



TRADE UNION ADVISORY COMMITTEE  
TO THE ORGANISATION FOR ECONOMIC  
COOPERATION AND DEVELOPMENT  
COMMISSION SYNDICALE CONSULTATIVE  
AUPRÈS DE L'ORGANISATION DE COOPÉRATION  
ET DE DÉVELOPPEMENT ÉCONOMIQUES

Submission to the  
8th meeting of the Regulatory Policy Committee (22-23 April 2013) & the  
47th session of the Public Governance Committee (25-26 April 2013)  
**Rule of Law and Labour Rights in Colombia**  
Paris, 22 April 2013

### Key messages

The Regulatory Policy Committee (RPC) and the Public Governance Committee (PGC) are meeting this week to discuss and approve OECD reports on regulatory reform and on public governance in Colombia. These appear under:

- RPC agenda item 2: Regulatory Policy Review of Colombia (GOV/RPC(2013)6), and
- PGC agenda item 7: Implementing Good Governance in Colombia (GOV/PGC(2013)5).

Although in recent years the government of Colombia has made efforts to reduce the power of armed organizations, modernize the economy and attract foreign investment, it has made little progress in addressing the needs of workers and their unions.

In view of the information provided in this submission, we believe that neither the PGC nor the RPC report should be adopted in its current form. Rather, both should be reviewed to explore further the rule of law and labour rights situation in Colombia and their impact on public governance and effective quality regulation.

In our view, neither report (hereafter “RPC report” and “PGC report”) places sufficient attention on the impact of collective insecurity and of recurrent failures to meet internationally recognised labour standards on public governance and regulatory quality in Colombia, including:

- the exceptional severity of the human rights risks to trade unionists and other human rights defenders in Colombia, including assassination;
- the violation of freedom of association and collective bargaining, which are essential forms of regulation of the labour markets,
- the weak enforcement of labour law,
- the defect in the police, public prosecution and judiciary leading to high levels of impunity in cases related to violence against trade union members,
- the absence of substantive social dialogue between government and trade unions.

We discuss each of the above based on extensive research provided by the International Trade Union Confederation<sup>1</sup> and the TUAC’s US and Canadian affiliates, the AFL-CIO<sup>2</sup> and the CLC<sup>3</sup>, as well as the European Trade Union Confederation. For each issue we also point to relevant section of the RPC and/or PGC reports.

<sup>1</sup><http://survey.ituc-csi.org/Colombia.html?edition=336&lang=en#tabs-5>

<sup>2</sup>The Colombian Action Plan Related to Labor Rights- The View Through Workers’ Eyes, AFL-CIO 2012  
<http://www.aflcio.org/Blog/Global-Action/Colombia-Labor-Action-Plan-Fails-to-Stop-Labor-and-Human-Rights-Violations>

<sup>3</sup><http://www.canadianlabour.ca/issues/free-trade-colombia>

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## **Rule of law**

According to the PGC report “*Good governance is about building a better national and regional environment in which people can live, learn and work[and]about enhancing trust in government, its institutions, the quality of its services and decisions, because they are perceived to be made in the general, public interest*” (#7). A fundamental pre-requisite to good governance as defined above, is to ensure proper rule of law, including effective compliance with human rights, including core labour standards. That appears far from being the case in Colombia. Nearly 3,000 Colombian trade unionists have been murdered since 1986 with the vast majority of cases still unsolved and the vast majority of perpetrators (both those who ordered the killings and those who carried them out) still unpunished. The 2011 ILO High Level Mission to Colombia confirmed that “*impunity has prevailed in Colombia for a long period and has caused immense damage to the country and suffering to its people*” and that “*the great majority of homicide cases remained unresolved.*”

## ***Killings and death threats***

Anti-union violence still remains at alarming levels. In 2012, 20 trade unionists were murdered and 4 have been murdered so far in 2013. Indeed, in just the two years in which the US-Colombia Labour Action Plan has been in effect, which included specific recommendations to reduce violence and impunity, 47 unionists have been assassinated, 18 were objects of attempted murder, 6 were forcibly disappeared and roughly 760 received death threats. This brings the total murdered since records were kept in 1986 to April 7, 2013 to 2,941, of which nearly 800 were trade union leaders. Indeed, there is now a marked increase of the number of leaders murdered, as assassins have become more selective and have chosen to target leaders, as their death has the greatest chilling effect on union activity.

### *Violations against trade unionists in 2012*

<b>Type of Violation</b>	<b>N° Cases</b>	<b>%</b>
Threats	431	68,8
Forced Displacement	90	14,4
Assault	49	7,8
Arbitrary Detention	20	3,2
Assassination	20	3,2
Attempted Murder	7	1,1
Disappearances	5	0,8
Torture	2	0,3
Illegal Break-ins	2	0,3
<b>Total general</b>	<b>626</b>	<b>100,00%</b>

According to the ITUC “*These figures vouch for the existence of a human rights crisis not consistent with random and indiscriminate violence. They reflect a policy of extermination, implemented over a sustained period and manifested by the thousands of lives claimed*”.

### ***Defects of the judiciary and criminal investigation system***

Chapter 6 of the RPC report on compliance, enforcement and appeals and on the role of the judiciary system (#333-338) fails to report on the defects of the Colombian judiciary and criminal investigation system in addressing the killings of trade unionists.

As of the end of 2011 the rate of impunity for assassinations remained well above 90 per cent. The actual rate of impunity is even higher when one considers the numerous defects with the few sentences achieved and the fact that some of those are sentenced in absentia and therefore are not in custody. Indeed, only 296 union victims of assassination have obtained a judicial decision in their case. Very few of these are for recent crimes, with less than 10 unionists murdered between 2007 and 2011 receiving a judicial decision in their case. The 2011 ILO High Level Mission to Colombia confirmed that “*impunity has prevailed in Colombia for a long period and has caused immense damage to the country and suffering to its people*” and that “*the great majority of homicide cases remained unresolved.*”

While the government increased its investigative capacity, this has yet to produce marked improvements. Furthermore, calls to improve the quality of the investigations and prosecutions by the adoption of new investigative methodologies – and thereby reduce the level of impunity – have not yet to be fully realized. The problem with the protection plan currently offered by the government to trade unionists is its predominately individual character (meaning that it does not seek to provide structural measures), which is oriented towards providing a series of measures with regard to particular threat. This has not been sufficient to overcome anti-union violence.

### **International regulatory co-operation**

According to the RPC report “*Colombia is participating in several international mechanisms, which among other issues address regulatory co-operation*” (#83). Several multilateral forums are mentioned (#85) including the International Civil Aviation Organization (OACI), the Inter-American Telecommunication Commission (CITEL), the Association of Water Regulatory Bodies of the Americas (ADERASA), among others. However, the report fails to mention the ILO, which is of crucial important for the 18million strong Colombian workforce. The report also fails to include Colombia’s evaluation by the ILO.

### ***International Labour Organization (ILO)***

Colombia has ratified all eight of the ILO fundamental conventions. For many years however, the supervisory mechanisms of the ILO have identified numerous ways in which Colombia’s labour laws fall short of the core labour standards, the minimum set of rights to be guaranteed by all countries<sup>4</sup>. Further, the government of Colombia’s has a very poor record enforcing the labour laws it has on the books.

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<sup>4</sup> Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98) Colombia (Ratification: 1976) [http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO::P13101\\_COMMENT\\_ID:2698926](http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO::P13101_COMMENT_ID:2698926)

### *Workers' right of association limited*

The right of association can be exercised by a very limited number of workers. Of about 18 million, less than 3 million have the right to join a union because the law establishes that only those workers hired through employment contracts can exercise that right, excluding workers hired under service, civil, or commercial contracts, workers in cooperatives, apprentices, self-employed and the unemployed, who constitute the majority of the workforce. Indeed, the majority of workers in Colombia are employed in the informal sector. The ILO has noted that, “*the concept of worker means not only salaried worker, but also independent or autonomous worker*” and that all workers should have the right to establish and join organizations of their own choosing.

### *Cooperatives and other subterfuges*

For years, hundreds of thousands of workers were hired through “associated labour cooperatives”, which were legal fictions used to sever the direct employment relationships and thus exempt workers from the protections of the labour code. In reality, workers were under the effective supervision and control of the employer. This was a widespread tactic to reduce terms and conditions and avoid trade unions and collective bargaining obligations.

In 2011-12, after legislation was enacted limiting the use of cooperatives, employers in some cases simply renamed these entities, such as “*sociedades anónimas simplificadas*” (simplified corporations), and continued to employ workers under fraudulent schemes. Indeed, the number of temporary service companies has increased 28%, and 723 “*contratos sindicales*” were signed in the last year, meaning that more workers labour under precarious forms of employment. Law 1610 of 2013 provides new tools to reduce the incidence of workers hired under illegal employment contracts, such as labour formalization agreements, increased sanctions and a faster timetable to complete investigations, but the efficacy of the law still remains largely untested.

### *Collective bargaining undermined*

Article 481 of the Labour Code permits collective agreements (“*pactos colectivos*”) to be directly negotiated with non-unionized workers where the union represents less than one-third of the workforce. In reality, they usually are contracts that workers are unable to negotiate and are forced to accept under threat of dismissal. In some cases, the employer will use the promise of an agreement to entice workers to resign from the union, leaving membership below the one-third threshold, making such agreements legal. The ILO Committee of Experts has repeatedly voiced its concern that the negotiation of collective accords could undermine the position of trade union organizations and called on the government to amend the legislation so that direct negotiations with workers should only be possible in the absence of trade union organizations. In effect the practice of collective pacts has greatly weakened trade union membership in Colombia<sup>5</sup>.

The labour code also does not explicitly provide for industry-wide collective bargaining, only bargaining at the company level. In practice, the government does not recognize the right of unions to bargain on an industry basis or on some social rights such as pensions. In 2005,

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<sup>5</sup> Data collected by the Escuela Nacional Sindical ([www.ens.org.co](http://www.ens.org.co)) shows that between 2010-11, 323 companies submitted collective pacts, 66 of which were companies that already had a union and a collective bargaining agreement. This led to the weakening of 44 unions and the disappearance of 22 others. For example, through its use of collective pacts, Avianca, the national airline, has been able to reduce union numbers down to just 680 workers out of a total of 15,000. Fifteen years ago, 90 per cent of Avianca workers were in a trade union. The remaining 25 companies have only collective pacts

Colombia reformed its Constitution to eliminate collective bargaining on the subject of pensions<sup>6</sup>.

### ***Free trade agreements***

Regarding bilateral regulatory co-operation the RPC report notes that within “*the framework of the Free Trade Agreement with Canada, this country provided support to study and review the procedures followed by Colombia’s MCIT to issue technical regulation*” (#86). It would be worth highlighting that technical regulation is not the only area of cooperation with Canada. Labour rights are too. Other free trade agreements are accompanied by monitoring process specifically addressing labour violation and rule of law in Colombia.

### *United States*

In April 2011, the US and Colombian governments negotiated the *Colombian Action Plan Related to Labor Rights* to forge a path forward for the long-stalled US-Colombia Free Trade Agreement. Its scope was too limited however. It resolved neither the grave violations of trade union freedoms nor the continuing violence and threats against unionists and human rights defenders. In addition, there was no specific provision requiring Colombia to establish a sustained, meaningful and measurable record of enforcement of any of the commitments prior to a congressional vote on or official entry-into-force of the trade agreement on May 15, 2012. The implementation of the agreement has been inadequate with regard to most of the 37 measures set forth in the plan, and indeed some of the measures were simply never implemented at all.

### *European Union*

The European Parliament ratified an FTA with Peru and Colombia in December, the agreement was formally signed by the Irish Presidency at the EU-Latin America Summit in January, and for Peru came into effect on 1 March 2013. Colombia, on the other hand has yet to ratify the text. On 11 June 2012, the European Parliament passed a resolution calling on Colombia (and Peru) to “*ensure the establishment of a transparent and binding road map on human, environmental and labour rights, which should be aimed essentially at safeguarding human rights, enhancing and improving trade unionists’ rights and protecting the environment*”<sup>7</sup>. The resolution includes five substantive areas where progress is needed: ensuring freedom of association, effective labour inspection, strengthening social dialogue, protecting the environment and ending impunity against trade union and other human rights defenders. International trade union organisations, including the ITUC, the ETUC, the Council of Global Unions and CSA (regional trade union organisation for the Americas) reiterated opposition to the FTA and called upon the EP resolution to become a legally binding commitment<sup>8</sup>.

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<sup>6</sup> The law also provides that the pension provisions of existing collective bargaining agreements will become null on July 31, 2010. The ILO has stated that “*Matters which might be subject to collective bargaining include the type of agreement to be offered to employees or the type of industrial instrument to be negotiated in the future, as well as wages, benefits and allowances, working time, annual leave, selection criteria in case of redundancy, the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in legislation etc.; these matters should not be excluded from the scope of collective bargaining by law.*”

<sup>7</sup> European Parliament resolution of 13 June 2012 on the EU trade agreement with Colombia and Peru (2012/2628(RSP)) Wednesday, 13 June 2012 - Strasbourg  
<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0249+0+DOC+XML+V0//EN>

<sup>8</sup> Trade unions united in opposing the EU-Colombia-Peru trade agreement, 09/10/2012  
<http://www.etuc.org/a/10412>

## **Human resource management in the public sector**

Under the chapter “Human Resource Management” the PGC report recommends to “*develop more flexible workforce management*” (#77) in the public sector and claims that “*there is a clear commitment to transparency and openness in the management of the public service, to creating a culture of equity and equal opportunities*” (#72) and that “*the basic principles set out in the 2004 legislation which regulates the public employment system are sound*” (#75).

We disagree.

### ***Right to collective bargain***

Public sector workers do not enjoy the right to collective bargaining in Colombia. On 31 March 2011, President Santos met with the trade union confederations and made several commitments, including a promise to extending bargaining rights for public sector workers. However, Decree 1092, which was promulgated in May 2012, was prepared without consultation with Colombian trade unions and does not contain all of the rights and guarantees necessary to be consistent with relevant ILO conventions 151 and 154 ratified by Colombia. For example, the decree maintains the limits on negotiations on salaries and benefits<sup>9</sup>.

### ***Right to strike***

Articles 430 and 450 of the labour code, read together, prohibit strikes not only in essential services in the strict sense of the term but also in a wide range of services that are not essential. The ILO has found that strikes may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population). The ILO has found that the following services on Colombia’s list are not essential: civil servants not exercising authority of the state, transportation, mining (salt) and oil. Some, but not all, work in telecommunications, hospitals and sanitation may be classified as essential. Workers who exercise the right to strike in these industries which are improperly designated “essential” may be fired under Article 450<sup>10</sup>.

## **Enforcement and inspection**

The RPC report’s analysis of the Colombian “*Approaches to regulatory enforcement and compliance*” (#325-332) under the chapter 6 and its recommendation for “*regulatory bodies should promote the use of risk-based approaches to increase compliance, target regulations, and focus their resources*” (#338) fails to highlight the severe gaps in the administration of the labour inspection system and the unfulfilled commitments to target specific sectors considered “at risk” of labour violations.

As part of the above mentioned *Labor Action Plan* agreed under the free trade agreement with the US, the Colombian government agreed to the addition of nearly 500 new inspectors, including 100 dedicated to inspecting cooperatives. Unfortunately, the record does not show that these inspectors have been properly trained nor are they carrying out vigorously the inspection commitments. Not all of the 100 inspectors specially assigned to inspecting

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<sup>9</sup> For more information, see <http://www.asmedasantioquia.org/ws/magazines/articulos/38-magazin-no-13/2988-sorpresa-e-inconformidad-del-movimiento-sindical-ante-el-decreto-de-negociacion-colectiva-en-sector-publico>

<sup>10</sup> Furthermore Article 417(1) of the labour code states that a federation has the same legal rights as a union, with the express exception of the right to strike. The ILO has found that “*The prohibition on the calling of strikes by federations and confederations is not compatible with Convention No. 87.*” In 2009, the ILO once again called on the Colombian government to amend this provision to allow federations and confederations to strike.

cooperatives are carrying out an inspection function<sup>11</sup>. The promised inspections with regard to temporary service companies – another sector that would deserve a full risk-based approach – do not appear to be producing significant results, with reporting on inspections and sanctions infrequent at best<sup>12</sup>.

Even if the agreed increase in the number of inspectors was to be effectively met, it would still not be enough. There should be at least 2000 labour inspectors who are adequately trained civil servants, with sufficient authority to enforce their decisions in order to carry out the workload.

### **Consultation and social dialogue**

The 2012 OECD Recommendation of the Council on Regulatory Policy and Governance as outlined in the RPC report (Box 2.1) calls upon governments to “*Adhere to principles of open government, including transparency and participation in the regulatory process to ensure that regulation serves the public interest and is informed by the legitimate needs of those interested in and affected by regulation*”. In the case of Colombia the RPC report concludes that “*there is no single, systematic and compulsory requirement to conduct public consultation within a given deadline*” in Colombia and that “*public consultation per se is not clearly defined, even if institutions are required to make their draft regulations public and they must solicit opinions during a set period*” (#193). Similar conclusions are found in the PGC report (#38) which also calls for “*more systematic, open national debate within the government and with Congress, sub-national authorities, business and citizens on major policy issues*” (#25).

Consultation with trade unions in particular is extremely challenging in Colombia. The Colombian government has established institution for social dialogue; however, they fail to function in any effective way. In 2011, an ILO High Level Mission in Colombia reported “*that the lack of trust between the tripartite constituents in Colombia is the main obstacle to the progress needed to achieve full respect for the rights guaranteed by ILO Conventions 87 and 98 of the ILO and a better future for Colombian society. [...] Colombia has to break this cycle of mistrust. Therefore, the mission gives the highest priority to actions aimed at strengthening the social dialogue processes. Colombia has the potential to develop meaningful social dialogue.*”

The Colombian Commission on the Resolution of Conflicts referred to the ILO has produced few results. In 2010 after 10 years in existence, it had resolved a mere 6.8% of the cases before it. In fact the Commission has acted as an obstacle to the treatment of cases by the ILO Committee on Freedom of Association.

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<sup>11</sup> Under the US free trade Labor Action Plan, Colombia promised to amend the 2010 Law of Formalization and First Employment to prohibit the misuse of cooperatives or any other kind of relationship that affects labour rights and impose significant fines for violations. In 2011, Decree 2015 was passed implementing the 2010 law. In most cases, however, companies which hired their employees through cooperatives have not changed their practices.

<sup>12</sup> Under the US free trade agreement Labor Action Plan, the Colombian Government promised to implement a regime including improving the inspection process of temporary service companies, designing a new training program for labour inspectors to raise their awareness, and building databases to identify regions and sectors where there has been abuse. However, according to the Escuela Nacional Sindical, there has been issued only an incomplete report that shows 109 visits by inspectors in the first quarter 2011, with a projected number of 625 visits by year end. However, information obtained at the close of 2011 showed that the goal was not met. Further, the only report regarding penalties, fines, and suspension of licenses, dated November 15, 2011, shows that only 8 companies were fined, 4 were suspended and 34 had their licenses cancelled. This is of a total of 527 temporary employment agencies that are known to be operating in the country.

The Permanent Commission on Labour and Wage Policies<sup>13</sup> is also meant to be a space in which the parties reach agreement on a broad range of policy. However, the unions report that the government fails to comply with the agreements reached in this space. In general, the trade unions report a failure of the government to consult adequately with the unions on major policy matters.

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<sup>13</sup>Comisión Permanente de Concertación de políticas salariales y laborales (CPCPSL)