Union “Petition” Under US-Colombia Free Trade Agreement Highlights Labor Violations in Oil and Sugar Industries in Colombia

Employment and Labor

Government

The presidential election campaign in the United States has shone a light on Free Trade Agreements (FTAs) entered into by the United States and other countries. The general purpose of FTAs is to facilitate the movement of goods and services by eliminating tariffs, reducing non-tariff barriers, and providing the state parties with increased access to financial and service sectors. However, FTAs joined by the United States often impose additional obligations on the state-parties to protect certain labor rights of their respective citizens. Commonly, these FTAs devote a “labor chapter” that calls for the state-parties to adhere to workers’ rights articulated under International Labour Organization (ILO) standards. A key component of these labor chapters is to provide for a quasi-judicial dispute resolution mechanism to resolve allegations of labor rights violations raised in complaints from state-parties or in “public submissions” from private entities, including employees, employers, and unions.

In May 2016, several American and Colombian labor unions filed a public submission (the Submission) under the US-Colombia Trade Promotion Agreement (the Colombia FTA) alleging the Colombian government’s failure to address and complicity in violations of the rights of union workers in the oil and sugar industries. The outcome of this Submission may inform the heated congressional debates on the Trans-Pacific Partnership (the TPP), the multilateral FTA the United States recently entered into with 11 other countries.

For employers, this Submission provides an instructive example of how unions and employees may use FTAs’ quasi-judicial dispute processes to air grievances alleging violations of worker rights articulated under international labor standards.

I. The Colombia FTA

The United States has entered into FTAs with multiple Central and South American countries, including Chile, Colombia, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Peru. The Colombia FTA was entered into force on May 15, 2012, and as with many other FTAs, the Colombia FTA has a “labor chapter” — specifically, Chapter 17.

In this labor chapter, the United States and Colombia reaffirm their obligations as members of the ILO. The parties are required to “adopt and maintain” in their laws and practices the following rights articulated under the 1998 ILO Declaration on Fundamental Principles and Rights at Work (ILO

Declaration):

- Freedom of association;
- The effective recognition of the right to collective bargaining;
- Elimination of compulsory or forced labor;
- The effective abolition of child labor, and prohibition of the worst forms of child labor; and,
- Elimination of employment discrimination.

Each state-party's obligation to "effective[ly] enforce" their respective labor laws that are directly related to the rights above is articulated in the negative. Specifically, the FTA states that the state-parties "shall not fail" to effectively enforce their respective labor laws "through a sustained or recurring course of action or inaction" in a manner affecting trade or investment.* However, each party is granted the right to exercise reasonable enforcement discretion. The Colombia FTA also ensures that persons have access to fair, equitable, and transparent tribunals for the enforcement of labor laws, as well as other procedural protections in seeking redress under the labor laws.

* While certain other Latin American FTAs also create this duty articulated in the negative, those FTAs are less prescriptive. For example, in the labor chapters of Central American Free Trade Agreement ("CAFTA") and the U.S.-Chile FTA, the state-parties reaffirm their obligations as members of the ILO, but only "strive" to ensure that labor rights recognized under the ILO Declaration are protected by each state-party's labor laws. The Colombia FTA is closer to the TPP in that both of those FTAs actually require that domestic law protect the rights under the ILO Declaration. The full text of CAFTA is available here. The full text of the TPP's labor chapter is available here.

As with other Latin American FTAs, the Colombia FTA also creates a quasi-judicial dispute resolution mechanism that is triggered when a state-party submits a written request with another state-party's "Contact Point" calling for consultation about any issues arising under the FTA. Even though there is no right of action for private parties such as employees, unions, and private employers, the FTA allows for "public submissions" to a party's "Contact Point," which also triggers the dispute resolution mechanism. Thus, a private party residing in either Colombia or the United States could make a public submission to the Contact Point of the United States or Colombia about violations in either the United States or Colombia. Such a public submission will trigger consultations among the state-parties.

The US Contact Point for labor issues that arise under this FTA (as well as numerous other FTAs) is the Office of Trade and Labor Affairs (OTLA) within the US Department of Labor (DOL). The OTLA requires that the public submission specifically demonstrate how a state-party's sustained failure to enforce its labor laws is a violation of the labor obligations under the FTA and how the issue affects trade between the state-parties.

If consultations do not resolve the issues raised by a state-party or the public, a "labor committee" comprising cabinet-level state-party representatives is convened.* If the issue remains unresolved after submission to the labor committee, the parties will proceed to the dispute settlement procedure articulated in Chapter 21. If the dispute resolution mechanism results in a conclusion that a state-party violated its obligations under the FTA, and that state-party does not correct its actions in a designated period of time, it may be subject to monetary sanctions.**

* In the case of NAFTA's NAALC, an "Evaluation Committee of Experts" comprising independent labor experts is first convened, and then the matter is turned over to the labor committee based on a

report of the experts.

** In the case of the TPP, the offending state-party could be subject to a suspension of the trade benefits the TPP grants that party, including suspension of tariff reduction.

II. The unions' submission

In May 2016, several American and Colombian labor unions (the unions) filed a public submission (submission) under the Colombia FTA with the Contact Point in the United States — the OTLA. This submission alleges that the government of Colombia violated multiple obligations under that FTA's labor chapter. The submission calls for the United States to engage in "Cooperative Labor Consultations" with Colombia to ensure Colombia's compliance with the labor chapter. If those Consultations fail, the Submission additionally calls for the United States to invoke the dispute settlement process under Chapter 21 of the FTA.

The submission highlights cases from Colombia's oil and sugar industries to illustrate the unions' position that Colombia violates various provisions of the labor chapter. While the submission alleges that the government of Colombia failed to prevent or stop labor violations committed by many oil companies — including the state-owned Ecopetrol — it makes a detailed case study of violations at Pacific Rubiales, a Canadian-based extractive company registered in Colombia as Metapetroleum. In the sugar industry, the submission highlights alleged violations at Ingenio La Cabana, a large Colombian sugar production and processing company.

An allegation common to both companies is the government's alleged failure to inspect and regulate "labor intermediation," the practice of setting up sub-contracting entities or "labor intermediaries" to provide labor to companies on a short-term basis. The unions argue that this practice "obscures a direct employment relationship" and allows companies to withhold the rights afforded to employees, including terminating those workers when they attempt to unionize. According to Colombian law, where workers perform core, permanent activities of the company, those workers may not be engaged by the company in such informal relationships. The unions allege that the workers at Pacific Rubiales and Ingenio La Cabana performed core, permanent activities that prohibited those companies from engaging them through labor intermediation.

Another allegation leveled against both companies is that each company discriminated against union-affiliated workers by either pressuring workers to disaffiliate or subjecting those workers to mass dismissals, intimidations, and threats. In each case, the respective company allegedly maintained the position that there was already a union that represented the workers, but the submission alleges that those pre-existing unions "heavily aligned" with the companies and failed to organize or otherwise properly represent the workers. The submission also details certain alleged instances where the Colombian government — including prosecutors, the military, and the police force — assisted the companies in quashing or deterring work stoppages and other union activities. Thus, the unions allege that the Colombian government not only failed to prevent or eliminate discrimination against union workers, but also actively assisted in such discrimination by deploying government forces to assist the companies commit acts of violence against those workers.

The submission also highlights that the unions unsuccessfully sought redress from Colombian government authorities — including seeking assistance from prosecutors to pursue criminal charges against the companies and filing administrative complaints with the Ministry of Labor. The submission indicates that the government authorities were not interested in protecting or redressing the union workers, and that in some cases retaliated against the workers by prosecuting union leaders.

The unions argue that these allegations support a finding that Colombia has failed to effectively enforce its labor laws “through a sustained and recurring course of action and inaction.” In particular, they argue that the government’s failure violates the rights of freedom of association and collective bargaining under the labor chapter of the Colombia FTA. These violations, according to the submission, allegedly affect trade and investment between Colombia and the United States by distorting the cost of labor in the oil and sugar sectors because Colombian workers are prevented from organizing and bargaining for better wages and working conditions, thus placing American oil and sugar workers at a competitive disadvantage. The submission concludes by calling for the US government to conduct a “thorough, wide-ranging investigation into” these allegations, and to launch labor consultations with the Colombian government.

III. The practical impact of the submission

It is unclear to what extent the submission will effect a change in Colombia’s workforce. Much depends on what the labor consultation and dispute resolution process will reveal about the merits of the unions’ allegations.

Unions have used the public submission process in this in other FTAs as a pulpit to raise awareness of alleged labor violations and to place pressure on state-parties to enforce their domestic laws to remedy alleged labor abuses by employers. For example, unions in Mexico submitted a public submission under NAALC to the DOL claiming that the Mexican government failed to enforce certain workers’ rights at a Mexican plant run by a Japanese electronics company. The OTLA found merit in the claims and recommended consultations between the state parties. While consultations were held, no sanctions were imposed, but commentators have noted that placing the Mexican government under media glare helped achieve some improvements to labor protections by both the Mexican state and the companies that operate in Mexico.

Even if it finds any merit to the allegations raised by the submission, it is unclear to what extent the United States will hold Colombia accountable. This is particularly true in an election year. The TPP, aggressively promoted by the Obama administration, has been subject to attacks that it will not effectively protect the rights of American workers or the workers of the other 11 state-parties. A seemingly unsatisfactory resolution of the claims raised by the submission under the Colombia FTA may add to the intensity of the criticism of the TPP’s labor protections and may, depending on the presidential election results, impact how the US government proceeds in response to the submission.

IV. Take-aways for employers

This submission under the Colombia FTA — though ostensibly aimed at correcting Colombia’s labor record — may provide another avenue for unions to place pressure on employers. Indeed, recent efforts in legislatures and courtrooms have sought to impose liability on private entities, like employers, for alleged violations of international standards such as the ILO Conventions and the United Nations Guiding Principles on Business and Human Rights. This submission is one such effort, and illustrates how FTAs could provide an international forum for unions to air grievances based on violations of the international labor standards incorporated into those FTAs.

Further Reading

U.S.-Colombia Trade Promotion Agreement, Ch. 17. As a point of comparison, while the North

American Free Trade Agreement (NAFTA) does not by itself include labor obligations, its side agreement, the North American Agreement on Labor Cooperation (NAALC), does.

Fed. Reg. Vol. 71, No. 245, at 76694 (Dec. 21, 2006).

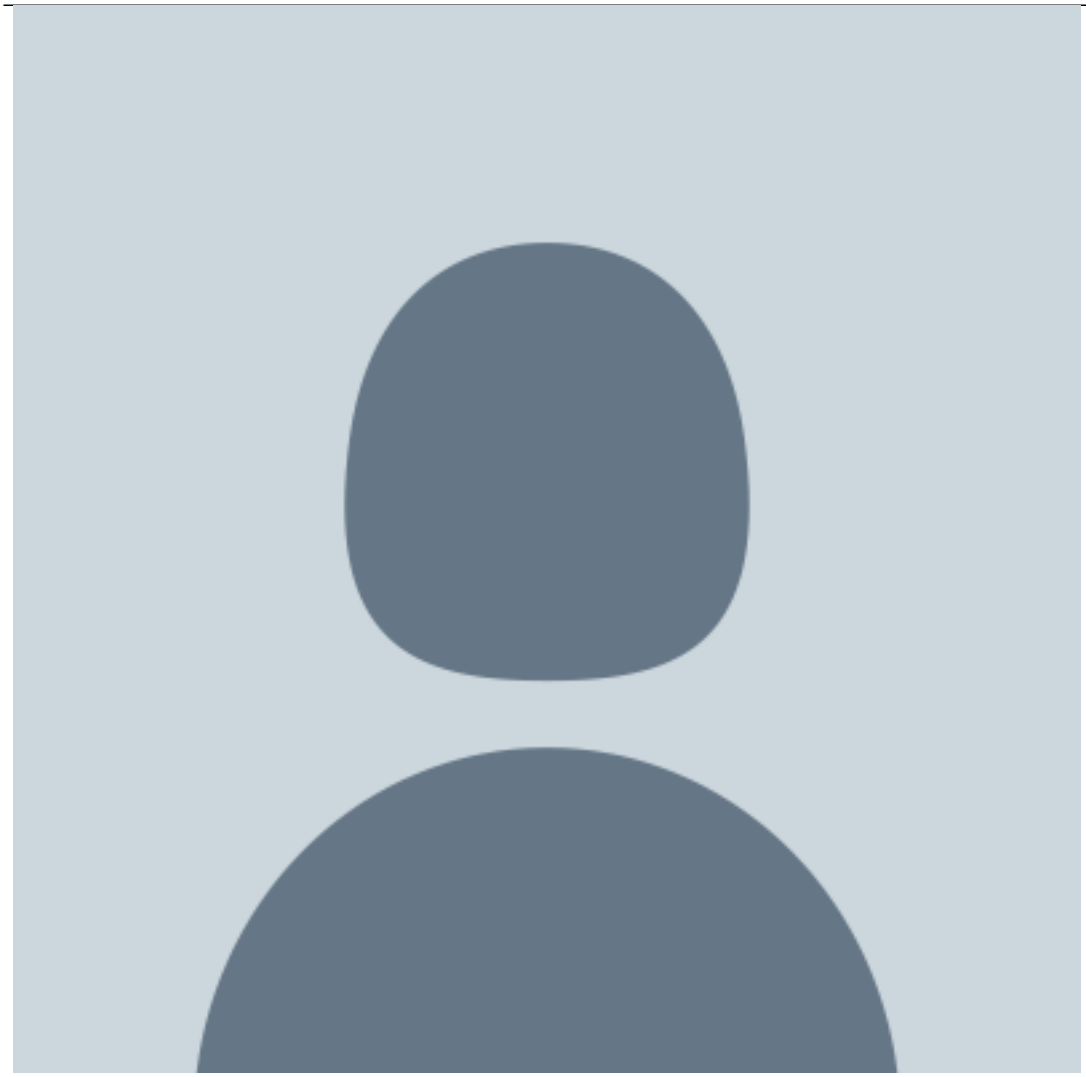
See Public Submission to the OTLA under Chapters 17 and 21 of the Colombia-United States Trade Promotion Agreement.

U.S. NAO Public Submission 940003 (Aug. 16, 1994).

See generally Jonathan Graubart, “Politicizing” a New Breed of “Legalized” Transnational Political Opportunity Structures: Labor Activists Use of NAFTA’s Citizen-Petition Mechanism, 26 Berkeley J. Emp. & Lab. L. 97 (2005).

See Stefan Marculewicz, Michael Congiu, John Kloosterman and Lavanga Wijekoon, California Laws Are Being Used to Advance Human Rights Claims Based on Global Supply Chain Activities, Littler Insight (Oct. 14, 2015).
John Kloosterman, Trent Sutton, Sari Springer, and Lavanga Wijekoon, In Canada, Foreign Workers Seek to Use International Norms as the Standard of Care in Negligence Claims Against Multinationals Operating Overseas, Littler Insight (Sept. 16, 2015).

John Kloosterman



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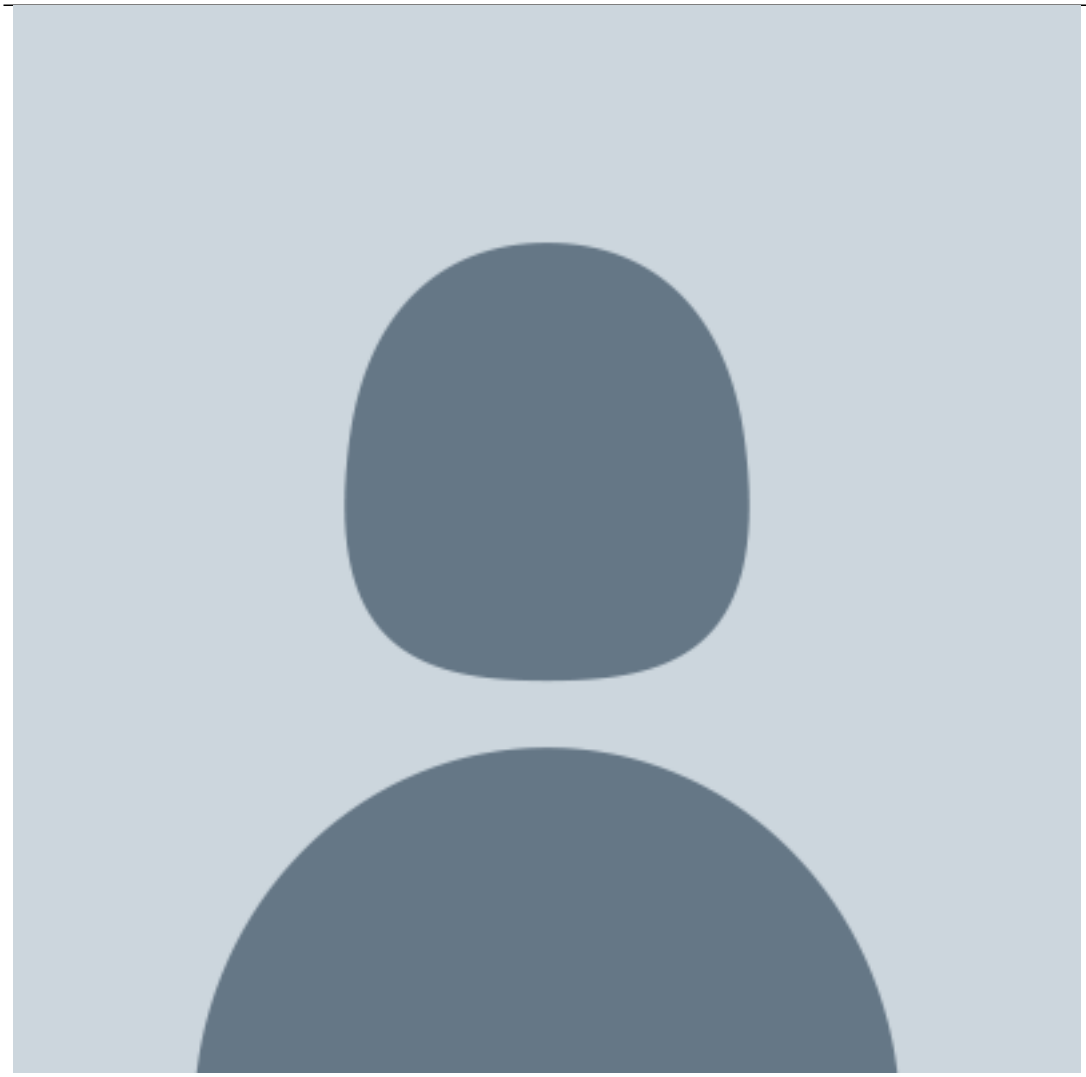

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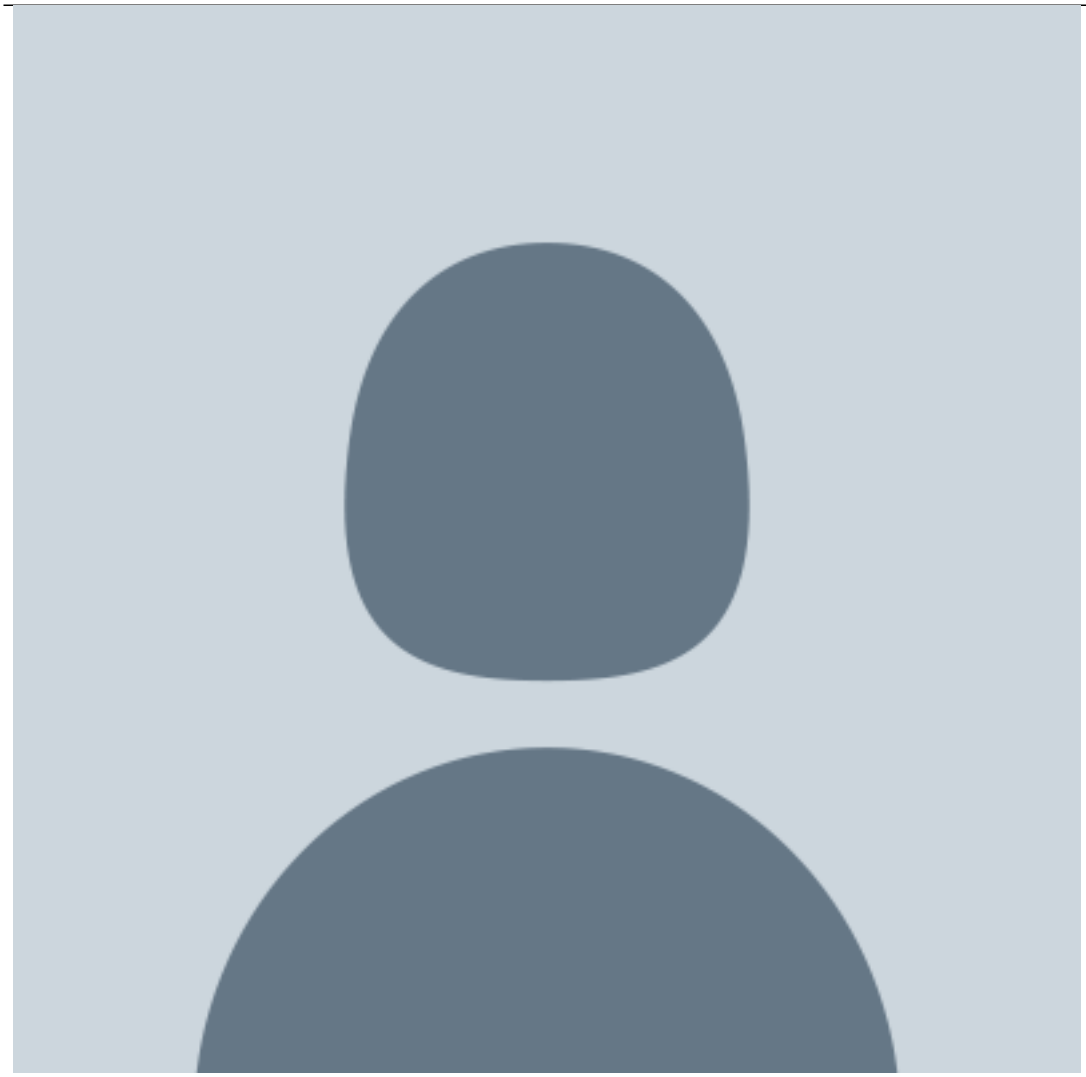

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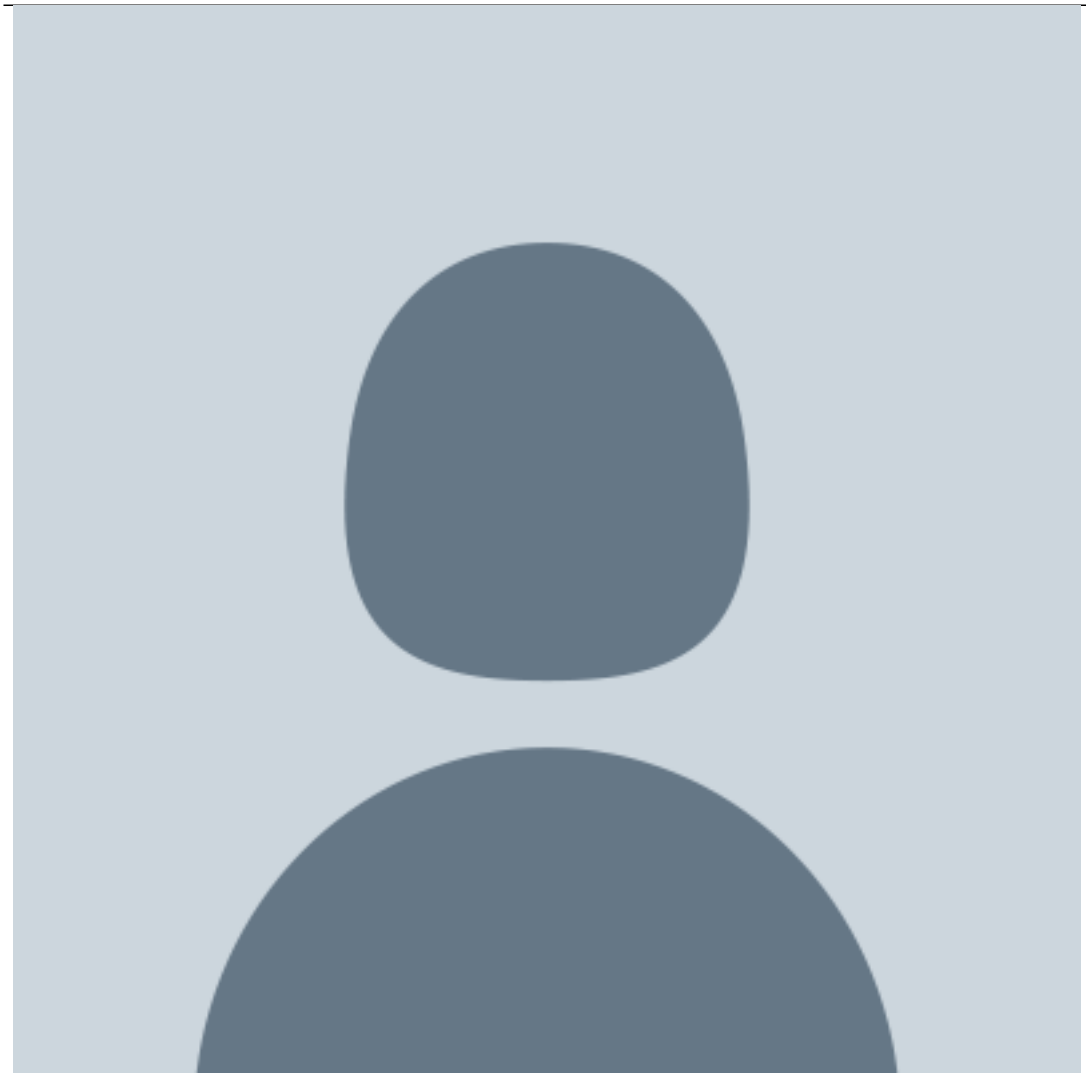

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