an organization that has lent support to Ecuador's banana workers, attended.

Human Rights Watch believes that such consultative meetings are important and commends the CONEPTI for taking the lead in organizing these events. Nevertheless, while these meetings may, over time, lead to efforts that could be important factors in the eradication of harmful child labor, such cross-sectoral dialogues have not, to date, been accompanied with concrete actions, such as those recommended in the benchmarks set forth above, that could, in practice, contribute to the elimination of the worst forms of child labor in Ecuador's banana sector.

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

The CONEPTI, in conjunction with IPEC and UNICEF, is in the process of developing a National Plan of Action for the Elimination of Child Labor, 2003-2006 (Plan). To support and reinforce the implementation of the Plan, IPEC is reportedly formulating a Time Bound Program (TBP) proposal for Ecuador for 2003-2006.¹⁷ To formulate the TBP, IPEC is allegedly planning to undertake 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. According to an IPEC official, the banana sector baseline study is scheduled to conclude before the end of 2002, at which time IPEC plans to develop specific programs to target child labor in the banana sector.

Human Rights Watch applauds such efforts by IPEC and CONEPTI to address child labor and encourages IPEC to complete its proposed surveys 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 unless the National Plan of Action incorporates the recommendations set forth above, 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, increase the minimum age of employment in the industry to fifteen from the legal minimum of fourteen, 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,

¹⁷ 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/ipiec/governments/index.htm> [September 3, 2002].

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.¹⁸

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 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. Such an oversight body would significantly enhance the credibility of the “social seal,” since, without a provision for an independent mechanism to award the seal, the current agreement raises the possibility that the seal will be self-administered by the industry.

In addition, Human Rights Watch is concerned that workers' representatives were not consulted when the agreement was negotiated nor were they invited to participate 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 viewed as a public relations exercise rather than a strong effort to safeguard human rights.

Proposed Creation of the Unit for the Control and Monitoring of Child Labor

The Ecuadorian government has drafted, though to date failed to adopt, a proposal for the creation of a Unit for the Control and Monitoring of Child Labor (Unit) to be located within the CONEPTI. The proposal, if adopted, would mandate that the Ministry of Labor transfer to the Unit labor inspectors to focus solely on the enforcement of child labor laws and that the Unit's operations be financed through the national budget and other national and international contributions. The proposed functions of the Unit would 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 drafting of a proposal to create such a Unit and urges its immediate adoption and implementation, amended to address the following concerns. Human Rights Watch is concerned that, under the proposal, the child labor inspectors would be “transferred” from the Ministry of Labor's Labor Inspectorate, which, as discussed above, is already severely understaffed. Human Rights

¹⁸ 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.

Watch urges the proposal to be amended, instead, to provide for the hiring of new labor inspectors for children. Human Rights Watch is also concerned that while the proposal would require the new Unit to collect data on child labor, the proposal fails to mandate that the data 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.

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.¹⁹ 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.²⁰

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.²¹ 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.²² 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."²³

¹⁹ 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.

²⁰ ILO Committee on Freedom of Association, *General (Protection against anti-union discrimination)*, Digest of Decisions, Doc. 1201, 1996, para. 695.

²¹ Labor Code, Article 188.

²² 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. 220, 21.

²³ 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.

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.²⁴ 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 constitute acts of interference,”²⁵ 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.

²⁴ 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.

²⁵ ILO Convention concerning the Right to Organize and Collective Bargaining (ILO Convention 98), 96 U.N.T.S. 257, July 18, 1951, Article 2.

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 organized on only roughly five of the more than 5,000 registered banana plantations in Ecuador,²⁶ and only about 1,650 of the roughly 120,000 to 148,000 banana workers were affiliated—approximately 1 percent.²⁷

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 124 Los Alamos workers were reported to have been illegally fired, 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 petition, 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 Cliade 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. Three more union activists were reported to have been illegally fired on May 2, however, and the plantation operators allegedly refused to negotiate in good faith with the unions, actions that provide legal grounds for strike declaration. On May 6, largely in response to these circumstances, the workers of Los Alamos declared a strike, which continues at this writing. 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, between 200 and 400 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,

²⁶ 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

²⁷ 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.

critically injuring one worker and injuring several others and a policeman. Reports indicate that by 8:00 p.m., police reinforcements finally arrived and arrested approximately sixteen or seventeen of the armed men. Roughly ten workers received gunshot wounds that day.

The men that were 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.²⁸ At this writing, no additional detentions have been made and no investigation of the incident is underway, creating a situation of impunity for the perpetrators of the anti-union violence.

Worker representatives said that on June 5, 2002, 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. Employers have reportedly failed to follow the Labor Directorate's order and have, 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 and allegedly continue to hire and employ them at this writing. 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—Cliade, 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 has been honored, however, and the *rompe-huelgas* continue to work on the plantations.

Several weeks after the May 16 violence described above, the Labor Inspectorate convened three arbitration and reconciliation panels, one each for Cliade, 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 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. According to article 486 of the Labor Code, in the event that the parties are unable to agree, the panel is to initiate "a period of evidence and investigation for six days that cannot be extended. Once concluded, the Panel will issue a ruling within three days." Although, on its face, the law suggests that the investigative period shall last no more than six working days, after which time a ruling must be issued within three, the law, in practice, is reportedly interpreted as allowing, instead, six working days for the parties to submit requests for evidence and information, after which time the panel has an indefinite period to undertake an investigation. Allegedly, in practice, only when this investigation is completed, must the panel issue a binding ruling within three working days. To date, the workers are still awaiting the official conclusion of the investigative period and the panels' rulings.

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

²⁸ 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.

their weekly salaries and used signatures from individuals not legally employed by the Los Alamos plantations, such as strikebreakers. All three panels rejected the proposed new Special Committees, however, allegedly 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.

More recently, however, the three plantation operators reportedly facilitated the convening of three new workers' assemblies to elect new leadership for the pre-existing Special Committees. According to unconfirmed reports from workers' representatives, the employers, in some cases, pressured workers into signing the petitions. 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, these new leaders petitioned the Ministry of Labor to dissolve the Special Committees and withdraw the workers' demands against their employers. 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. The workers are awaiting the ruling of the third panel on the issue.