Complaint against the Peruvian Government for failing to fulfil its labour and environmental commitments under the Trade Agreement between Peru and the European Union

Organisations that make up the Plataforma Europa Perú (PEP [Europe–Peru Platform]), a member of the EU DAG (Domestic Advisory Group), and European organisations that are signatories to the complaint:

1. Asociación Pro Derechos Humanos (Spain)
2. Putumayo vzw (Belgium)
3. Broederlijk Delen (Belgium)
4. Catapa vzw (Belgium)
5. Centre for Research and Documentation Chile-Latin America – FDCL (Germany)
6. CNCD-11.11.11 (Belgium)
7. Commission Justice et Paix de Belgique Francophone (Belgium)
8. Entraide et Fraternité (Belgium)
9. FOS – Socialistische Solidariteit (Belgium)
10. Informationsstelle Perú e.V. (Germany)
11. Kampagne “Bergwerk Peru – Reichtum geht Armut Bleibt” (Germany)
12. Koepel van de Vlaamse Noord-Zuidbeweging – 11.11.11 (Belgium)
13. Peru Support Group (UK)
14. Secours Catholique (France)

Peruvian civil society organisations that are supporting the complaint:

1. Asociación Nacional de Centros (ANC)
2. Asociación Pro Derechos Humanos (Aprodeh)
3. Central Autónoma de Trabajadores del Perú (CATP)
4. Central Unitaria de Trabajadores del Perú (CUT)
5. Centro Peruano de Estudios Sociales (CEPES)
6. Confederación Campesina del Perú (CCP)
7. Confederación General de Trabajadores del Perú (CGTP)
8. Confederación Nacional Agraria (CNA)
9. Conferencia Nacional de Desarrollo Social (CONADES)
10. CooperAcción
11. Coordinadora Nacional de Derechos Humanos (CNDDHH)
12. Equidad. Centro de Políticas Públicas y Derechos Humanos
13. Estudio para la Defensa de los Derechos de la Mujer (DEMUS)
14. Federación de Trabajadores del Agua Potable y Alcantarillado del Perú (FENTAP)
15. Federación Nacional de Trabajadores Textiles, Confecciones y Afines del Perú (FNTTP)
16. Foro de la Sociedad Civil en Salud (FOROSALUD)
17. Grupo Propuesta Ciudadana (GPC)
18. Instituto del Bien Común (IBC)
19. Movimiento Ciudadano Frente al Cambio Climático (MOCICCC)
20. Red Latinoamericana sobre Deuda, Desarrollo y Derechos (Latindadd)
21. Red Muqui Perú
22. Red Peruana por una Globalización con Equidad (RedGE)
23. Red Uniendo Manos Perú
24. Superintendencia Nacional de Fiscalización Laboral (SUNAFIL)

Brussels, 19 October 2017
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Introduction

On 26 June 2012, the European Union (EU) and Peru signed a Trade Agreement (TA) that has been provisionally applied since 1 March 2013. Peru ranks 47th among the EU’s trading partners; it exports goods to Europe worth EUR 4.949 billion, primarily agricultural products (47.9 %), as well as fuel and minerals (44.6 %). In turn, the EU exports machinery and transport equipment (49 %) and other manufactured goods such as chemicals (16 %) to Peru.1

The EU is Peru’s third-largest trading partner; it accounts for 13.6 % of the country’s total trade and over 50 % of the country’s foreign direct investment (FDI) comes from the EU, in particular from Spain, France, the United Kingdom and the Netherlands. Most of this investment is in the mining sector, which represents approximately 60 % of Peruvian exports.

In its ‘Trade for All’ strategy, the European Union has recognised the need for a trade policy based on values.2 This is an aim that our civil societies trust may become a reality; based above all on effective fulfilment of the environmental and social commitments that the EU’s trading partners have made by signing up to the Titles on Sustainable Development that form part of the Trade Agreements concluded with countries such as Peru and Colombia.

However, on 17 June 2015, in letters addressed to the Ministerio de Comercio Exterior y Turismo del Perú (MINCETUR [Peruvian Ministry of Foreign Trade and Tourism]) and to the Delegation of the European Union, Peruvian civil society publicly expressed its concerns regarding both the current weakening of environmental and social standards in order to favour the promotion of investment and the state of the labour market and labour relations in Peru, asking for these issues to be taken into account at the Second Meeting of the Sub-committees and Trade Committee — within the framework of the Trade Agreement between Peru, Colombia and the European Union — that took place from 11 to 19 June 2015.3 This action was repeated in 2016, within the framework of the Third Meeting of the Sub-committee on Trade and Development, and also again in 2017.4 However, to date, the situation of these rights has not improved. Peru continues to fail in the effective application — in both its laws and its practices — of the labour and environmental

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1 Delegation of the European Union to Peru, Trade relations. See https://eeas.europa.eu/delegations/peru/1684/peru-y-la-ue_es
3 See Annex 1: Peruvian civil society letters to the Delegation of the European Union and MINCETUR, both dated 17 June 2015.
standards laid down in international human rights law and in the Conventions relating to these rights that it has ratified and undertaken to honour.

In consequence, the organisations listed on the front page of this document submit this petition to the European Union contact point referred to in Article 280 TA on the grounds that the Peruvian Government is not meeting its convention obligations with regard to the labour and environmental standards set out in the TA, in particular, in Title IX.

Although non-fulfilment of these obligations occurs in numerous sectors of the Peruvian economy, this petition focuses particularly on the description of cases that show how this is occurring in sectors such as agriculture, mining, oil and gas, as well as in textiles and clothing, because these are linked to the trade between the two parties.

To show how these breaches are occurring, cases have been selected in all of these sectors that are representative of how the labour and environmental commitments under Title IX are consistently disregarded as a result of the lack of regulatory provision and/or appropriate institutional action to enforce them. They also illustrate the regulatory backsliding that has occurred and the widespread tolerance shown by the Peruvian Government in the face of flagrant cases of non-compliance with the (few) regulations on labour and environmental protection that currently exist in Peru.

1. Description of the general sustainable development commitments assumed under the Peru–European Union Trade Agreement

Article 1 of the TA includes binding provisions to ensure the protection of human rights, affirming, ‘Respect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, and for the principle of the rule of law, underpins the internal and international policies of the Parties. Respect for these principles constitutes an essential element of this Agreement’, which means that failing to respect human rights and democratic principles constitutes a material breach of the Trade Agreement under public international law. This should give rise to the adoption of appropriate measures, including the possibility of withdrawing from the Agreement or partially or totally suspending it. But in order for this to occur, it is first necessary to ensure that the respect for human rights by all of the signatories is appropriately verified and the practical application of the human rights clause is enforced.
Article 8(1) TA on the fulfilment of the obligations entered into under the Agreement specifies that each Party:

‘is responsible for the observance of all provisions of this Agreement and shall take any necessary measure to implement the obligations under it, including its observance by central, regional or local governments and authorities, as well as non-governmental bodies in the exercise of governmental powers delegated to them by such governments and authorities.’

Article 268 refers to the sovereign right of each Party to establish its own levels of environmental and labour protection ‘consistent with the internationally recognised standards and agreements referred to in Articles 269 and 270, and to adopt or modify accordingly its relevant laws, regulations and policies; each Party shall strive to ensure that its relevant laws and policies provide for and encourage high levels of environmental and labour protection.’

Additionally, in Article 271(1) TA the Parties reaffirm that trade should:

‘promote sustainable development. The Parties also recognise the beneficial role that core labour standards and decent work can have on economic efficiency, innovation and productivity, as well as the value of greater coherence between trade policies, on the one hand, and labour policies on the other.’

Title IX of the agreement titled ‘Trade and Sustainable Development’ rounds out the framework applicable to this subject with a separate set of provisions concerning labour and environmental standards, the aim of which is to ensure that a high level of labour and environmental protection is a priority for both parties.

The following pages will show how Peru consistently disregards these obligations despite the numerous warnings given by Peruvian civil society to the competent authorities in Peru and to the Delegation of the European Union itself. This calls for the situation to be thoroughly examined as a matter of urgency in order to ensure that these obligations will be met and that the TA will fulfil its aim of ensuring that trade serves to promote sustainable development.
2. Review of Peru’s non-compliance with its labour obligations under the TA

2.1 Description of the specific obligations in labour matters entered into under the Peru–European Union Trade Agreement.

With regard to labour matters, the first paragraph of Article 269 TA stipulates that:

the Parties ‘reaffirm their commitments to promote the development of international trade in a way that contributes to productive employment and decent work for all’.

Decent work\(^5\) constitutes a universal goal for the International Labour Organisation (ILO), and has been defined as the promotion of opportunities for women and men to obtain decent productive work in conditions of freedom, equity, security and human dignity. For the ILO, decent work is an overarching concept that serves to provide a general framework for actions designed to foster economic and social development.\(^6\) Furthermore, it sums up the aspirations of people in their working lives. It involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organise and participate in the decisions that affect their lives and equality of opportunity and treatment for women and men.\(^7\)

To ensure fulfilment of this objective, the third paragraph of Article 269 TA states that:

‘Each Party commits to the promotion and effective implementation in its laws and practice and in its whole territory of internationally recognised core labour standards as contained in the fundamental Conventions of the International Labour Organisation (...).’

The fundamental conventions of the ILO concern (i) freedom of association and the effective recognition of the right to collective bargaining; (ii) the elimination of any kind of forced

\(^5\)Decent work also encompasses implementing and enforcing standards, promoting employment, extending social protection and encouraging social dialogue. In particular, decent work requires effective assurance of freedom of association and the right to collective bargaining because exercising both rights is what can generate the necessary bargaining power to eliminate the large number of unacceptable practices that exist, whether it be in the export industries or in any other sector of the economy.


\(^7\) See http://www.ilo.org/public/spanish/decent.htm
labour; (iii) the abolition of child labour; and (iv) the elimination of discrimination in respect of employment and occupation. All of these are issues that have to do with the fundamental rights and freedoms of people who work. Consequently, they are all also protected under Article 1 TA insofar as it refers to the Parties’ commitment to ensuring the effective exercise of human rights as an essential element.

This is why, in accordance with this intention, Article 277 TA provides that:

‘1. No Party shall encourage trade or investment by reducing the levels of protection afforded in its environmental and labour laws. Accordingly, no Party shall waive or otherwise derogate from its environmental and labour laws in a manner that reduces the protection afforded in those laws, to encourage trade or investment.

2. A Party shall not fail to effectively enforce its environmental and labour laws through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties (...)

The assumption of these obligations must be seen in the light of the commitment made by the Parties under Article 267(2)(b) TA which states that one of the objectives of the Agreement is precisely to

‘strengthen compliance with the labour and environmental legislation of each Party, as well as with the commitments deriving from the international conventions and agreements referred to in Articles 269 and 270, as an important element to enhance the contribution of trade to sustainable development.’

To recap: under the TA the Parties have undertaken to implement legislation that is consistent with the standards defined by the ILO conventions on fundamental rights; not to make regulatory changes that involve a reduction in the existing levels of protection for the purpose of encouraging their trade; nor to fail to effectively enforce their environmental and labour laws through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties, since all such practices involve a breach of their obligations to respect and enforce human rights, which constitutes an essential element of the Agreement.

As will be seen in this section, the labour obligations assumed by the Peruvian Government under the TA are consistently and systematically disregarded. First of all, it should be pointed out that from a regulatory point of view Peru has special or separate legal frameworks that
mainly affect workers involved in trade between the Parties in the textile, clothing and agricultural sectors as regards both the exercise of their right to freedom of association (a commitment made directly by the Peruvian State) and the possibility of obtaining decent productive work.

Secondly, the legislation put in place by the Peruvian State does little to protect the exercise of the fundamental rights of workers; in particular, their fundamental right to freedom of association. In general terms, in addition, there is evidence in Peru not only of a systematic disregard for the judgments of both the domestic justice system and the Inter-American Court of Human Rights when these order the reinstatement of labour or pension rights, but also an alarmingly passive attitude towards breaches of labour regulations committed by companies involved in trade with the European Union.

To describe these aspects, this section has been divided into three parts. The first part provides an overview of the labour situation in Peru and points out the shortcomings of its labour inspection and justice systems where workers’ rights are involved. The second part describes the regulatory frameworks that affect workers in the sectors referred to above; while the third part presents several case studies that illustrate the detrimental impact of these infringements and of the inaction of the Peruvian Government in the face of these flagrant breaches of its obligation to guarantee the exercise of the rights recognised under the ILO conventions by workers who are involved in trade with the European Union.

The information contained in the following sections is supplemented by that given in Annexes 4, 5 and 6 of this document. These annexes refer, firstly, to the report prepared by the Working Group of the Trade Committee of the Congress of Peru that was set up to evaluate the impact of the cooperation and trade agreements signed by Peru with the United States, the European Union, Canada and China; secondly, the conclusions and recommendations contained in the report by the University of Ghent titled ‘Labour Rights in Peru and the EU trade agreement. Compliance with the commitments under the sustainable development chapter,’ which offers an in-depth analysis of Peru’s performance regarding the labour obligations that it has taken on by becoming a Party to the TA; and finally, in third place, the recommendations of the US Department of Labor concerning Peru’s breach of its labour obligations under Chapter 17 of the United States–Peru Trade Promotion Agreement. All of these documents largely agree with the analysis and conclusions that are presented herein and should be taken into account when examining the issues addressed in this claim.
2.2 Description of how the failure to fulfil the obligation to ensure the effective application of the fundamental labour standards recognised internationally, as they are set out in the fundamental conventions of the International Labour Organisation and as required under Title IX of the TA, has a negative impact on the exercise of labour rights, including freedom of association.

2.2.1 Systematic unchecked violation of labour rights in general

The Peruvian Government does not ensure the effective application of its own laws and there is disregard for the labour standards contained in international human rights legislation and in the conventions on the fundamental rights and freedoms of workers of the International Labour Organisation.

The Economically Active Population (EAP) of Peru is around 16 million people. Informal employment accounts for more than 70% of jobs in all categories and sectors of the economy. And, at USD 260 per month, the country has one of the lowest minimum wages in Latin America, where the average is USD 330.

The union membership rate in the private sector is six times lower than it was 30 years ago. Although this situation is linked in part to the fragmented nature of its labour legislation (Peru is one of the four countries in Latin America that do not have a labour code), it also reflects the continuous pressure from various business sectors that are constantly striving to lower the levels of legislative protection. It is also compounded by the limited resources that the State has available for enforcing its own legislation.

The enormous increase in temporary employment in recent years, particularly at companies in the sectors linked to export activities, has had a severe impact on worker, job and income security, as well as on the exercise of workers’ right to union membership and collective bargaining.

These companies abusively use temporary employment contracts as a tool to minimise any real opportunities for the establishment of trade unions and for workers to engage in collective bargaining with their employers that leads to an improvement in their working conditions.

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8 See https://www.inei.gob.pe/estadisticas/indice-tematico/ocupacion-y-vivienda/

9 See http://gestion.pe/economia/peru-717-pea-no-se-encuentra-planilla-2174810
conditions. As a result, workers’ incomes are at a standstill, or else have dropped substantially.

The lack of enforcement of the human right to safe and healthy working conditions has led, according to Ministry of Labour statistics, to there being around 14 500 occupational accidents each year, 145 of which are fatal.

The labour situation in general reflects a widespread crisis in the management of the resources that the State has available for ensuring basic working conditions, to the point where it is not unusual to find situations of semi-slavery in Peru, such as those highlighted by the Global Slavery Index. With over 200 000 people living in some form of modern slavery, Peru ranks third in Latin America, and eighteenth out of 181 countries worldwide, by the proportion of the population who have absolutely no freedom to decide on their own destiny, according to a report published by the Walk Free Foundation.10

A recent fire in Lima, Peru’s capital city, highlighted — once again — not only the dramatic situation of workers at companies that keep them in conditions of semi-slavery, but also the total failure on the part of the Government and the labour authorities to put an end to this situation. 11

The systematic failure to meet minimum standards in human/labour rights and the unwillingness of the Peruvian Government to bring its legislation and practices into line with the international standards to which it is committed under the international treaties ratified by the country have also led to Peru becoming one of the Latin American countries with the most complaints filed against it with the control bodies of the International Labour Organisation.12

It is also one of the countries most reported to the Inter-American Commission on Human Rights (IACHR) for violating human rights (including labour rights). And it holds the sad distinction of being the country with the greatest number of judgments against it from the Inter-American Court of Human Rights.

In the Global Competitiveness Report 2016–2017,13 Peru ranks 67th. With regard to the labour market flexibility indicator, Peru is highly flexible when it comes to the possibility of lowering wages (it is placed 17th, and is the second most permissive country in Latin

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10 See https://www.globalslaveryindex.org/index/
12 Peru is the country with the greatest number of complaints filed against it before the ILO Committee on Freedom of Association. See the ILO QVILIS database at http://white.lim.iло.org/qvilis_mundial/
America). Its severance payments are also among the lowest in the world: Peru is in 4th place, with severance pay that is less than half of what is paid in Sweden, Australia, France, China, Brazil, Colombia, Costa Rica, Uruguay, Mexico, El Salvador, Guatemala and Chile, among others. In fact, according to the World Economic Forum, Peru is the Latin American country with the lowest compensation for unjustified dismissal. As a result, it is extremely cheap to dismiss a worker without objective reasons or just cause.

2.2.2 Existence of an illusory system for overseeing the enforcement of labour legislation

When the Superintendencia Nacional de Fiscalización Laboral (SUNAFIL [National Superintendency for Labour Oversight]) was set up in 2013, for example, it was said that in order to fulfil its role it required at least 2 000 fully qualified inspectors. According to the Encuesta Nacional de Hogares [National Household Survey] at that date, over 4 million employees required labour inspection visits at least twice a year to verify compliance with social and labour rights. With the number of inspectors available at the time, the labour inspection system could barely meet 20.09% of the total demand for inspection (957 980 employees). According to SUNAFIL itself:

‘a total of 2 082 inspection personnel (1 892 inspectors and 190 supervisors) would be required to meet the demand for labour inspection. (And) the lack of a State presence in the oversight of social and labour rights leads to abuse, mistrust and labour disputes.’

It currently only has 105 inspectors: 97 in Lima and 8 in the other regions of the country. But there are 14 regions in Peru (Loreto, Tumbes, Tacna, Ayacucho, Ica, Lambayeque, Apurímac, Puno, Moquegua, Amazonas, Pasco, Huancavelica, Madre de Dios and San Martín) where there is not a single labour inspector. In the Ucayali region there are two inspectors and in the remaining nine regions there is only one.

According to the Minister of Labour, inspection visits to companies to verify compliance with labour rights are currently being made to barely 7% of total economic units. In addition, the Ministry’s oversight target for 2020 is barely 22% of organisations.15

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14 SUNAFIL, Comments on the draft of Law No 538-2011. See www.mintra.gob.pe/RMV/superintendencia_nacional_fiscalizacion_laboral.ppt
15 Statement made by the Minister of Labour, Alfonso Grados, to daily newspaper La República. 23.08.17. See http://larepublica.pe/economia/1077412-al-2020-se-realizaran-111-mil-inspecciones-laborales-al-22-deempresas-locales
2.2.3 Systematic failure to comply with judgments when they order the reinstatement of labour and social security rights

Peru is the subject of international criticism for its systematic failure to comply with judgments ordering the reinstatement of financial and social rights (in particular labour and social security rights) when issued both by domestic courts and by the Inter-American Court of Human Rights.

The systematic disregard for the judgments of its highest courts not only undermines the legitimacy and credibility afforded by national and international society to Peru’s justice system (for example, when it comes to safeguarding the ownership rights of investors); it also sows doubts about the country’s ability to ensure the existence of effective resources that will prevent it from failing ‘to effectively enforce its environmental and labour laws through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties’, as is required under Article 277(2) TA.

The Inter-American Commission on Human Rights recently drew attention to this serious situation in its Merits Report No 41/17 of 23 May 2017 concerning the action taken against the Peruvian State by the Asociación Nacional de Cesantes y Jubilados de la Superintendencia Nacional de Administración Tributaria ([National Association of Redundant and Retired Staff of the National Superintendency for Tax Administration]). This report indicates the following:

‘The IACHR notes that the Peruvian State’s failure to comply with judgments delivered against State entities since the 1990s goes beyond the individual situation of the victims in this case and forms part of a more general context.'

Thus, the Inter-American Court had already ruled on two cases concerning the failure in Peru to comply with judgments equalising the pensions of former public officials in conformity with Decree Law No 20530 in the 1990s. The two judgments delivered by the Court indicated that the court rulings reinstating certain of the victims’ labour and pension benefits had not been executed.

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In turn, in the context of these cases, the IACHR has stated that the Peruvian State’s failure to comply with judgments ‘obscures the practice and sense of the administration of justice and weakens the confidence of Association members in the rulings of judges.’ \textsuperscript{18} The Commission has also taken on several cases in which similar claims are being made,\textsuperscript{19} and these are awaiting a decision on their merits.

Similarly, the Commission observes that in October 1998 the Defensoría del Pueblo [Ombudsman’s Office] issued a report titled \textit{Failure by the State authorities to comply with judgments}.\textsuperscript{20} The Ombudsman’s Office found that a problem that occurs within the judiciary is the failure to execute judgments that are delivered against a State entity.\textsuperscript{21} It stated that since being set up in 1993 it had handled approximately 101 complaints against a variety of State agencies for failure to comply with final judgments against them.\textsuperscript{22} It said that over 50\% of the complaints related to ‘court rulings on labour matters that are not put into effect.’\textsuperscript{23} The Ombudsman’s Office explained that in the large majority of cases these were court rulings that involved complying with an obligation of a monetary nature such as the equalisation of pensions.\textsuperscript{24}

\textsuperscript{18} IACHR, Case 12 357, Claim filed before the IA Court of Human Rights by the members of the National Association of Redundant and Retired Staff of the Office of the Comptroller General of the Republic, Peru, 1 April 2008, paragraph 63.
\textsuperscript{21} Ombudsman’s Report No 19, Ombudsman’s Office, Non-compliance with judgments by State authorities, October 1998.
\textsuperscript{22} IACHR, Case 12 357, Claim filed before the IA Court of Human Rights by the members of the National Association of Redundant and Retired Staff of the Office of the Comptroller General of the Republic, Peru, 1 April 2008, paragraph 63.
\textsuperscript{23} Ombudsman’s Report No 19, Ombudsman’s Office, Non-compliance with judgments by State authorities, October 1998.
It should be pointed out that the description of the situation given by the Ombudsman’s Office in its 1998 report (subsequently reiterated in a further two Ombudsman reports: Nos 35 and 172) falls short, for there are currently many more cases that could be cited in which the same thing is happening: the Peruvian State is systematically disregarding court judgments that order the reinstatement of the monetary rights of its workers or former workers. This is a situation which, as can be seen from the cases being handled by the IACHR, involves not only several thousand Peruvians, but also members of the Peruvian judiciary itself who have been given judgments that order the reinstatement of their rights, non-compliance with which has led to their situation being considered to constitute a structural violation of human rights by the Inter-American Commission on Human Rights.

On this same subject it should also be pointed out that in its 2015 Multi-dimensional Review of Peru, the Organisation for Economic Co-operation and Development (OECD) stressed that progress still needs to be made in Peru in key areas such as contract enforcement and the governance of the judiciary. It therefore recommended that the Peruvian Government should strengthen its ‘administrative and criminal justice systems to effectively enforce existing laws and regulations and avoid impunity.’

Because of the important role it plays in allowing the economy and factors related to well-being to develop stably over time, a well-functioning rule of law is one of the critical aspects that the OECD assesses in connection with countries wishing to join the Organisation. In fact, as the EU Member States that belong to the OECD know, joining the Organisation should be synonymous with an increase in the quality of public policy, which should be sustained over time.

26 See IA Court of Human Rights in the case of Acevedo Jaramillo and others v Peru, Judgment of 7 February 2006 (Preliminary Objections, Merits, Reparations and Costs), Series C No 144; IACHR Petitions 861-06 (Raúl Alvarado Calle and Other Redundant Staff of the National Superintendency of Customs), P-1038-13 (Humberto Corzo and Other Redundant Staff of the National Superintendency of Customs), P-919-03 (Manuel Arnillas Gamio and other Redundant Staff of the National Superintendency of Banking and Insurance, P-181-17 (Calixto Eduardo Ruiz Zapata and Other Redundant and Retired Staff of the Agricultural Sector of Piura), etc.
27 See IACHR Petition P-1422-13 (National Association of Judges).
29 OECD, Public governance reform, Peru, Highlights, 2016, Page 15
30 The rule of law means that all citizens, including those in government and the country’s institutions, are subject to the law. This in turn means that there is an effective separation of powers, equality before the law, a fair system of justice and widespread public confidence that laws and court rulings will be applied fairly and will protect their fundamental rights, including the rights of protection of individuals and their property.
However, it is obvious that Peru still has much to do in this regard. This is essentially because, as has been recognised publicly by its own Centro Nacional de Planeamiento Estratégico (CEPLAN [National Centre for Strategic Planning]) on the basis of a set of World Bank indicators, the Peruvian State is well below the OECD averages in this matter. As an example, although Colombia (which joined the OECD in 2012) and Peru are at similar levels in terms of institutions, and they are both a long way behind the OECD averages in all aspects, Peru’s indicators relating to the rule of law are lower than those of Colombia.

It is a picture of failure of the rule of law which, in addition to weakening the legal certainty of contracts and the very right to ownership, seriously questions Peru’s ability to enforce its own legislation and the international treaties to which it is party, including the TA.

2.2.4 Description of Peru’s current general labour system, the special schemes that regulate working conditions in the textile, clothing and agri-industry sectors and the impact they have on the exercise of freedom of association and the rights to equality and non-discrimination.

2.2.4.1 Law on Labour Competitiveness and Productivity (Supreme Decree No 003-97-TR)

In the private sector, the general labour system is regulated by the Law on Labour Competitiveness and Productivity (Legislative Decree No 728), adopted by Supreme Decree No 003-97-TR. The general system provides for the possibility of both open-ended employment contracts, which are for an indefinite period, and fixed-term contracts. However, given the impact that temporary contracts have on employment stability (and the subsequent exercise of workers’ other labour rights, such as the right to trade union membership), they must meet certain requirements: they must be made in writing, for a maximum period of time, and there must be an objective reason justifying the use of this type of contract.

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31 See the comments on this matter made by The Business Year in January 2015 regarding Peru’s chances of achieving its ambition of joining the OECD in 2021. See http://gestion.pe/economia/tby-llegar-oede-peru-replicar-progreso-que-tuvo-ultimos-10-anos-2119329


33 Legislative Decree 728 was enacted on 8 November 1991. Its consolidated text was adopted under Supreme Decree 003-97-TR of 21 March 1997.

Although the Law on Labour Competitiveness and Productivity formally makes temporary contracts subject to there being a reason for their use, it provides for almost 10 different types of temporary contract and 18 different cases in which they can be used. These include circumstances that have nothing to do with the length of time that the worker will be employed (i.e. permanent positions being filled by workers on temporary contracts).

In 2014, only 56.8% of employees in Peru had an employment contract, which means that 3,089 million workers were excluded from the scope of the labour legislation by the fact that they were not registered. This is particularly prevalent in the private sector of the economy. Of the workers with contracts, 61.1% were on short-term contracts (what some labour lawyers call ‘scheduled dismissal contracts’) compared to 29.4% with open-ended contracts and 7.7% with civil law contracts for services (now known in the public sector as ‘Service Orders’), which do not give rise to any kind of labour protection.35

According to the 2014-2015 Annual Report on Employment, in 2014, of the total Economically Active Population in work, 37.9% were employed by the private sector and 8.8% by the public sector. This means that 49.7% of the EAP in work in Peru were employees. Meanwhile, a further 35.1% of the EAP in employment were independent workers. The rest were divided among employers, domestic workers and unpaid family workers.

However, of the total number of employees (public and private sectors), 54.7% of them were in informal employment. That is to say, only 45.3% of them had an employment contract and access to social security. It should be pointed out that 54.7% translates as 4,044,718 people in informal employment. And in the case of independent workers, 89.3% of them (4,957,572 people) were working informally.36

According to the latest information published by the Ministerio de Trabajo y Promoción del Empleo (MTPE [Ministry of Labour and Promotion of Employment]), in 2016 an average of 3,312,749 workers were registered in the private sector. Of that total only 1,207,383 workers had an open-ended employment contract (36.44%), with the remainder being employed under temporary contracts.37

However, temporary employment in Peru does not only take the contractual forms provided for under the Law on Labour Competitiveness and Productivity (which, as stated earlier, are already fairly broad); there are also other forms of employment contract provided for under special schemes that treat the workers subject to them in a different manner to that of the regular system. One of these special schemes is that implemented by the Law on Non-Traditional Exports (Decree Law No 22342), as explained below.

2.2.4.2 Law on Non-Traditional Exports (Decree Law No 22342)\(^{38}\)

In 1978, under the dictatorship of General Francisco Morales Bermúdez, the Law on Non-Traditional Exports (Decree Law No 22342) was passed with the stated objective of providing a stimulus to encourage the growth of investment in the textile and clothing sector, focusing on exports in both cases.

In labour matters, the special scheme set up under Decree Law No 22342 allowed companies to employ their workers on a temporary basis, subject to meeting some formal requirements and for positions that might or might not be of a temporary nature.\(^{39}\)

The difference between this scheme and the contract types provided for under the Law on Labour Competitiveness and Productivity (the general system) is that while the latter require a verifiable objective cause, the former need only provide evidence that the worker will be engaged in export-related work.

\(^{38}\) See [http://www2.produce.gob.pe/dispositivos/publicaciones/2001/dl22342.pdf](http://www2.produce.gob.pe/dispositivos/publicaciones/2001/dl22342.pdf)

\(^{39}\) Article 32 of the Law on Non-Traditional Exports reads as follows: 'The companies referred to in Article 7 of this Decree Law may hire any number of temporary staff under the system established by Decree Law 18138 to perform export production operations under the following conditions:

a. The hiring will be dependent upon:
   (1) An export contract, purchase order or supporting documents thereof.
   (2) An Export Production Programme to fulfil the contract, purchase order or supporting documents thereof;

b. Employment contracts must relate to specific work encompassing the entire programme and/or the jobs that comprise it, and may be entered into by the parties as many times as necessary, subject to the provisions laid down in this Article.

c. Each employment contract must give details of the work to be performed and the export contract, purchase order or supporting document thereof; and

d. Employment contracts must relate to specific work encompassing the entire programme and/or the jobs that comprise it, and may be entered into by the parties as many times as necessary, subject to the provisions laid down in this Article.'
Likewise, workers hired under the Law on Non-Traditional Exports can be employed for an indefinite number of years (unlike under the Law on Labour Competitiveness and Productivity, which establishes a maximum term for each contract type, up to a maximum of five years). This means that their contracts can be renewed at the absolute discretion of their exporter employers without any kind of limit. This is why workers can be found in this sector who have been on consecutive short-term employment contracts without interruption for 15 or 20 years.

The situation naturally gives rise to a very high degree of instability in the working life of the individuals involved, imposing a real barrier that makes it very difficult for them to exercise their rights, principal among them the right to freedom of association.

Attention was drawn to the prejudicial nature of the Law on Non-Traditional Exports by the ILO Committee on Freedom of Association in the complaint filed under Case No 2675 by the Confederación General de Trabajadores del Perú (CGTP [General Confederation of Workers of Peru]) concerning the persistent non-renewal of temporary contracts on grounds of trade union membership (which in practice equates to discriminatory dismissal).

On that occasion, the Committee on Freedom of Association acknowledged that the power given to exporters under the Law on Non-Traditional Exports to hire workers on a short-term basis indiscriminately and indefinitely could prejudice the exercise of the right to freedom of association. For this reason, it recommended:

‘[that] the [Peruvian] Government examine, with the most representative workers’ and employers’ organisations, a way of ensuring that the systematic use of short-term temporary contracts in the non-traditional export sector does not become in practice an obstacle to the exercise of trade union rights.’ [Emphasis added]

As a result of this and other measures, since the beginning of the 1990s the textile export sector grew rapidly, particularly during the authoritarian regime of former president Fujimori. Over 2010-2016, approximately 70 000-80 000 workers were employed under this type of contract, as the following chart shows.

**Monthly average number of workers under the non-traditional export scheme 2010-2016**
It should be pointed out that although the use of such contracts did not increase significantly, and the number subsequently remained stable in those years, trade union membership among workers subject to that type of contract — as can be seen in the following chart — has fallen drastically:

**Monthly average number of workers under the non-traditional export scheme 2010-2016, by trade union membership**

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>Sindicalizado</th>
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<tbody>
<tr>
<td>2010</td>
<td>77426</td>
<td>83425</td>
</tr>
<tr>
<td>2011</td>
<td>73935</td>
<td>83425</td>
</tr>
<tr>
<td>2012</td>
<td>69888</td>
<td>83425</td>
</tr>
<tr>
<td>2013</td>
<td>69041</td>
<td>83425</td>
</tr>
<tr>
<td>2014</td>
<td>72258</td>
<td>83425</td>
</tr>
<tr>
<td>2015</td>
<td>70758</td>
<td>83425</td>
</tr>
<tr>
<td>2016</td>
<td>70758</td>
<td>83425</td>
</tr>
</tbody>
</table>

This situation is clearly seen in the (unequal) distribution of income among these workers, and particularly in the differences between those who are trade union members and those who...
are not. Indeed, according to the figures provided on the MTPE spreadsheet, if in 2008 the average income of a trade union member employed under the non-traditional export scheme was PEN 876 and represented 88.2% of the average pay (PEN 993) of workers employed under that scheme, in 2016 the proportion of these amounts was reversed: the average wage of trade union members (PEN 1,525) was not only higher than that of non-trade union members (PEN 1,433), but had also risen to represent 106% of the average income in the sector (PEN 1,437).  

The change there has been in this respect leads us to conclude that the temporariness created by the abusive use of the employment contracts provided for under the non-traditional export scheme has been clearly prejudicial to the exercise of freedom of association. To provide further support for this conclusion, in Section 2.4 we submit as evidence several cases that we consider to be representative of this situation, all of which are duly documented.

2.2.4.3 Law for the Promotion of the Agricultural Sector (Law No 27360)

In late 2000, shortly before the collapse of the authoritarian regime of President Fujimori, the Law for the Promotion of the Agricultural Sector (Law No 27360) was passed at the initiative of a minister connected with the agri-industrial sector. This law regulated differentiated access to the benefits of the labour system for workers in this sector.

While the general labour system includes among wage benefits the payment of additional remuneration (known as a ‘bonus’) in July and December (equivalent to one month’s regular wage), as well as compensation for length of service, which is equal to one month’s pay plus 1/6 for each year worked (giving a total of 15 payments in the year), the system set up under Law No 27360 provides for workers in this sector to receive these benefits (bonus and length-of-service compensation) as part of their monthly wage (12 payments in the year).

In addition, while under the general system severance pay for arbitrary dismissal is equal to one and a half month’s pay for each year worked, under the system instituted by the Law for the Promotion of the Agricultural Sector this amount is half of one month’s pay per year (i.e. a third of the cost of the general system).

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40 See the [Spanish language] Blog on Decent Work, Keys to understanding the discussion on the non-traditional export employment scheme: When the objective is to prevent trade union membership. At http://trabajodigno.pe/2017/06/12/claves-para-entender-el-debate-sobre-el-regimen-laboral-de-lasexportaciones-no-tradicionales-cuando-el-objetivo-es-impedir-la-sindicalizacion/

41 See http://larepublica.pe/impresa/politica/768440-el-cuento-chino-de-la-cts-y-gratificaciones-dela-ley-chlimper
Similarly, while annual holiday under the general system stands at 30 calendar days of paid leave for each year of service, under the agricultural scheme this holiday is cut by half (15 days).

In the agricultural sector, workers tend to be hired on a casual basis. This is either by means of intermittent or seasonal contracts, or under the short-term contracts that are characteristic of companies exporting non-traditional products to which the system created by the Law on Non-Traditional Exports applies.

In summary, this is a population of workers who, in addition to receiving fewer financial benefits than other workers enrolled in the general system, are massively subject to types of short-term contracts that severely restrict both the exercise of their trade union rights and their access to decent productive work.

Observing the number of workers employed under this system and their rate of trade union membership, reveals that — as happens with workers employed under the Law on Non-Traditional Exports — this proportion is alarmingly low.

**Average number of workers under the agricultural scheme 2009-2016, by trade union membership**

<table>
<thead>
<tr>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>170,110</td>
<td>188,666</td>
<td>211,078</td>
<td>197,926</td>
<td>208,837</td>
<td>231,267</td>
<td>250,586</td>
<td>239,194</td>
</tr>
<tr>
<td>Trade union members</td>
<td>8,295</td>
<td>8,229</td>
<td>7,426</td>
<td>6,569</td>
<td>10,718</td>
<td>11,368</td>
<td>11,081</td>
<td>11,065</td>
</tr>
<tr>
<td>Rate of trade union membership</td>
<td>4.9 %</td>
<td>4.4 %</td>
<td>3.5 %</td>
<td>3.3 %</td>
<td>5.1 %</td>
<td>4.9 %</td>
<td>4.4 %</td>
<td>4.6 %</td>
</tr>
</tbody>
</table>

Source: Spreadsheet – PLAME 2009-2016
Produced in-house

Similarly, while in the private sector the average monthly wage of workers enrolled in the general labour system was PEN 2 271\(^{42}\) (approximately USD 696) in 2016, the average monthly pay of workers belonging to the special agricultural scheme was just PEN 1 317\(^{43}\) (approximately USD 403).

\(^{42}\) According to MTPE 2016 Statistical Yearbook.
\(^{43}\) According to Spreadsheet – PLAME for 2016.
This situation is largely attributable to the widespread use of temporary employment contracts as a deterrent intended to restrict workers’ trade union membership since, all too frequently, if they exercise their right to freedom of association their contracts are not renewed and they lose their jobs. It is a situation in which the prevalence of short-term contracts that is allowed under the special scheme causes extraordinary uncertainty among workers, who have no way of knowing which of them will keep their jobs at the end of the contract. Combined with this are the precarious working conditions to which they are exposed: inadequate pay, unsafe working conditions and frequent discrimination at the workplace; and, as already mentioned, a countless number of barriers which in practice prevent them from exercising their trade union and collective-bargaining rights, thereby seriously harming the rights of these workers and their families.

It is pertinent here to mention that after an observation mission that it carried out in Peru in 2014, the International Commission of Jurists (ICJ) said:

‘For the Observation Mission, it is evident that the low rate of unionisation (in the agri-industrial sector) in general terms responds to the intermittent nature of the contracts, as although over 80% of the workers are employed in companies that have more than 20 workers, a requirement for forming a trade union, most workers do not have the necessary stability that would enable them to join trade unions.’

The consequence of this state of things is that Peruvian exports that are able to take advantage of this *sui generis* labour system benefit from special labour treatment not enjoyed by their competitors on the European market. A system which, by limiting the possibilities for exercising fundamental rights such as those of free association and collective bargaining (protected under Title IX of the TA), gives goods exported from Peru to the EU the competitive advantage of production that is based on forcibly low wages.

The following sections give details of some representative cases from the textile, clothing, agricultural and mining sectors. These cases illustrate how this violation of workers’ rights in these sectors plays out in the field, resulting in the violation of Peru’s duty not to encourage trade or investment by reducing the levels of protection afforded in its labour laws; and not to fail to enforce or in any way set aside its labour laws so as to reduce the protection provided by them in order to encourage trade or investment; nor to fail to effectively enforce its labour

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laws through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties.

2.3 Description of how the obligation to guarantee the exercise of the rights protected under the ILO Conventions on Fundamental Rights, which is provided for under Title IX of the TA, is not met in the textile and clothing sector

2.3.1 The case of Topy Top SA.

A) Facts

Topy Top SA (Topy Top) is one of the largest textile and clothing manufacturers and exporters in Peru. It currently employs over 4,700 workers in factories in Lima and the surrounding area. Topy Top supplies very well-known global brands such as GAP, Hugo Boss, Under Armour, Abercrombie, Ralph Lauren, among others.

It exports around the world, the principal destinations being the United States and the European Union (Germany, Spain, Portugal and Belgium).

However, Topy Top is known not only for its extensive participation in the domestic and international marketplace, but also for being accused of a series of violations of the freedom of association of its workers. In 2013, the book by the renowned Professor of the University of Salamanca, Dr Wilfredo Sanguineti, titled ‘Empresas Multinacionales, Responsabilidad Social y Derechos Laborales en el Perú. La experiencia de Topy Top’ 45 [Multinational Companies, Social Responsibility and Labour Rights in Peru. The Experience of Topy Top], documented the events presented below.

On 25 February 2007, 22 Topy Top employees set up the Sindicato de Trabajadores Obreros de Topy Top (SINTOTTSA [Topy Top Workers’ Union]), driven primarily by the low wages they were being paid as well as the long hours they had to work: 12 hours a day, 7 days a week.

On 5 March 2007, the SINTOTTSA was officially registered with the MTPE so that it could operate in accordance with Peruvian regulations. However, instead of recognising the union

and allowing it to operate, Topy Top took a series of actions intended to debilitate and shut down the organisation.

Between March and June 2007, Topy Top dispensed with the services of over 90 members of the SINTOTTSA (including its entire governing council) by not renewing their contracts (under the Law on Non-Traditional Exports). Noteworthy is the fact that a large group of these workers had been employed for over five years under non-traditional export contracts.

To address this deliberate action by Topy Top aimed at restricting the right to freedom of association of its workers, the MTPE fined the company PEN 103,500.00. However, despite being fined, the company continued to pursue its anti-union practices by dismissing the new secretary general of the SINTOTTSA together with a further 80 union members.

In view of the limited capacity of the Peruvian authorities to correct this situation, the SINTOTTSA found itself obliged to adopt a different strategy and made contact with a number of international organisations with the objective of putting pressure on the companies buying from Topy Top (such as GAP and Inditex) and the International Textile, Garment and Leather Workers’ Federation (ITGLWF). As a result, after a number of meetings between the parties involved, an agreement was signed in which they called on Topy Top to re-hire the dismissed workers and to improve the working conditions of company employees.

However, this peace was short-lived, because in 2008, at a time when negotiations were under way to reach the company’s first collective agreement with its workers, Topy Top dismissed 200 employees, 120 of whom were SINTOTTSA members. The workers who had been dismissed through the non-renewal of their non-traditional export contracts filed a claim before the courts calling for their reinstatement and in June 2014 (six years later), the Constitutional Court ruled in their favour and ordered that they be readmitted.

A year later, in 2009, the SINTOTTSA drew attention to the fact that Topy Top was not fulfilling the minimum requirements of the Law on Non-Traditional Exports to justify the temporary hiring of workers. In early 2012, in response to a complaint by the trade union, the labour inspectors concluded that 740 workers (including 100 members of the SINTOTTSA) were employed under irregular contracts (i.e. they did not meet the legal requirements) and they should therefore be hired by Topy Top under open-ended contracts.46 Despite this, so far Topy Top has refused to comply with this order, and none of these 740 workers has been hired for an indefinite term.

Similarly, in September 2012 Topy Top announced the dismissal of 44 SINTOTTSA members, including the union’s secretary general. However, the company was obliged to rehire these workers in response to a request from the Under Armour brand and other buyers because these practices were in conflict with their corporate codes of social conduct. Nevertheless, in January 2013 Topy Top once again dismissed 18 SINTOTTSA members, in breach of the agreement that it had previously reached with the union, according to which the company would only dismiss staff subject to prior notice and with adequate justification.

As a result of these actions in flagrant breach of the right to freedom of association, in June 2014 the company was once again fined PEN 33 858 (USD 11 286) by the Labour Inspectorate.47

More recently, in March 2015, Topy Top once again dismissed the secretary general of the SINTOTTSA, as well as the press secretary of the Federación Nacional de Trabajadores textiles, Confecciones y Afines del Perú (FNTTP [National Federation of Textile Workers of Peru]) who also worked for this company.

B) How workers’ fundamental rights are violated in this case in breach of the obligations laid down in Title IX of the TA

The above case study shows how companies like Topy Top use the Law on Non-Traditional Exports to weaken or adversely affect the possibility of their workers exercising their right to freedom of association, in particular by means of the non-renewal of their temporary contracts.

The persistent non-renewals (which in practice are anti-union dismissals) have led to the company being fined by the MTPE, and to severe objections from its trading partners abroad. However, the impact of these measures is low or non-existent if we observe how the company continued to violate the rights of its workers.

In the present case, we find not only the use of the Law on Non-Traditional Exports as a legislative tool that supports and encourages this type of practice but, in addition, behaviour that deliberately violates Peruvian labour regulations, as described below.

Anti-union discrimination: The rights to union membership, collective bargaining and striking are regulated under the consolidated text of the Ley de Relaciones Colectivas de Trabajo

Both the Political Constitution of Peru and Articles 3 and 4 of the Law on Collective Labour Relations, in accordance with the provisions of ILO Convention No 87, recognise the right of workers to establish and join organisations of their own choosing, and not be exposed to any type of restriction as a result of exercising their right to freedom of association.

This legislation also prohibits any interference on the part of employers in the establishment and functioning of trade unions (pursuant to ILO Convention No 98, to which Peru is a signatory). But, clearly, in this case not only has Topy Top systematically violated this legislation, but the Peruvian labour authorities have been unable to stop it from doing so.

Protection of trade union privilege: Articles 30 and 31 of the Law on Collective Labour Relations guarantee trade union privilege for certain workers who belong to the trade union (leaders or candidates for leadership). This right protects union members from potential dismissals or acts of retaliation for exercising their right to freedom of association.


49 Supreme Decree No 010-2003-TR, Article 3: ‘Union membership is free and voluntary. A worker’s employment cannot be made dependent upon his union membership, non-membership or relinquishment of membership, nor can he be obliged to belong to a trade union, or prevented from doing so.’ Article 4: ‘The State, employers and the representatives of one and the other must refrain from any action that is aimed at coercing, restricting or diminishing in any way the right of workers to join unions, and from intervening in any way in the establishment, administration or support of the trade unions that they set up.’

50 Supreme Decree No 010-2003-TR, Article 30: ‘Union privilege guarantees that certain workers may not be dismissed or transferred to other establishments of the same company without duly substantiated grounds or without their agreement. The worker’s agreement is not required when his transfer does not prevent him from performing his functions as union leader.’ Article 31: ‘The following are protected by union privilege: a) Members of trade unions that are in the process of formation, from the date of the application for registration until three (3) months afterwards. b) Members of the governing body of unions, federations and confederations, and also delegates of union branches. The scope of protection of union privilege may be extended as part of the collective bargaining procedure. The collective agreement will specify which offices are covered by union privilege. c) The delegates referred to in Article 15 and the representatives referred to in Article 47 of this Law. d) Candidates standing for office as leaders or delegates, thirty (30) calendar days before the election procedure until thirty (30) calendar days after its completion. e) The members of the negotiating committee of a petition, until three (3) months after the relevant procedure has been completed. The parties may specify in the collective agreement the number of leaders granted union privilege. In the absence of agreement, no more than three (3) leaders may be granted union privilege in workers’ unions with up to fifty (50) members; one (1) more leader may be added to this number for every fifty (50) additional members, up to a maximum of twelve (12) leaders. At federations, two (2) leaders per trade union forming part of the federation, up to a maximum of fifteen (15); there may be no more than one (1) leader per company. At the confederation, up to two (2) leaders per federation forming part of the confederation, up to a maximum of twenty (20); there may be no more than one (1) leader per company. A collective agreement may set a higher number of leaders granted union privilege. The number of leaders granted the union privilege may not be established or changed by an administrative act or ruling.’
In the case in hand, it is clear that Topy Top repeatedly violated these articles by disregarding the protection that union privilege confers on these workers with its successive dismissals of the SINTOTTS union leaders. It is also clear that the authorities were unable to prevent this.

2.3.2 The case of Hilandería de Algodón Peruano SA

A) Facts

Hilandería de Algodón Peruano SA (HIALPESA) is one of Peru’s biggest textile and clothing manufacturers and exporters. It employs over 3,000 workers in Lima and the surrounding area. It currently exports its goods to Europe, supplying well-known brands such as Nautica, Guess, North Face and New Balance, among others.

As in the previous case, HIALPESA has also made abusive use of the unlimited power granted under the Law on Non-Traditional Exports, using that power to undermine the trade union established at the company by not renewing temporary contracts.

After signing its first collective agreement in May 2008, the HIALPESA Workers’ Union (the Union) began to enrol more workers. In response, in December of that same year HIALPESA did not renew the temporary contracts of 150 workers (including 80 Union members). Sixty of these workers took legal action seeking reinstatement, and after more than five years (in 2013), the Constitutional Court ruled in their favour and ordered that they be reinstated.

Another means employed by HIALPESA to weaken the Union was the use of temporary contracts that did not comply with the legal requirements. In March 2013, the secretary general of the Union asked the MTPE to review 1,000 temporary contracts filed by HIALPESA with the Ministry between June and November 2012. This request was based on the fact that the workers had not signed these contracts, which should therefore be declared void and the workers employed by HIALPESA under open-ended contracts.

In response, the MTPE issued two decisions declaring 1,008 contracts void and calling for the workers involved to be taken on as permanent employees. However, HIALPESA refused to comply with the MTPE decisions and filed a number of appeals in order to avoid doing so.

In October 2013, the Union announced that it would not sign any more temporary contracts and called for the MTPE decisions to be enforced. In response, the company refused to

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employ 136 Union members, who after being subjected to a series of pressures had to sign temporary contracts under the Law on Non-Traditional Exports.

In March 2014, the company told the Union members that it intended to close a spinning mill, precisely where 90% of the Union members were located. The company approached the Union members individually to offer them severance packages, without proper prior negotiation with the Union.

This led the Union to file a complaint with the Fair Labor Association (FLA), which issued a report concluding that the company had discriminated against the Union by excluding it from any negotiation of the severance packages of its members.

Lastly, in May 2014, the company initiated dismissal proceedings against the Union secretary general on the grounds that security cameras had been tampered with. Although the union leader was able to prove that he had been working on the date of the alleged offence, he was eventually dismissed.

B) How workers’ fundamental rights are violated in this case in breach of the obligations laid down in Title IX of the TA

Anti-union discrimination: As in the previous case, HIALPESA flagrantly violated Articles 3 and 4 of the Law on Collective Labour Relations by acting in ways that were deliberately intended to interfere with the functioning of the trade union: non-renewal of temporary contracts of Union members, negotiating individual severance packages, and refusing to comply with MTPE resolutions.

This was compounded by abusive use of the temporary contracts permitted under the Law on Non-Traditional Exports, which the MTPE did not put a stop to despite formally having the powers to do so. In failing to take action in response to the violation of these rights, the labour authorities have been explicitly passive.

Fraudulent use of temporary contracts: The Law on Non-Traditional Exports requires a worker’s express consent to a temporary contract (in the form of a signed contract) together with the fulfilment of a series of formal requirements. In this case, HIALPESA failed to comply with these legal requirements as well as those of the Law on Labour Competitiveness and Productivity in this respect: a written contract signed by the worker, a maximum term set and objective grounds that justify temporary employment.
This is a situation in which it is once again evident, as in the case of Topy Top, that the MTPE failed to take action against the serious, systematic and deliberate failure of HIALPESA to comply with the regulations.

2.3.3 The case of Creditex SAA

A) Facts

Creditex SAA (CREDITEX) is one of the main producers and distributors of thread for domestic clothing manufacturers; it also exports textiles to the international market (in Europe it exports to Germany and France as well as to other countries). It directly employs over 1,500 people who work at its plants in Lima and Trujillo (in the north of Peru). As in the cases described above, this company is widely accused of making abusive use of temporary contracts to restrict the exercise of its workers’ right to freedom of association.

In April 2016, the Workers’ Union of the CREDITEX textile company (the Union) asked the Labour Inspectorate to make an inspection visit because the company was making the renewal of temporary contracts (under the Law on Non-Traditional Exports) subject to relinquishment of Union membership.

As evidence, they attached notarised letters under which certain workers had already agreed to give up their membership of the Union (all of the letters had been sent from the same notary’s office and paid for by CREDITEX). The workers who refused to give up their Union membership were dismissed (their contracts were not renewed).

During the inspection visit, the labour inspectors confirmed that CREDITEX had arranged all the formalities with the notary’s office (and had paid the cost of them) for the notices of relinquishment of Union membership. This evidence was proof of CREDITEX’s clear interference in the functioning of the trade union.

Regarding the non-renewal of temporary contracts, the Labour Inspectorate also verified that the workers whose contracts were not renewed were members of the Union. However, it did not impose a penalty for this infringement because the case was already before the courts, although it made clear reference to the union membership of the workers who were being targeted with these practices.

52 See Infringement Report No 2186-2016-SUNAFI/ILM.
As a result of these findings, the labour authorities fined CREDITEX PEN 130,350.00 for taking actions that violate the freedom of association of its workers.

At the beginning of 2017, the National Federation of Textile Workers of Peru asked the Labour Inspectorate to verify the legality of the non-traditional export contracts signed by CREDITEX because they did not comply with the formal legal requirements.

This resulted in the issuance of an Order dated 9 March 2017 in which the Labour Inspectorate concluded that CREDITEX was not legally authorised to use the contracts regulated by the Law on Non-Traditional Exports in this case. The Order declared the use of them to be fraudulent and called on the company to regularise the situation of the 640 workers employed under this scheme.

The labour inspection findings showed how, while knowing that the use of these contracts under the Law on Non-Traditional Exports was unlawful, CREDITEX kept its workers under this scheme, exposing them to grave employment instability with the same pernicious effects as have been discussed in the previous cases.

B) How workers’ fundamental rights are violated in this case

Anti-union discrimination: In the same way as the cases described above, CREDITEX flagrantly violated Articles 3 and 4 of the Law on Collective Labour Relations by taking actions that were deliberately intended to interfere with the functioning of the trade union: by not renewing the temporary contracts of workers who were union members; making their employment subject to giving up union membership; and also bearing all the costs incurred for them to relinquish their membership.

Fraudulent use of temporary contracts: In this case, the Labour Inspectorate found that CREDITEX had made fraudulent use of non-traditional export contracts and, despite not being legally allowed to do so, had hired more than 600 workers under this scheme, severely hindering the exercise of their right to freedom of association. These events draw attention to how even companies that are not legally authorised to use this type of temporary employment contract avail themselves of the Law on Non-Traditional Exports to impact the rights of their workers, in the face of the passiveness of the Peruvian authorities.

2.3.4 The case of Aris Industrial SA

A) Facts
Aris Industrial SA (Aris Industrial) is another manufacturer, distributor and exporter of textiles in addition to working with other products (ceramics and chemicals).

In the textile business, Aris Industrial mainly supplies Barrington, a company that belongs to the same corporate group as Aris Industrial. Barrington is one of the biggest textile and clothing manufacturers and retailers in Peru, and also exports to the United States and Europe.

Aris Industrial has a substantial record of flagrant anti-union practices. In January 2016, the Labour Inspectorate issued an Order calling on Aris Industrial to rectify a clear situation of union discrimination: the inspectors found that the company was paying lower wages to workers who were union members, in comparison with their peers who were not.

While the workers who were union members received no wage increases, those who were not members of the union did receive rises on several occasions (2011, 2013, 2014 and 2015). This difference in wages, which was quite clear in the opinion of the Labour Inspectorate, had no objective basis to support it, which is why the decision was made to impose a fine totalling PEN 108 625.00 (approximately USD 33 490) for Aris Industrial’s anti-union behaviour.

Subsequently, in Deputy Intendancy Resolution No 264-2016SUNAFIL/ILM/SIRE issued on 1 September 2016, the SUNAFIL intendancy in the Lima Metropolitan Area confirmed the labour inspectors’ finding that there was differential treatment in the wages paid to the Aris Industrial workers who were trade union members in contrast with those paid to non-union members, who did receive individual wage increases, unlike the union members.

B) How workers’ fundamental rights are violated in this case in breach of the obligations laid down in Title IX of the TA

Anti-union discrimination: As in the cases described above, here also it can be observed how Aris Industrial violated Articles 3 and 4 of the Law on Collective Labour Relations by taking actions that were deliberately intended to interfere with the functioning of its workers’ trade union. This was specifically in the form of differential treatment in wages, with discrimination against many workers because of their union membership.

This behaviour also violated the right to equality recognised under Article 2.2 of the Peruvian Constitution, as well as the legal protection given to workers to exercise their right of

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53 Constitution of Peru, Article 2: ‘Every individual has the right: 2. To equality before the law. No one may be discriminated against on the basis of origin, race, sex, language, religion, opinion, economic status, or on other grounds.’
freedom of association pursuant to ILO Convention No 98 (on the right to organise and collective bargaining) and in ILO Convention No 111, which prohibits acts of discrimination in employment.

The cases described above evidence how the anti-union behaviour of exporters in the textile and clothing sector in Peru has become a widespread practice that is essentially based on the prerogatives they are granted under the Law on Non-Traditional Exports, as well as the basically indulgent attitude of the MTPE, which has not used all of the legal tools that are available to curb and prevent the repetition of these unchecked violations of the right to freedom of association.

2.4 Description of how the obligation to guarantee the exercise of the rights protected under the ILO Conventions on Fundamental Rights, which is provided for under Title IX of the TA, is not met in the agricultural sector

2.4.1 The case of Camposol

A) Facts

CAMPOSOL SA (CAMPOSOL) is one of the biggest companies in Peru’s agricultural sector. It is linked with the CHAVIMOCHIC irrigation project in the province of Virú, Department of La Libertad, in the north of Peru.

54 ILO Convention No 98, Article 2: ‘1. 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. 2. In 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 within the meaning of this Article.’

55 ILO Convention No 111, Article 1: ‘For the purposes of this Convention the term “discrimination” includes: (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers’ and workers’ organisations, where such exist, and with other appropriate bodies. 2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination. 3. For the purpose of this Convention the terms ‘employment’ and ‘occupation’ include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.’
CAMPOSOL was recently considered the world’s biggest exporter of Hass avocados, with the United States and Europe being two of its main export destinations. In 2016, the company reported employing almost 12,000 workers at its plantations.

The Camposol SA Workers’ Union (SITECASA) was set up in 2007. From then onwards, the company engaged in a policy of harassment of the leaders and members of this trade union.

As mentioned earlier, workers in the agricultural sector tend to be employed on a casual basis (83% of the workers in this sector have temporary contracts). The forms of short-term employment used by employers in the sector include both the use of non-traditional export contracts (when the product sold is among those listed under the Law on Non-Traditional Exports) and the use of the wide variety of temporary contracts provided under the Law on Labour Productivity and Competitiveness. The one most frequently used among those is the one known as the intermittent contract.

Article 64 of the Law on Labour Productivity and Competitiveness provides that:

> ‘Intermittent service contracts are those entered into by an employer and a worker to meet the needs of the company’s operations which by their nature are ongoing but discontinuous. These contracts may be performed by the same worker, who will have a preferential right to be hired. This right may be specified in the initial contract and will apply automatically without there being any requirement for a new contract or renewal.’

At the end of the term for which the worker was hired, employers can renew this contract or suspend it by granting what is known as temporary leave. This temporary leave was designed as a legal measure to allow employers to choose not to contract the services of a worker in periods of low demand for labour. However, as we will see in this case, temporary leave is extensively used in the agricultural sector to penalise workers who join trade unions and thereby interfere with the exercise of freedom of association.

In the case of CAMPOSOL, after the formation of the SITECASA, the company began to give the union’s leaders and members temporary leave while nevertheless continuing to hire new workers, thereby drawing attention to what was clearly an act of anti-union discrimination.

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56 See Deputy Directorial Decision No 031-2014-GR-LLGR/GRSTPE-SGIT issued by the Regional Government of La Libertad.
In January 2008, CAMPOSOL notified the MTPE of its decision not to renew the contract of 321 workers, most of whom were SITECASA members, in what was a decision that was clearly damaging to the collective rights of its workers. Furthermore, CAMPOSOL SA has on several occasions been accused of arranging for workers to relinquish their membership of the SITECASA in notarised proceedings that are handled by the company itself, which also bears the costs involved.

These accusations have been confirmed locally by the relevant justice of the peace, who stated in a letter dated 21 October 2014 addressed to the SITECASA that:

‘these letters (cancelling union membership) were left by representatives of CAMPOSOL, SA for notary-certified receipt thereof and it was the same company representatives who collected the statements once they had been processed (…)’

In December 2012, the SITECASA organised a strike in pursuit of a solution during the collective bargaining that was taking place with CAMPOSOL at that time. In retaliation, the SITECASA members were subjected to a series of acts of harassment, intimidation, coercion and threats of dismissal. These threats were carried out on 10 December 2012 with the delivery of over 250 notifications of suspension of employment (unremunerated temporary leave).57 These workers were then directly dismissed under the pretext of the expiry of the term of the contracts of the Union’s members and leaders. Most of them had been working for the company for more than four years and were therefore covered by Article 69 of Legislative Decree No 728 and its Regulation, which provide that:

‘if the worker is employed by the same employer for two consecutive or three alternate seasons, that worker has the right to continue being employed in the following seasons.’

Unfortunately, the company refused to employ the SITECASA union members and leaders, and hired new workers instead, as reported by the Union in June 2013.58

All of this took place against a background of serious anomalies in the action taken by the Peruvian State with regard to its duty to enforce the labour law that protects the exercise of workers’ collective rights, and in particular their right to freedom of association. The fact is that after a SITECASA Union committee had been set up in the region of Piura, the company dismissed all of the workers involved, even though they had been working at CAMPOSOL for more than four years. The MTPE, however, found there had been no violation or restriction of the freedom of association, even though subsequently in an informal comment it recognised that the dismissals ‘looked like violations of the freedom of association’.  

In 2013, the company used judicial harassment to hinder the exercise of freedom of association by filing criminal charges against the workers who took part in the strikes called by the SITECASA, claiming that the strike action had damaged the company’s assets. For this same reason, 36 workers were dismissed in what was clearly an anti-union act.

In that same vein, when in March 2014 SITECASA workers exercised their right to strike in response to a series of breaches of collective agreements reached in 2012-2014, CAMPOSOL dismissed 18 workers who participated in the strike, including the SITECASA secretary general, Felipe Arteaga Saavedra, who had been working for the company for 14 years and also had legal action taken against him for making public statements on the strike events. In parallel, the company gave temporary leave to 400 workers.

In 2014, SUNAFIL issued Deputy Directorial Resolution No 031-2014-GR-LLGGR/GRSTPE-SGIT of 31 December 2014 confirming the findings of Infringement Report No 24-2014SUNAFIL (of 16 May 2014), which identified a series of anti-union actions taken against 569 CAMPOSOL workers; the breach of obligations laid down in the 2012-2015 collective agreement involving the same 569 workers; and the failure to file the necessary returns concerning 14 of the workers involved.

Evidence of CAMPOSOL’s anti-union behaviour can be found in the inspection report issued under File No 260-2014-PS-SDIT/TRU, which confirms the company’s systematic non-compliance with collective agreements. This report was subsequently confirmed by the senior authority of the Labour Inspectorate.

Further evidence is provided by the administrative procedure under File No 0093-2014-SGPSC, which established that CAMPOSOL had not complied with the requirement to

deduct the union dues of the workers who were members of the SITECASA. This led to the company being fined for violating the right to freedom of association of the workers involved.

In May 2014, the SITECASA wrote to the Congress of the Republic to inform them that 75 workers were being subjected to the company’s anti-union practices, which included 13 letters giving the union leaders notice of dismissals (7 union leaders had already been dismissed); 19 actions aimed at intimidating workers to force them to relinquish their union membership; 5 resignations from the union submitted under threat; and 33 cases of non-renewal of employment contracts as a result of union membership. That same month, the Labour Inspectorate established that CAMPOSOL was also violating the rights to health and safety at work by not supplying its workers with proper uniforms, there were no adequate toilet facilities for female and male workers in the fields, and its canteens were not in adequate condition for use by workers.

On that same occasion\(^{61}\) it was established that the company had placed all of the union leaders on temporary leave while hiring new workers, which was classed as an anti-union practice. There were also found to be 40 unlawful dismissals — in the form of non-renewal of temporary contracts — in retaliation for exercising the right to freedom of association.

Lastly, on the basis of information provided by the SITECASA for this report, 64 members are currently taking legal action against CAMPOSOL for dismissals connected with the exercise of their right to freedom of association.

All of the foregoing illustrates employer practices that seek to violate the right to freedom of association of SITECASA members through the non-renewal of the temporary contracts of the workers who belong to the trade union and the use of temporary leave (which is unremunerated) to penalise workers who had exercised their union membership rights. In addition, there is the repeated breach of the company’s obligations under the collective agreements, together with the harassment of SITECASA members by means of criminal proceedings that are intended to intimidate the workers in order to stop them exercising their right to freedom of association.

B) How workers’ fundamental rights are violated in this case

Anti-union discrimination: Once again we find the violation of Articles 3 and 4 of the Law on Collective Labour Relations, the provisions of which CAMPOSOL is in direct breach of by the dismissal, non-renewal of contracts and placing on temporary leave of workers who exercise their right to freedom of association.

We can also see how abusive use is made of certain legal tools (the temporary hiring under the general system) with the obvious intention of discouraging the establishment of trade unions and penalising those who exercise this right, while the labour authorities make little effort to prevent it.

Trade union privilege: Although Articles 30 and 31 of the Law on Collective Labour Relations guarantee trade union privilege for certain workers who belong to the trade union (leaders or candidates for leadership), and this right protects them against potential dismissal or acts of retaliation for exercising their right to freedom of association, it is obvious that the leaders of the SITECASA did not enjoy the protection that union privilege affords them.

Disregard for the binding nature of collective agreements: According to Article 28 of the Political Constitution of Peru, collective agreements are binding within the scope of the terms agreed. Nevertheless, CAMPOSOL has repeatedly failed to comply with the terms of the collective agreements reached with the SITECASA, in clear violation of this constitutional provision.

This is a particularly serious matter since the binding nature of collective agreements constitutes one of the expressions of the principle of good faith enshrined in collective bargaining under ILO Convention No 98.

Duty to ensure occupational health and safety: As indicated above, this case also involves CAMPOSOL’s failure to meet its obligations as an employer to safeguard the health and safety of its workers by not providing them with the working conditions that they require in order to do their jobs in the agricultural industry.

It is pertinent here to recall that according to Principle I of the Ley de Seguridad y Salud en el Trabajo [Law on Occupational Health and Safety] (Law No 29783):

‘Employers guarantee the provision at the workplace of the necessary means and conditions to protect the lives, health and well-being of their workers (…)’.

In addition, according to Principle IX of the law:

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62 Peruvian Constitution, Article 28: ‘The State recognises the right to form unions, to engage in collective bargaining and to strike. It ensures the democratic exercise of these rights by: (…) 2. Encouraging collective bargaining and promoting the peaceful settlement of labour disputes. Collective agreements are binding within the scope of the terms agreed.’
‘Workers have the right to decent working conditions, assured by the State and employers, that guarantee, on an ongoing basis, a physically, mentally and socially healthy lifestyle.’

In the present case, the Labour Inspectorate has established that the workers do not have toilet facilities at the workplaces, which is severely detrimental to their health and physical well-being. It has also reported that CAMPOSOL workers suffer from a number of health problems, such as lower back pain, pterygium of the eyes (due to the heat and dust) and gastritis (due to poor diet, urinary infection and contamination by strong fertilisers and chemical inputs).^{63}

Lastly, the non-action of the Peruvian State is blatantly apparent in its failure to penalise as an anti-union practice the dismissal of all of the workers belonging to the SITECASA committee in Piura, despite the fact that it subsequently acknowledged that this action was indeed a violation of the right to freedom of association.

2.4.2 The case of Sociedad Agrícola Virú

A) Facts

Sociedad Agrícola Virú SA (SAV) was set up in 1994. It belongs to the Nicolini corporate group (one of the biggest in Peru) and operates primarily in the food industry, exporting asparagus, artichokes and various types of pepper to the United States and Europe, among other destinations.

It should be noted that SAV uses two types of employment contract. The ‘factory’ workers (i.e. those who work in the company itself) are employed under the general labour system that is regulated by the Law on Labour Productivity and Competitiveness. However, the agricultural workers that it employs — in the strict sense of the term ‘agricultural’ — are contracted under the special agricultural scheme, but their employer is a different company: Agrícola Trillum.

SAV has become known for using a number of techniques to interfere with the functioning of the trade union to which its workers belong, as explained below.

The Sindicato de Trabajadores de la Empresa Sociedad Agrícola Virú SA (SITESAV [Workers’ Union of Sociedad Agrícola Virú SA]) was established in 2007, since when it has enjoyed the appropriate official recognition (Deputy Directorial Ruling No 122-2007-GRRL-GRDS-DRTPE).

In April 2009, the SITESAV governing body reported that the company was paying higher wage bonuses to non-union member workers than to those who were union members. Three months later, in July 2009, the company dismissed the SITESAV secretary general, Isidro Gamarra Quiroz. In January 2010, an inspection by the regional labour authority found evidence of the fraudulent use by the company of temporary contracts to discriminate against union members, and it was fined for this practice.

Then, in July 2010, the workers accused the company of seeking to debilitate the workers’ ability to organise themselves by filing criminal claims against their union leaders, dismissing workers and union leaders and discriminating against union members by not hiring them because of their membership.

Thereafter, the company began to use the threat of filing criminal claims to intimidate workers who sought to belong to the SITESAV. Thus, in June 2011, it filed criminal actions against eight SITESAV members (five leaders and three members) for allegedly preventing 4 800 workers from doing their jobs. SAV sought payment of USD 80 000 in compensation. After almost a year of legal proceedings, the union leaders were cleared of any liability.

As for Isidoro Gamarra, the former SITESAV secretary general dismissed by SAV, he filed a claim for reinstatement on the grounds that he had been the victim of an anti-union dismissal. After two years of legal proceedings, in August 2011 the court ordered that he be reinstated. However, SAV ignored the court order and delayed his reinstatement until April 2014. They also reinstated him in a different job from the one he was performing when he was dismissed, at a lower wage, and this situation led Mr Gamarra to resign from the company.

In June 2012, the SITESAV secretary for defence, Fidel Polo, was the victim of arbitrary dismissal by the company for making a statement to the press on the situation of workers in the agri-industrial sector, based on circumstances that had been verified by the Labour Inspectorate. SAV also filed a criminal complaint against Mr Polo, who found himself under threat of one year in prison, 365 days of daily fine and the obligation to pay the company PEN 10 000 in civil compensation. An appeal was filed against the ruling, which is still pending resolution.
Thus, a situation has gradually arisen in which the company systematically implements a series of anti-union practices with the sole purpose of continuing to debilitate the SITESAV: whether it be by means of not renewing employment contracts, or making use of arbitrary dismissals and criminal proceedings that restrict the individual freedom of union leaders.

This all has a serious impact on SITESAV which, after a significant period of inactivity, on 3 June 2016 resolved by the decision of its members to reactivate the trade union and elected a new governing body in an assembly attended by barely 28 people at which the 16 officeholders of the Union’s governing body were elected.

Almost immediately afterwards, in letters dated 10 and 21 June 2016, SAV notified the labour authorities of the Regional Government of La Libertad of the existence of ‘irregularities’ in the way in which the assembly had been conducted. On the one hand, the company claimed that the assembly had not taken place; on the other, it claimed that the relevant legal procedures had not been followed. The purpose of this action was to interfere with the normal functioning of the SITESAV.

In parallel, SAV resorted to using temporary leave to inhibit the activities of the workers who belonged to the SITESAV governing body, as well as of the workers who participated in the assembly referred to above. The company also continued to pursue the practice of filing criminal complaints against the union leaders. Thus, by alleging fraud in relation to the signatures of the union members who took part in the assembly, it accused the leaders of the SITESAV governing body of a criminal offence (see the complaint filed under File No 2306014501-2016-4192-0, which has resulted in the Public Prosecutor’s Office investigating the SITESAV governing body for committing the alleged offence of procedural fraud).

SAV’s anti-union practices have resulted in the company being fined by the Labour Inspectorate. Thus, in the case of SUNAFIL Infringement Report No 0223-2016, after verifying that a number of actions taken by SAV constituted a violation of the right to freedom of association, the Labour Inspectorate imposed a fine on the company of PEN 138 250.00. Nevertheless, the imposition of this fine has been ineffective, since it has brought no change in SAV’s practices and the systematic violation of the fundamental rights of workers who are members of the SITESAV continues.

B) How workers’ fundamental rights are violated in this case

Anti-union discrimination: As in the cases described above, we see here also how Articles 3 and 4 of the Law on Collective Labour Relations are directly violated by SAV. In particular, this occurs through unjustified dismissals, non-renewal of temporary contracts and abusive
use of temporary leave to hinder the exercise of freedom of association. The criminal complaints referred to above serve to compound these breaches of the duty to respect and guarantee the exercise of the right to freedom of association of the workers involved.

Trade union privilege: Although Articles 30 and 31 of the Law on Collective Labour Relations guarantee trade union privilege for workers who belong to the trade union, thereby protecting them in principle from potential dismissals or reprisals for exercising their right to freedom of association, in practice the leaders of the SITESAV have been deprived of the protection that union privilege confers on them. They are instead being harassed by the company with a series of criminal complaints whose sole objective is to interfere with the functioning of the SITESAV.

2.4.3 The case of the Palmas corporate group

A) Facts

The Palmas Group comprises several companies in the agricultural sector that are connected with the harvesting, processing and distribution of oil palm and cacao. This corporate group is also linked to the Romero Group (one of Peru’s biggest corporate groups) and has plans to expand its already considerable markets by exporting cacao to Europe.\(^64\)

As will be explained below, two of the companies that belong to the Palmas Group (Industrias del Espino S.A. and Palmas del Espino S.A) systematically violate their workers’ rights in matters of freedom of association and occupational health and safety.

At Industrias del Espino S.A, a Workers’ Union of Industrias del Espino S.A (the Union) has been established. For some years now, the Union has reached collective agreements with the company; however, the company has employed anti-union practices to debilitate the trade union, particularly by discouraging membership of it.

After each collective agreement is reached, Industrias del Espino proceeds to extend the benefits of the agreement reached with the Union (which is a minority union since fewer than half of the company workers are members of it) to all of the workers, regardless of whether they are members or not. Such is the finding of Infringement Report No 002-2016OZTPEAH-T-SM, which clearly states that workers who do not belong to the Union are receiving the benefits of the collective agreement, despite the fact that the Law on Collective Labour

\(^{64}\) See http://gestion.pe/economia/cacao-valor-agregado-nuevo-objetivo-grupo-palmas-2149320
Relations specifies that the collective agreements of minority unions apply exclusively to their members and not to other company workers.

The purpose of extending the benefits agreed with the minority union to other company workers is to dissuade them from joining the Union, since in order to receive those benefits they do not need to run the risks nor bear the costs incurred by those who are members of the minority union. This is also an indirect way of preventing the Union from becoming a majority union were it to succeed in recruiting an increasing number of workers.

In addition, the above-mentioned Infringement Report found that workers who did not belong to the Union even received other forms of additional remuneration, which meant that in general terms their wages were higher than those of Union members. This additional remuneration began when the workers relinquished their membership of the Union, proving that the case is one of totally anti-union and discriminatory practice. Consequently, in its report the Labour Inspectorate concluded that Industrias del Espino had engaged in anti-union practices, which included the existence of evident discrimination in pay, as a result of which the Inspectorate imposed on it a fine of PEN 86 900.00. However, this situation has not changed substantially since the fine was imposed in March 2016.

Another sphere in which the rights of the workers of this company are violated is that of the lack of diligence in matters of occupational health and safety. There have been several fatal accidents at Industrias del Espino because of this, as is the case, for example of Carlos Borda Alvarado (who died in June 2014 in an incident involving a faulty conveyor belt) and Miguel Salinas Rodríguez (who died as he was using chemicals to clean a tank in August of that same year).

In the case of Palmas del Espino SA (Palmas del Espino), the authorities have verified the systematic irregular use of temporary contracts, together with the unlawful use of the scheme to promote the agricultural sector (when it was not applicable).

While the first practice has as its purpose the debilitation of the union, the second is intended to lower the wages paid to agricultural workers.

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65 This was certified in Infringement Report No 007-2014-SDI-OZTPE-T of 9 September 2014.
66 This is borne out in Infringement Report No 008-2010-SDI-OZTT-DRTPESM. Also, in May 2014, the CGTP reported that Palmas del Espino was making irregular use of around 1 900 employment contracts.
67 According to a study carried out by the former Deputy Minister for the Promotion of Employment, economist Julio Gamero Requena, Available at [http://www.redge.org.pe/sites/default/files/estudio_derechos%20laborales_Gamero.pdf](http://www.redge.org.pe/sites/default/files/estudio_derechos%20laborales_Gamero.pdf)
Also, in October 2013, after 290 Palmas del Espino workers had exercised their right to strike during the collective bargaining procedure, the company filed a criminal complaint against five union leaders. In September 2014, the complaint was dismissed.68

With regard to the protection of health and safety of workers, there is also evidence of an alarming lack of diligence. This is evidenced by the deaths of Manuel Rengifo Lavi (who died on the company premises), Mayer David Tamani (who died at work after a company truck overturned) and Ely Mermao Barneo (who died after being ordered to cut branches on the plantation when he had received no training for the job).69

B) How workers’ fundamental rights are violated in this case in breach of the obligations laid down in Title IX of the TA

Anti-union discrimination: In a manner similar to that of the cases described above, the Palmas Group infringes with impunity the provisions of Articles 3 and 4 of the Law on Collective Labour Relations by engaging in practices that are deliberately intended to interfere with the functioning of the trade union. Namely, by giving differential treatment in wages, by discriminating against workers for their membership of the Union (the benefits of the minority union’s collective agreement are extended illegally to the rest of the workers who are not union members, and additional remuneration is given to workers who relinquish their union membership), as well as by taking reprisals against the workers who legitimately exercise their right to strike.

These practices are a violation of the right to equality as recognised under Article 2.2 of the Political Constitution of Peru, and under ILO Convention No 98 (on the right to organise and collective bargaining) and ILO Convention No 111, which prohibits acts of discrimination in employment.

Practices to discourage union membership: Article 9 of the Law on Collective Labour Relations provides that:

‘In matters of collective bargaining, the union whose members number the absolute majority of workers included within its sphere of activity becomes the representative of all of the workers, even if they are not union members.’

68 Under Decision No 02 of 4 September 2014 of the Uchiza Prosecutor’s Office.
69 It should be pointed out that although these events were reported, neither the regional authorities nor the labour authorities have carried out the necessary enquiries to correctly determine the company’s liability.
From this it may be inferred that minority trade unions represent only those workers who are members of it, and therefore the collective agreement only applies to them.

The result of any action to extend the scope of application of the agreement is therefore to discourage membership of the minority union, since non-member workers who have made no effort to reach the agreement enjoy the benefits of it. By extending the benefits of the collective agreement, Industrias del Espino is engaging in clearly anti-union practices that infringe Peruvian legislation.

Duty to ensure occupational health and safety: In addition, in the present case it is also clear how the company fails to fulfil its obligations to ensure the health and safety of its workers by not providing them with adequate working conditions for the work they do, or training them to carry out the tasks that they are given.

In this case, the fatal accidents there have been (and their causes) are a clear example of the failure of Palmas Group companies to comply with Principles I and IX of the Law on Occupational Health and Safety (Law No 29783) referred to earlier, which has a serious and irreversible impact on the rights to health, safety and life of the Group’s workers.
2.5 Description of how the obligation to guarantee the exercise of the rights protected under the ILO Conventions on Fundamental Rights is not met in the mining sector

2.5.1 The case of Shougang

In 1992, the Chinese state-owned Shougang Group bought the Peruvian state-owned company Hierro Perú for approximately USD 118 million. At that time it was the biggest Chinese company in Latin America.\(^{70}\)

Shougang is the only open-pit iron mine in Peru, which means that its output — as well as being exported (87%) to destinations that include several in Europe — supplies practically all of the requirements for the production of steel for the domestic market and the building industry. In addition, its strategic location — 15 km from the coast on the Bay of Marcona, which is a natural harbour, the deepest in the country — has enabled it to reach record production figures (37 million tonnes in the last five years), drastically reduce its costs (the lowest in Latin America), and increase its profitability exponentially (in 2010 it obtained a net profit of USD 818.4 million, which was 451% more than in 2009; in the first quarter of 2011 its net profit was USD 300 million). However, this economic boom is far from being reflected in the pay levels of its workers. In 2010, the company had a direct workforce of 1,925 (spanning manual workers, employees and civil servants), representing an annual average expense per worker of approximately PEN 65,000. That is to say, no more than USD 50 million per year.\(^{71}\)

Workers and various trade unions have filed several complaints against Shougang for violation of labour rights and precarious working conditions. The working environment at this company is noted for the high level of social and labour disputes that characterise its relations with workers, particularly those who are members of the employees’ and manual workers’ unions and those who are employed by subcontractor companies.\(^{72}\) A sector of the population in the district of Marcona that has organised itself around the Frente de Defensa de Marcona [Marcona Defence Front] is also recognised as being affected by the company.

There have been more than a few complaints concerning the breach of and disregard for fundamental labour rights, in particular the right of workers to engage in collective bargaining.

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\(^{70}\) SANBORN & TORRES (2009).


\(^{72}\) Outsourcing or subcontracting is a practice engaged in by a company when it hires a second company to provide a service that it should in principle provide itself. It is a procedure that is usually used to reduce costs.
to improve their working conditions in an atmosphere of good faith and social dialogue. Year after year since 1996 this has resulted in the collective bargaining procedures at Shougang being settled by the labour authorities — either the Ica regional labour authorities or the MTPE directly — using compulsory arbitration mechanisms and against a background of lengthy work stoppages.

At the root of this conflict lie the difficulties in reaching agreements on financial matters and pay. There is substantial distance between the demands for better wages made by the workers and what the company is prepared to accept. During the last collective-bargaining exercise relating to the collective agreement for 2016-2017, the Shougang workers’ union asked for a daily pay increase of PEN 8.40 (USD 2.60), the equalisation of the workers’ basic wage and a bonus for those working the day shift. What the company offered — as indicated by the general manager of Shougang, Raúl Vera — was an increase of the equivalent of PEN 1 per day (USD 0.30). The average daily wage at Shougang is PEN 85 (USD 26.31), which is less than the amounts achieved through collective bargaining at other major Peruvian mining companies where the comparative advantages are fewer and there is also trade union activity (Southern, Volcan, Buenaventura, etc.).

The poor relations between Shougang and its manual workers and employees have a lengthy record of complaints for anti-union practices, irregular outsourcing, fraudulent use of employment contract types, pay discrimination, non-compliance with occupational health and safety standards (between 2000 and 2011 there were 11 fatal accidents), etc., which the labour authorities have not succeeded in resolving.

The manual workers’ and employees’ unions complain that despite its excellent financial situation, Shougang refuses to negotiate in good faith any improvements in their working conditions and pay levels. For 14 years now, this situation has forced workers to stage indefinite strikes during collective bargaining to press for a solution after the extra-procedural stages of conciliation and negotiation conducted under the auspices first of the regional labour authorities’ Dirección de Conflictos Laborales (DRTPE-GRI [Labour Conflict Department]) and then of the MTPE in Lima failed.

74 In the case of the manual workers’ union, the following pay rises were awarded: 2003 = PEN 2.5; 2004 = PEN 3.1; 2007 = PEN 3.45; 2008 = PEN 3.70; in the case of the employees’ union the pay rises were as follows: 2008 = PEN 4.20 and 2009 = PEN 3.10.
75 Hiring workers through so-called service companies or intermediaries to do the primary work of the contracting company, thereby infringing the provisions of the law that regulates outsourcing. Law No 29245.
76 Using types of contract that are not appropriate to the job done by the worker.
Ultimately, this dynamic renders the workers’ right to collective bargaining meaningless, since in their role as compulsory arbitrator the labour authorities override the independent will of the parties and limit the attention given to their demands to only two aspects of the union petitions, excluding the rest of them without giving adequate reasons for doing so.

Far from encouraging a negotiated solution to the dispute and its complex set of labour problems, what this does instead is encourage the emergence of irreconcilable positions between the parties and an escalation of the conflict.

Nevertheless, in recent years there have been a number of events that could change this outlook: 1) in November 2011, the judiciary annulled the DRTPEGRI ruling on the draft collective agreement for 2010 presented by the employees’ union, and called for adequate reasons to be given as to why only two of the benefits sought by the workers had been granted and the rest excluded; 2) the Constitutional Court (File 03561-2009-PA/TC) determined that should one of the parties act in bad faith, the other could, without going on strike, opt for discretionary arbitration; and 3) Supreme Decree No 014-2001-TR came into force, which provides that in cases in which a strike has a supra-regional or national impact, the labour department of the MTPE is competent to settle the dispute (as illustrated by the case of the proposed collective agreement for 2011 presented by the manual workers’ union when the MTPE labour department annulled the ruling of the Ica regional labour department and took on direct responsibility for the case).

The company does not only have difficulties in achieving stable and respectful labour relations with its direct workers. The most serious conflicts (in terms of the levels of violence reached) involve workers employed by the subcontractors that provide services to Shougang. In total, 70% of the workers at the mining complex are employed by these service or outsourcing companies.

The conflict with Shougang has reached levels of violence that have resulted in the loss of human lives. On 25 May 2005, Luis Quipe Chumpi died after being shot by the police as they were repressing a demonstration by workers outside the company premises.

This killing came against the background of an indefinite general strike called by the Shougang unions that was supported by the population and involved roadblocks, shop closures, suspension of teaching and food shortages. One of the triggers of the dispute was the

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77 Supreme Decree No 014-2001-TR provides that once direct dealings and the heteronomous intervention of the State via conciliation or extra-procedural means have been exhausted, the parties may apply for the dispute to be brought before an arbitral tribunal.

78 PAUCAR, Jorge. 'Marcona: Este es el conflicto laboral relacionado a la minera Shougang que ya cobró su primera victima mortal [Marcona: Labour dispute at Shougang mining company claims first fatality]. La Mula. Available at https://goo.gl/hNv8Qy  Checked on 22/03/17.
arbitrary dismissal of over ninety (90) workers by the Coopsol cooperative, an outsourcing company that provided services to Shougang. The employees of Coopsol went on strike during a collective bargaining procedure, as a result of which the principal company (Shougang) terminated the contract with Coopsol, which resulted in many workers losing their jobs.

C) How workers’ fundamental rights are violated in this case in breach of the obligations laid down in Title IX of the TA

The reported actions of Shougang that are described above impact the exercise of the rights to freedom of association, collective bargaining and strike that are regulated under both the consolidated text of Peru’s Law on Collective Labour Relations and its Political Constitution, and also the provisions of ILO Convention No 87, which all recognise the right of workers to establish and join organisations of their own choosing and not be exposed to any type of restriction as a result of exercising their right to freedom of association.

They also involve a breach of ILO Convention No 98 (of which Peru is a signatory), according to Article 4 of which the Peruvian State makes the commitment that ‘measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.’

The recurrence of complaints concerning Shougang’s anti-union practices, irregular outsourcing, fraudulent use of employment contract types, wage discrimination and non-compliance with occupational health and safety standards, and the fact that these have not been substantially reversed by the Peruvian labour authorities, also speaks of the State’s lack of effective will to uphold — as agreed under Article 269 of the TA — its commitment to promote and guarantee ‘the promotion and effective implementation in its laws and practice and in its whole territory of internationally recognised core labour standards as contained in the fundamental Conventions of the International Labour Organisation (...).’

79 OTRA MIRADA. ‘La Shougang, los dueños de Marcona’ [‘Shougang, the owners of Marcona’]. 10 June 2015. Available at https://goo.gl/yFgXzg Checked on 22/03/17.
3. Review of Peru’s non-compliance with its environmental obligations under the TA

3.1. Specific environmental obligations assumed under the Trade Agreement between Peru and the European Union

The environmental obligations of the Peruvian State comprise those laid down in its Political Constitution, its national law (specific and sectoral legislation) and those that are the product of the Treaties and/or Agreements to which the State is signatory. It should be pointed out that, in accordance with the Peruvian Constitution, all provisions laid down in Treaties are automatically transposed into national law and are therefore legally binding. Compliance with all these provisions is mandatory for the State and, in the specific case of those laid down in a Treaty, non-compliance may constitute a breach of international responsibility by the State.

The obligations of the State with regard to the nationwide protection of the environment and the conservation of natural resources are laid down in the following articles of the Constitution:

Article 2.
22. To peace, tranquillity, free time and rest and to live in a balanced, appropriate environment.

Article 66. Natural resources
Natural, renewable and non-renewable resources are the assets of the Nation. The State is sovereign as regards their exploitation.

The terms under which they may be used and under which they may be granted to private individuals shall be laid down in organic law. Concession grants the right holder a right in rem subject to that law.

Article 67. Environmental policy
The State shall determine national environmental policy. It shall encourage the sustainable use of natural resources

Article 68. Conservation of biological diversity and protected natural areas
The State has the obligation to encourage the conservation of biological diversity and of protected natural areas.

At international level, by signing and acceding to various agreements, the Peruvian State has undertaken to respect the environmental obligations laid down in the following:

i. Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere (Washington, 1940).\(^\text{81}\)

ii. Convention concerning the Protection of the World Cultural and Natural Heritage.\(^\text{82}\)

iii. Convention on Biological Diversity.\(^\text{83}\)

iv. Vienna Convention for the Protection of the Ozone Layer.\(^\text{84}\)

v. United Nations Framework Convention on Climate Change.\(^\text{85}\)

vi. ILO Convention No 169 concerning Indigenous and Tribal Peoples.\(^\text{86}\)

All these conventions form part of Peruvian national law\(^\text{87}\) and do not require any special procedure for them to conform with domestic legislation, meaning that in the case of a potential conflict between this and the provisions of the Treaty, compliance with the latter takes precedence. The Vienna Convention on the Law of Treaties (1969) that regulates international agreements between states lays down that treaties are governed by the principle of *pacta sunt servanda* (Article 26), i.e. every treaty in force is binding upon the parties to it and must be performed by them in good faith. In addition, the State party may not invoke the provisions of its national law as justification for its failure to comply with a treaty (Article 27). If a State fails to comply with its international obligations it is in breach of international responsibility.

As regards the sustainable development obligations assumed under the Trade Agreement between Peru and the European Union, the Agreement includes environmental provisions under Title IX on Trade and Sustainable Development that recognise the sovereign right of each Party to establish its domestic policies and priorities on sustainable development and its

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\(^\text{81}\) Ratified by Peru in 1946.

\(^\text{82}\) Drawn up by UNESCO in 1972 and ratified by Peru in 1981.

\(^\text{83}\) Signed in Rio de Janeiro, Brazil, in 1992 and ratified by the Peruvian State in 1993.

\(^\text{84}\) Adopted on 22 March 1985.

\(^\text{85}\) Adopted on 4 June 1992.

\(^\text{86}\) Ratified by Peru on 2 February 1994.

\(^\text{87}\) In accordance with Article 55 of the Constitution.
own levels of environmental and labour protection consistent with the standards laid down in the internationally recognised Multilateral Environmental Agreements (MEAs).  

Likewise, the Parties recognise the benefit of considering trade-related labour and environmental issues as part of a global approach to trade and sustainable development. To this end, they seek to strengthen compliance with labour and environmental legislation, as well as with the commitments deriving from the international conventions and agreements, as an important means of enhancing the contribution of trade to sustainable development. Thus, the Parties reiterate their commitment to address global environmental challenges, in accordance with the principle of common but differentiated responsibilities.

Similarly, the Trade Agreement also regulates issues such as Biological Diversity, Climate Change and Forest Products.

Although Article 268 TA recognises the sovereign right of each state to regulate its environmental and labour legislation at domestic level, the TA stresses that the Parties must ensure high levels of protection. Furthermore, no Party shall encourage trade or investment by reducing the levels of protection afforded in its environmental and labour laws. In other

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88 The MEAs are accepted standards by which countries address issues of common interest. They include instruments such as the Convention on International Trade in Endangered Species, signed in 1974; the Convention on Biological Diversity (CBD), signed in 1992; and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989); among others.

89 As regards Biological Diversity, the Parties recognise the importance of the conservation and sustainable use of biological diversity and all of its components as a key element for the achievement of sustainable development. They likewise confirm their commitment to conserve and sustainably use biological diversity in accordance with the CBD and other relevant international agreements to which the Parties are party. The Parties also recognise the importance of protected areas for the welfare of populations settled in those areas and their buffer zones.

90 In relation to climate change, the Parties declare that they are resolved to enhance their efforts regarding climate change through the promotion of domestic policies and suitable international initiatives to mitigate and to adapt to climate change in accordance with their common but differentiated responsibilities, respective capabilities and social and economic conditions, and the high vulnerability to the adverse effects of climate change of those Parties which are developing countries. The TA lays down the Parties’ commitment to sustainable use of natural resources and promotion of trade and investment measures that promote and facilitate access, dissemination and use of best available technologies for clean energy production and use, and for mitigation of and adaptation to climate change (Article 275). To adapt to climate change, the measures include the adoption of trade and investment policies that facilitate the removal of barriers to access to innovation, development, and deployment of goods, services and technologies that can contribute to mitigation or adaptation. Likewise, the Parties must promote measures for energy efficiency and renewable energy that respond to environmental and economic needs and minimise technical obstacles to trade.

91 Referring to forest products, and in order to promote sustainable management of them, the Parties are urged to adopt practices such as the effective application of the CITES and the development of systems and mechanisms with which to verify the legal origin of timber products, among others. The Parties therefore recognise that employing practices of this type helps to improve forest management and promote trade in legal and sustainable forest products (Article 273).
words, in accordance with the provisions of Article 277, no Party shall waive or otherwise derogate from its environmental and labour laws in a manner that reduces the protection afforded in those laws, to encourage trade or investment.

### 3.2 Description of how non-compliance with these environmental obligations occurs

For the purposes of this document, two articles are key to assessing compliance with the international commitments assumed by the Peruvian State under the Trade Agreement with the EU. These articles are numbers 268 and 277 mentioned above. To demonstrate non-compliance we have selected investment projects that we consider to be emblematic. These projects have been selected on the following criteria: (i) the project must have been awarded, implemented or in implementation during the period of validity of the TA; (ii) the investors in the project must include current members of the EU; (iii) the project invested in must be in a sector that has a high direct or indirect impact on the environment. It should be recalled in this regard that the EU Member States that currently invest in Peru are, in order of size of investment, Spain, United Kingdom, Belgium, Italy and Luxembourg. The main sectors receiving investment are energy, mining, oil and transport.

### 3.2.1 Description of how environmental standards have been relaxed over 2013-2017

Since the entry into force of the TA, environmental standards have been steadily relaxed. This has occurred in parallel to the promotion of investment in sectors that are considered to be strategic to the Peruvian economy. Peru’s enormous potential as regards the extraction of natural resources has led recent governments to prioritise sectors such as mining, large-scale infrastructure and transport, among others. Government eagerness to exploit our natural resources has rekindled concerns about the risks of overdependence on exports of primary products and about the structural challenges of achieving a more diverse and productive economy in Peru.

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92 The result of the Brexit referendum has generated uncertainty about the terms on which countries will trade with the United Kingdom after it leaves the EU. Until the negotiations are concluded, the United Kingdom’s participation in the agreements currently in force remains unchanged. In this regard, at the date of drafting of this report the United Kingdom continues to be a member of the EU and, consequently, has been considered one of Peru’s main EU-member trading partners.

93 According to the *Reporte de Proyectos por Origen de Inversión* [Report on Projects by Investment Source], available on the webpage of Proinversion, a Peruvian agency for the promotion of private investment (http://www.proinversion.gob.pe).
The slowdown in the Chinese economy — which had a significant impact on the price of and demand for our commodities — influenced this relaxing of environmental standards and access to natural resources. The flow of investment into Peru decreased and the country’s economic growth stagnated. This was used by the Government to justify the removal of barriers to private investment and the extreme simplification of administrative procedures, both of which were considered key to encouraging investment.

A significant proportion of these procedures related to the environment and included aspects such as environmental certification, the rights of indigenous peoples to prior consultation, careful management of water resources and access to land, including via expropriation of communal land, for example. According to the Government, the environmental and social requirements that had to be met by all public and/or private investment projects constituted barriers to investment and therefore needed to be simplified or, if possible, removed. This belief has not only led to a severe lowering of standards within the legal framework protecting the environment and the rights of indigenous peoples, but also clearly contravenes the commitments assumed by the Peruvian State under the TA. In particular, it contravenes its obligation not to ‘encourage trade or investment by reducing the levels of protection afforded in its environmental and labour laws’ in accordance with Article 277 of the Trade Agreement signed between Peru and the European Union.

While the main changes in this respect were made under former President Ollanta Humala (2011-2016), the trend has been maintained by the current Government of President Pedro Pablo Kuczynski (2016-2021). These regulatory changes coincide with the period of validity of the TA.

These rules have favoured the entire private sector, including investment by EU Member States in key sectors of our economy (hydrocarbons, energy, infrastructure and transport, among others). It is therefore important to show the magnitude of the harm caused when investment is prioritised over protection of the environment and the rights of indigenous peoples.

It should be noted that Peruvian civil society has voiced criticism throughout this process of relaxing of environmental and social standards, and has repeatedly stated the risks to the environment and to indigenous communities in the areas of influence of these projects associated with this facilitation and relaxing. As a result of this opposition, challenges to some of these laws have been brought before the corresponding courts, where it has been necessary to demonstrate the impact of and harm caused by specific projects due to implementation of this policy.
Below is an account of the regulations issued between 2013 and 2017 that we consider to represent a step backwards in environmental management in this country. The following sections describe the mechanisms that demonstrate/illustrate this relaxing of standards.

3.2.1.1 Creation of Supporting Technical Reports to weaken Environmental Impact Assessments

In 2013, the so-called Supporting Technical Reports (STRs) were created to allow modification of auxiliary components, to extend investment projects for which environmental certification had been approved and that had no significant environmental impact and to make technological improvements to operations. With these, it is no longer necessary to follow the standard Environmental Impact Assessment (EIA) modification procedure; the STR approval procedure can be followed instead. There are, however, major differences between the standard procedure and the STR procedure. These mainly lie in the significant shortening of the deadlines for approval of the modification and the removal of the requirement for informed public participation and/or consultation, which forms part of the process of approving a modification to the EIA.

This new procedure was implemented by Supreme Decree No 054-2013-PCM (Article 4) adopting special provisions for administrative authorisation and/or certification procedures for investment projects within national territory.

It should be noted that improper interpretation and application of the STR procedure makes it possible to sidestep the modification procedure normally applied to EIAs, which requires — in addition to the updating of the technical feasibility studies — informed public participation. In addition, the decree shortened the deadline for evaluation of STRs to 15 days when previously the legal deadline was 120 working days.

STRs are used primarily in the mining and quarrying sector and the establishment of an open clause that provides no detailed definition of what is understood by ‘no significant environmental impact’ — as has happened with this decree — gives rise to the denaturing of the instrument, which should only be used in exceptional cases and not as a general rule.

Approval of STRs on these terms has led to a significant number of socio-environmental conflicts. This is mainly because these instruments are currently used to make major changes to investment projects in the mining and hydrocarbons sectors, and those changes cause significant harm to the environment. In addition to this, STRs are based on a simple affidavit by the company concerned, which makes them vulnerable, since the competent environmental
authority focuses its assessment on information provided by the company alone. Given that STRs do not require consultation of the public potentially affected, the information received therefore runs the risk of being biased. This leads to public distrust which, in turn, can lead to socio-environmental conflict.

3.2.1.2 Measures to encourage public and private investment projects at the expense of environmental standards

The shortened deadlines set and the conditions imposed on the competent public officials when implementing the Government’s new approach to this issue have placed the environmental impact assessment process at risk of being performed improperly, essentially because of the shortened deadlines, thereby jeopardising the quality of the environmental assessments.

Modification of the deadlines for approval of the EIAs was implemented by Supreme Decree No 060-2013-PCM (Article 2), which established special provisions for the performance of administrative procedures and other measures to encourage public and private investment.

Article 2 of Supreme Decree No 060-2013-PCM lays down that in the EIA approval phase the public bodies that participate in the procedure have a deadline of twenty (20) days — applicable from the entry into force of the decree — to assess the detailed and semi-detailed EIAs and, at the same time, approve the terms of reference applicable to projects with common characteristics, which must be used by the inspected parties when drawing up the above-mentioned EIAs.

Once that deadline has expired, the competent environmental authority must submit the proposed terms of reference for projects with common characteristics to the public bodies that emit binding and non-binding opinions on the matter. These bodies must issue a decision within a maximum of five (5) days. The final version of the ‘consensual’ terms of reference is then submitted to the Ministry of the Environment (MINAM) for acknowledgement.

Decree No 060-2013-PCM states, moreover, that public officials should continue the environmental assessment without taking into account the views of the opinion-issuing

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94 The Detailed Environmental Impact Assessment (EIA-d) is a document that assesses the environmental impact of investment projects whose implementation could generate quantitatively or qualitatively significant negative environmental impacts.

95 The Semi-detailed Environmental Impact Assessment (EIA-sd) is a document that assesses the environmental impact of investment projects whose implementation could generate negative environmental impacts that could be reversed or minimised by easily applicable actions and/or measures.
authorities. Although these opinions are not binding, they have always been considered relevant due their contribution to strengthening the EIAs. Prior to the issuance of this Decree, in the mining sector all the opinions, binding or not, were taken into consideration, thereby ensuring environmental assessment quality. This is why it is wrong to prohibit (and even penalise) public officials from requiring additional information or requesting rectification of information relating to environmental assessments.

The Decree lays down, moreover, that administrative authorities and public officials and/or servants are prohibited from making requests for information or rectifying EIAs on matters or aspects that have not been commented on previously during the process or in the terms of reference. Non-compliance with this provision is considered an administrative offence subject to penalisation under Law No 27444 on general administrative procedure. This measure is clearly disproportionate when it is taken into account that penalisation for administrative offences can extend to suspension of duties, dismissal from post and even termination of employment for the public official concerned depending on the seriousness of the offence, the recidivism, the harm caused and the intent with which the public official acted (Article 239, Law No 27444).

3.2.1.3 Establishment of tax measures and simplification of procedure and permissions under Law No 30230 to promote and encourage investment in the country at the expense of lowering environmental standards

One of the most significant changes that occurred after the entry into force of the TA was brought about by Law No 30230, which had the effect of weakening environmental auditing in Peru in order to promote private investment, especially in the mining and quarrying sector. Article 19 of this Law removed the power of the Organismo de Evaluación y Fiscalización Ambiental (OEFA [Environmental Assessment and Auditing Body]) to impose penalties for environmental offences. This article stipulates that if a breach of environmental law is found to exist, the OEFA is first obliged to order implementation of corrective measures. Only if these measures are not implemented can it impose a penalty. As a result, penalties will only be applied in exceptional circumstances and, in addition, they may only constitute up to 50% of the maximum fine that the OEFA would normally impose.

There are only three cases in which the OEFA may impose sanctions in excess of 50%: (i) when the infringement is classified as very serious, which occurs when there is proof that actual harm has been caused to human life or health; (ii) when the activity is performed without the environmental management instrument or in a prohibited area; and (iii) when the
infringement reoccurs within 6 months of that infringement having been penalised under a final decision.

Application of this law has created perverse incentives for companies, since it encourages them not to comply with environmental regulations. Although the aim of a penalty is to discourage infringement (in this case to discourage infringement of environmental regulations), the fact that the penalties are only applicable in exceptional circumstances makes non-compliance relatively attractive, as it is less costly to pay the meagre fines than to correct and/or remedy the environmental harm produced. An example of this was that within eight months of implementation of the regulation the amnesty and reductions in fines for environmental infringements had benefited the mining and quarrying industries by more than PEN 55 million, according to research conducted by an independent publication. These measures will remain in force for three years from 13 July 2014.

Furthermore, Article 22 of Law 30230 redefines land-use planning as a ‘political, technical and administrative process intended to guide orderly occupancy and sustainable use of land based on the identification of potentialities and limitations while considering economic, sociocultural, environmental and institutional criteria. The national land-use policy is adopted by Supreme Decree, as endorsed by the President of the Council of Ministers and as passed by a vote in favour by the Council of Ministers. Neither Zonificación Económica Ecológica [Environmental Economic Zoning] nor Land-Use Planning assign or exclude uses.’ This definition is a major step backwards in terms of the land-use policies applied by regional governments, halting the advances made by several of them as it is during the planning process that decisions are made on land occupancy and use to define and regulate uses and issue directives and guidelines on them. Without the ability to make decisions to solve the problems and territorial imbalances caused by inappropriate land occupation or use — as is the case, for example, with occupation of high-risk areas — land-use planning lacks effectiveness.

Other amendments introduced by Law 30230 are found in Title III, which creates special procedures for the physical and legal reclassification of land, whether publicly or privately owned, either formally or informally, to facilitate the hand-over of this land exclusively to investment projects. This generates enormous legal uncertainty in land ownership and

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96 See investigation by Convoca (http://www.convoca.pe/especiales/juegosdelpoder/como-se-hace-una-ley)
97 It should be noted that Law No 30230 was widely criticised by civil society and indigenous organisations, and even after its adoption a draft law (Law No 269-2016-CR) restoring the OEFA’s power to impose penalties and repealing Article 19 of Law No 30230 was submitted to the Peruvian Congress. The draft of the law was passed on 12 April but as yet it has not been published in the official journal it has not yet been brought into effect. The deadline for the temporary measure provided for in that Article expired last July, meaning that it is without effect. However, the internal regulation passed to implement it during the period of validity of the former also needs to be rendered ineffective; if not its effects will be perpetuated.
possession in subsistence farming and indigenous communities (indigenous peoples), as well as among smallholders and farmers whose lands are classified as of interest and necessary for the development of an investment project. This land could be reclassified (in other words, rapidly assigned ownership) in order for it to be handed over to the sponsors of the investment projects.

Law No 30230 was adopted for the alleged purpose of ‘reactivating the economy’ and formed part of an initial package of ‘reactivator’ legislation, which was supplemented later by other regulatory packages. As mentioned above, the alleged objective of this law was to unlock investment. However, instead of promoting sustainable investment, it produced the opposite effect. The lowering of the standards applicable to sectors with a high environmental impact — such as mining and hydrocarbons — generated widespread unrest, with the resulting increase in the number of socio-environmental conflicts in the mining and quarrying sector.98

3.2.1.4 Removal of environmental protection applicable to hydrocarbon-related activities

On 12 November 2014, Supreme Decree No 039-2014-EM, titled Reglamento para la Protección Ambiental en las Actividades de Hidrocarburos [Regulation for Environmental Protection applicable to Hydrocarbon-Related Activities], was adopted. The decree lowered the existing environmental and social standards, especially within the sphere of hydrocarbon exploration and with regard to the guarantee of the right to public participation. The main objections to the regulation raised by civil society include the following:

(i) In accordance with Annex No 1 to Supreme Decree No 039-2014-EM99 on seismic exploration, such exploration in Maritime, Coastal and Mountain areas shall require a Semi-detailed Environmental Impact Assessment (EIA-sd),100 even

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99 Supreme Decree No 039-2014-EM and Annex No 1 are available at file:///C:/Users/Marth/Downloads/ds_039-2014-EM.pdf

100 The Environmental Assessments applicable to hydrocarbon-related activities are as follows: (i) Environmental Impact Statement (EIS). This document is essentially an affidavit stating that the investment project complies with the currently applicable environmental legislation and environmental protection criteria and is likely to generate insignificant negative environmental impacts.

(ii) Semi-Detailed Environmental Impact Assessment (EIA-sd). This document assesses the environmental impact of investment projects whose implementation could generate negative environmental impacts that could be reversed or minimised by easily applicable actions and/or measures.

(iii) Detailed Environmental Impact Assessment (EIA-d). This document assesses the environmental impact of investment projects whose implementation could generate quantitatively or qualitatively significant negative environmental impacts.

(iv) Strategic Environmental Assessment (SEA). This environmental management instrument is applied to policies, plans and programmes proposed by authorities at the three levels of government (national, regional and local) with potentially significant environmental implications.
when the exploration projects are located in Protected Natural Areas (PNAs), including their Buffer Zones, or in Regional Conservation Areas, Fragile Ecosystems or, where applicable, habitats of critical importance for the reproduction and development of species that are endemic, endangered or of economic importance. In the case of Forest areas, Detailed Environmental Impact Assessments (EIA-d) may be required only in cases affecting Protected Natural Areas, including their Buffer Zones, or Regional Conservation Areas, Fragile Ecosystems or, where applicable, habitats of critical importance for the reproduction and development of species that are endemic and/or endangered, Reserved Areas or Indigenous Reserves, areas containing untouched habitats and projects that include the construction of new access routes (roads). Although in the case of Forest areas this regulation requires an EIA-d in some specific areas, in all of them it is possible to conduct just an EIA-sd and make an Environmental Impact Statement (EIS). Thus, this decree allows for the submission of an EIA-sd even in cases of exploratory drilling in Maritime, Coastal and Mountain areas, Forest areas again being an exception and requiring submission of an EIA-d. The requirement of only an EIA-sd for seismic exploration and the option to require no more than an EIA-sd for drilling lowers the environmental standards in place before this Decree came into force, as Article 26 of the previous Regulation (adopted by Supreme Decree No 015-2006-EM) required the prior approval of an EIA-d before commencing any activity in the hydrocarbon sector.

(ii) The Regulation does not set limits on extractive hydrocarbon-related activities in territories inhabited by indigenous peoples in voluntary isolation or at the initial contact stage. Rather, Annex 1 to the Decree opens up the possibility of conducting hydrocarbon-related activities affecting Reserved Areas or Indigenous Reserves. Neither does it include the obligation to carry out prior consultation when these areas are affected directly or indirectly, as is laid down in Article 15(2) of ILO Convention No 169, ratified by Peru and in accordance with which the indigenous peoples likely to be affected must be consulted ‘before undertaking or permitting any programmes for the exploration or exploitation of such resources.’

(iii) The Regulation also lowers environmental standards for the start of distribution by pipeline. Thus, while the previous Regulation required an EIA-d before distribution by pipeline could be started, the new Regulation only requires an

The importance of mandatory environmental impact assessments in this sector is that they allow us to identify, prevent and mitigate an investment project’s potentially positive or negative impacts prior to the start of the activity. Furthermore, they require the participation of the population directly affected by those projects.
EIA-sd. In addition, it opens up the opportunity to [re]classify projects,\(^\text{101}\) thereby lowering the requirements as regards the respective environmental standards since this [re]classification allows the strictest environmental assessment instrument to be replaced with a less strict one.

(iv) The Regulation makes no reference to the inviolability of Protected Natural Areas of indirect use.\(^\text{102}\) In fact, Article 54\(^\text{103}\) makes no reference at all to the inviolability of these areas.

Proposed amendments to the Regulation are currently being reviewed by civil society organisations.

3.2.1.5 Effect on the right to land of indigenous peoples and communities caused by approval of the *Ley Marco de Adquisición y Expropiación para la Ejecución de Obras de Infraestructura* (Framework Law on Acquisition and Expropriation for Infrastructure Works)

To facilitate the acquisition and expropriation of property linked to investment projects, in August 2015 Legislative Decree No 1192 repealing Law 27117 on expropriation was adopted. Despite the fact that expropriation is treated as an exceptional measure under the Peruvian Constitution,\(^\text{104}\) this Legislative Decree proposes use of expropriation of property as a general

\(^{101}\) Article 15 (Application for classification of environmental assessments) of Supreme Decree No 039-2014-EM on regulation of environmental protection applicable to hydrocarbon-related activities states: ‘At the request of the right holder, the Competent Environmental Authority may classify projects that include hydrocarbon-related activities that are not listed in Annex 1, or that although contained therein the right holder considers, based on the particular characteristics of the project or of the environment in which it will be implemented, do not match the classification assigned to it in the Annex in question.’

\(^{102}\) Protected Natural Areas of indirect use comprise National Parks, National Sanctuaries and Historical Sanctuaries. Protection of the natural resources in these areas is inviolable, in other words, extraction of elements or modification of the environment in any way is prohibited. Only scientific research and tourist, educational and cultural activities are permitted in them. This category is the strictest in terms of management and classification under Peru’s *Sistema Nacional de Áreas Protegidas por el Estado* (SINANPE [National System of State-Protected Areas]). In these areas, State protection is intended to ensure minimal human intervention and, by protecting their natural resources, so generate indirect benefits, such as carbon capture (and, consequently, regulation of the global climate) and water supply both for society today and future generations. PNAs in this category protect soil against erosion, thereby ensuring its productivity and benefit for local populations. Similarly, they protect nearby populations against natural disasters like landslides and conserve representative samples of biodiversity and ecosystems, thereby ensuring the maintenance of genetic diversity and the continued study of species beneficial to humans.

\(^{103}\) Included in Chapter 4 of Title VII, titled ‘Hydrocarbon-related activities in Protected Natural Areas (PNAs) and/or their buffer zones or in Regional Conservation Areas.’

\(^{104}\) Political Constitution of Peru, Article 70 (Inviolability of property rights): ‘The right to property is inviolable. The State guarantees it. It shall be exercised in harmony with the common good and within the limits of the law. Nobody may be deprived of his property except, and exclusively, for reasons of national security or public
rule applicable whenever necessitated by large-scale investment projects declared to be of public necessity.

The Decree, however, ignores the difficulties relating to the ownership of the lands and territories of Peru’s indigenous and native communities. This is a serious omission in that public and private investment projects often extend into indigenous land to which ownership has not been assigned, thereby affecting their collective rights in that the corresponding expropriation processes would be endorsed by a declaration of public need for the infrastructure projects that would not allow the communities the opportunity to accredit their right of ownership.

Within three weeks of adoption of the Decree, a new one was published. This was Legislative Decree 1210, the sole article of which amended the wording of the tenth supplementary provision of Legislative Decree 1192, removing the reference to the effect on rights of ownership and possession of subsistence farming and native communities, making clear the intention behind this legislation.

We should mention that a significant number of the more than ten thousand subsistence farming and indigenous communities do not hold title deeds or have access to georeferenced cadastral maps. Moreover, this all occurs in a context in which — at present — the Ministry of Culture and the Ministry of Agriculture, the two governing bodies in matters relating to indigenous peoples and rural land, respectively, do not have access to either up-to-date, shared and centralised georeferenced information or to an up-to-date cadastre of rural property providing information about indigenous land and right-holding native and subsistence farming communities in the process of registering ownership or in possession of their lands and territories.

3.2.1.6 Relaxing of environmental standards under the legislative decrees issued in 2016 and 2017

In September 2016, Congress authorised the Government to issue legislative decrees intended to encourage reactivation of the national economy. Of the 112 legislative decrees issued, we have selected, on the one hand, those that have had greatest impact on environmental matters and, on the other, those with the potential to affect the rights of indigenous peoples.

A) Simplification of access to land for priority investment projects

necessity as declared by law and following payment in cash of fair compensation that includes compensation for any loss incurred. Cases may be brought before the judiciary to appeal against the value assigned to the property by the State in the expropriation procedure.’
On 5 January 2017, the Peruvian Government published Legislative Decree No 1333 intended to facilitate large-scale infrastructure works considered to be of national interest. Two years before, in 2015, the Ministry of Economy and Finance (MEF) prioritised a list of 53 projects in the mining, hydrocarbons, transport, electricity, agriculture, telecommunications and sanitation sectors that would benefit from the above-mentioned decree. To justify this, the Government indicated that aggregate initial investment in these projects represented 16% of GDP, with 61% of the investment still to be made, attributing the delay in that investment to the alleged obstacles preventing rapid access to the land required.

To remedy this situation, it proposed establishing an *ad hoc* procedure that would expedite the acquisition and release of the property required for the priority investment projects and set up, under Legislative Decree No 1333, a special project run by PROINVERSIÓN (the state agency for the promotion of investment) called *Proyecto Especial para facilitar el Acceso a Predios para Proyectos de Inversión Priorizados* (APIP [Special Project to Facilitate Access to Land for Priority Investment Projects]). The APIP would enjoy functional, administrative, technical and economic autonomy and would have a duration of 3 years, which could be extended by resolution of the MEF at the request of the Executive Director of PROINVERSIÓN.

Civil society organisations brought legal action against Law 30230 on grounds of unconstitutionality, and given that the new decree was going to implement Title III of Law 30230, appealed to the Constitutional Court to review the decree on grounds of its connection to that law, since the procedures laid down to achieve physical and legal reclassification of the land associated with public and private investment projects contravened both the right of private property of the subsistence farming and native communities and national land-use planning regulations. This was mainly because the law did not consider exceptions of any kind, allowing such procedures to be linked to land occupied by indigenous communities and peoples that may not necessarily hold title deeds to that land at present. Another reason to challenge the decree was that it laid down that the APIP would implement Legislative Decree No 1192 which — as mentioned above — was also being monitored by civil society organisations in 2015.

105 The APIP would be responsible, among other matters, for identifying the various forms of possession, occupation, ownership and right to title of land required for investment projects; for identifying if the land is privately or state-owned and formalising the rights to ownership of the State; for rectifying errors in individual property deeds granted by state entities; for establishing the need to relocate people in coordination with the respective bodies and calling assemblies, among other measures; and for exercising the powers regulated by Title III of Law No 30230, and its amendments, as applicable, and for exercising the powers granted under Legislative Decree No 1192.
The Decree’s provisions threatened the right to the land of the populations — especially indigenous communities — living within the direct or indirect area of influence of the investment projects given priority. Moreover, due essentially to shortcomings for which the State is responsible, 72.7% of Peru’s indigenous peoples — living in 6138 subsistence farming communities and 2166 native communities nationwide106 — do not have the means of irrefutably accrediting their right to ownership because of the lack of georeferencing of the location and boundaries of their land. As a result, there is currently pending demand for assignment of title to the land of native and subsistence farming communities.

Meanwhile, Legislative Decree No 1333 granted the APIP the power to determine the need to relocate populations and convene community assemblies. This, despite the fact that only indigenous peoples have the power to convene assemblies for this purpose. This is a key issue when it is taken into account that the sites of the biggest mining, energy and infrastructure projects in Peru extend into, or are within the direct or indirect sphere of influence of, land and territory of indigenous peoples or subsistence farming or native communities. Granting the Government the exclusive power to relocate these populations without exception is of extreme concern to the indigenous population as, among other matters, it contravenes Article 8 of the United Nation’s Declaration on the Rights of Indigenous Peoples, in accordance with which

‘States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of dispossessing them of their lands, territories or resources’ and ‘Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights.’

Indigenous organisations challenged this decree by various means, with the outcome that Congress’s Comisión de Constitución y Reglamento [Committee on the Constitution and Law] recommended its full repeal. Although this recommendation was approved, when it was submitted to the Government the latter overruled it and upheld the legislation, the result being that at present Legislative Decree 1333 remains in force. Moreover, in his recent address to the nation (July 2017) President Kuczynski submitted to Congress a new draft law designed to simplify expropriation for infrastructure projects. The draft of the law reworks the unconstitutional provisions of Legislative Decree No 1333, going even further than that decree by creating a new body with broad powers of physical and legal reclassification of land prioritised for investment, merely changing the former’s name from Proyecto Especial de Acceso a Predios para Proyectos de Inversión Priorizados (APIP [Special Project to Facilitate Access to Land for Priority Investment Projects]) to Proyecto Especial de acceso a Predios para Obras de Infraestructura Priorizadas (APIP [Special Project to Facilitate

106 Data provided by the Institute for the Commons as at December 2016.
Access to Land for Priority Infrastructure Works]). Although the new law provides for the exclusion of ‘property under the ownership or in the possession of indigenous peoples’ this exclusion is insufficient since more than half of subsistence farming communities (3,300 communities) are not officially recognised as indigenous peoples in the Ministry of Culture’s official database of indigenous peoples. In addition, about 3,000 subsistence farming or native communities are not right holders. Nor is there a rural cadastre that provides official information on the boundaries of the communities’ land, a situation that tends to be justified by the State for failing to meet its national and international obligations to protect the land rights of indigenous peoples.

B) Ley Marco de Promoción de la Inversión Privada mediante Asociaciones Público-Privadas [Framework Law on Promotion of Private Investment through Public-Private Partnerships] (Legislative Decree 1251)

Exercising the powers delegated to the Government to issue legislative decrees to encourage economic recovery, the Government passed Legislative Decree No 1251, thereby redrawing the legal framework governing public-private partnerships (PPPs). Legislative Decree No 1251 stipulates that PPPs considered self-sustaining (in other words, those in which the State does not have to provide financial guarantees and in which the costs of the works will be assumed by the investor), will be exempt from the requirement to solicit the prior opinion of the corresponding regulatory body and of the Ministry of Economy and Finance, among others (Article 16.2). However, given the risks associated with these projects in the transport and mining sectors it is concerning that these PPPs are exempt from the requirement to submit documents that are essential for public auditing — as provided for under the previous legal framework — to ascertain both whether the projects awarded to these partnerships under this model will be economically beneficial to the country and their possible social and environmental externalities.

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107 In accordance with Article 3 of Legislative Decree No 1012 (published in official journal ‘El Peruano’ on 13 May 2008, amended by Law No 29771, by Legislative Decree No 1016, by Law No 30114 and by Law No 30167), ‘Public-private partnerships are forms of attracting private investment and incorporating external experience, knowledge, equipment and technology while sharing risk and resources, preferably private, in order to create, develop, improve, operate or maintain public infrastructure, provide public services and/or provide services linked to these required of the State, as well as to carry out applied research and/or technological innovation, on the terms laid down in the regulation implementing this legislation. Participants in a PPP shall be the State, through the public bodies established in the preceding article, and one or more private investors.’

108 Legislative Decree No 1012, Article 4 (Classification as public-private partnership): ‘Public-private partnerships may be classified as follows: a. Self-sustaining: one that meets the following conditions: i. Requires minimal or no financial guarantee from the State, in accordance with the regulation implementing this legislative decree. ii. Guarantees of a non-financial nature shall not or shall be unlikely to require use of public resources, in accordance with the regulation implementing this legislative decree (…)’.
In addition, the decree only provides for a single occasion to comment on the final PPP contract, should such comments be appropriate. If no prior reports or opinions on the contract are issued within the deadlines stipulated, these reports and opinions will be considered favourable.\textsuperscript{109}

The decree lays down that PROINVERSION officials responsible for making decisions on the investment projects regulated by the Decree will be protected by liability insurance against administrative, civil and even criminal claims.\textsuperscript{110} This protection is provided to these officials in a context in which their decisions bind the State to payment commitments and obligations for up to 60 years; in a context in which it has been shown that some investment projects were not duly planned, are not economically viable and/or are potentially harmful to the environment; and in a context of corruption cases related to PPPs created under concession contracts managed by companies like Odebrecht. These factors make it unacceptable that the legislation relieves public officials, \textit{a priori}, of civil, administrative and even criminal liability given the enormous impact of their decisions. It should be noted, moreover, that Legislative Decree No 1251 also fails to include — in the case of PPPs — a clause impeding the State signing contracts with companies that have been found to be associated with corruption offences, a clause that is currently applicable in the case of public works.\textsuperscript{111}

3.2.2 Description of how the obligations set out in Articles 268 and 277 TA are not met

In accordance with Article 268 of Title IX TA, ‘\textit{Recognising the sovereign right of each Party to establish its domestic policies and priorities on sustainable development, and its own levels}’

\textsuperscript{109} Legislative Decree No 1251, Article 16.7: ‘Having requested prior reports and opinions, and these not being issued within the deadlines stipulated, such reports and opinions shall be considered favourable. Notwithstanding the above, in the case of projects entrusted to PROINVERSION the Governing Body may decide to exclude the project from the approval process if the holder of the rights to the project fails to submit an opinion within the deadlines stipulated.’

\textsuperscript{110} Legislative Decree No 1251, Article 38-A (Liability insurance for public officials): ‘PROINVERSION shall take out liability insurance against administrative, civil and criminal claims for officials at the entity responsible for making decisions on the investment projects regulated by the present Legislative Decree.’

Second Final Supplementary Provision (Administrative liability of public officials in relation to investment projects regulated by Legislative Decree No 1224): ‘In the context of implementation of the investment projects regulated by Legislative Decree No 1224, public officials responsible for making decisions that involve an element of discretion shall not be subject to penalties or attribution of liability unless there is reasonable evidence to show wilful misconduct or gross negligence.’

\textsuperscript{111} To date, this exclusion has been applied to the traditional form of procurement (public works) (Legislative Decree No 1341 amending Law No 30225 on State procurement) and lays down that any natural or legal person associated with corruption offences (extortion, embezzlement of public funds, corruption of public officials, unjust enrichment, influence peddling, crimes committed in competitive bids or selection procedures) will be excluded from the procurement process. However, a similar exclusion has not been included for PPPs. Although Article 8 of Legislative Decree No 1224 refers to exclusions applicable to State procurement, these do not include association with corruption offences.
of environmental and labour protection, consistent with the internationally recognised standards and agreements referred to in Articles 269 and 270, and to adopt or modify accordingly its relevant laws, regulations and policies; each Party shall strive to ensure that its relevant laws and policies provide for and encourage high levels of environmental and labour protection.'

As will be seen in the examples provided below, this has not been the case in Peru.

The most tangible proof of the terrible harm to the environment and to the Amazonian indigenous peoples resulting from the relaxing of environmental standards following the withdrawal of the OEFA’s powers (Article 19, Law No 30230) lies in the spillages in Amazonia in recent years from the Norperuano pipeline operated by state-owned company Petroperú. This company, headed by the MINEM [Ministry of Energy and Mining], transports hydrocarbons (crude oil) via the pipeline, which runs through the departments of Loreto, Amazonas, Cajamarca, Lambayeque and Piura. Various operators transport hydrocarbons via the pipeline, among them Pluspetrol Norte S.A. and Pacific Stratus Energy del Perú SA. The main operators also include Franco-British company Perenco Petroleum Limited (Peru branch).

3.2.2.1. The case of the Norperuano pipeline and the oil spills in Amazonia

a) Facts

On 30 June 2014 there was an oil spill at kilometre 41 of Section I of the Norperuano pipeline (ONP) located in the settlement of Cuninico, district of Urarinas, province and department of Loreto. The spill totalled 2,358 barrels of oil. The OEFA’s Dirección de Supervisión [Oversight Board] concluded that state-owned oil company Petroperú had failed to carry out preventive maintenance of the ONP as per its environmental obligations and that it was liable for the environmental impact caused. Not only had actual harm being caused to flora and fauna, but actual harm had also been caused to human health as the local people in Cuninico daily use the River Cuninico — the waters of which were polluted by the oil spill — for subsistence (fishing), leisure (play) and hygiene (bathing).

The OEFA ruled that administrative liability existed on the part of Petroperú and imposed corrective measures. This is because, in application of Article 19 of Law No 30230, which impeded the application of penalties by the OEFA (as explained in section 3.2.1.3), it was only able to impose corrective measures. These were not implemented by Petroperú within

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112 In Directorial Resolution No 012-2016-OEFA/DFSAI of February 2016 the OEFA concluded that Petroperú had not carried out the preventive/predictive maintenance of Sections I and II of the North Branch of the
the deadline stipulated by the OEFA, thereby not only causing delays in remediation, but also generating social conflict and discontent among the population affected.

The failings in the pipeline have been occurring since 2011 and continue to occur with total impunity to date. On July 12, the OEFA reported that there had been a new oil spill at kilometre 59 of the ONP in the district of Urarinas, province and department of Loreto, close to the Nueva Alianza native community. The lowering of environmental standards in Peru since the entry into force of the TA has, in many cases, made it easier for operators to act with impunity.

Following the oil spills in Amazonia, the settlements affected have filed legal claims that aim to force, among other goals, the updating of the environmental assessments conducted in the oil sector, full repair of oil industry infrastructure, contracting of environmental insurance, payment of easements and upholding of the State’s obligation to consult the indigenous peoples affected before approving the updated environmental impact assessments.

An example of this is the legal action taken against Petroperú for the oil spill from the Norperuano pipeline in the community of San Pedro. On 12 September 2016, the Asociación Cocama de Desarrollo y Conservación San Pablo de Tipishca (ACODECOSPAT [Cocama Association for the Development and Conservation of San Pablo de Tipishca]) filed a claim with the Court of Nauta-Iquitos against state-owned company Petroperú SA for the oil spill that occurred in November 2014 following the rupture of the Norperuano pipeline. The rupture occurred in a containment channel in Section I of the Norperuano pipeline, about 20 kilometres from Station 1, very close to the native community of San Pedro, in the Marañon de Loreto basin. This spill represented a high risk since it occurred in the buffer zone of the Pacaya Samiria National Reserve.

Various media sources reported a spill of approximately 7,500 barrels of crude oil from the Norperuano pipeline. A similar incident had already occurred, in June 2014, in this case in Section 41 of the same pipeline, barely 12 kilometres from the Cuninico rupture, on land.

Norperuano pipeline as per its Programa de Adecuacion y Manejo Ambiental (PAMA [Environmental Adaptation and Management Programme]). This conclusion was reached following two inspection visits made between January and February 2016. The visits revealed that Petroperú was not taking the necessary measures to prevent these spills occurring. In addition, the OEFA stressed that the spills that occurred in January and February 2016 were not isolated cases, but were part of a series of environmental emergencies brought to the attention of the OEFA caused by failings in the pipeline. In its resolution, and as a preventive measure, the OEFA ordered Petroperú to carry out effective, immediate and comprehensive maintenance on those sections of the pipeline that had not suffered severe or significant deterioration and to replace those sections that had suffered severe or significant deterioration. It also ordered Petroperú to draft an update of its environmental management instrument and submit it to the MINEM. However, Petroperú did not carry out the preventive measures ordered by the OEFA, which led the institution to declare administrative liability on the part of Petroperú and to impose a corrective measure.
belonging to the kukama kukamiria indigenous community in Loreto. Consequently, warning had already been given of the critical state of repair of the pipeline, which has been carrying oil for over 40 years.

As regards the oil spill in San Pedro, there was never a public report on the supervisory actions taken in the area by the OEFA, nor was an administrative environmental infringement procedure opened, despite the magnitude of the case.

The legal claim demanded PETROPERÚ update the environmental management instrument in force since 1995 (as established in the internal rules, which require it to be updated every five years) and that, in addition, approval of this instrument be subject to prior consultation as it directly affects the rights of the indigenous communities impacted. Likewise, the legal claim demanded that Petroperú fulfil its obligation to carry out environmental remediation in the area and compensate financially the indigenous communities living in San Pedro. It also specified the amount payable for the right of easement over the more than 40 years that the Norperuano pipeline had been operating in indigenous territory. In addition, the claim demanded that the company carry out comprehensive maintenance on the pipeline and adopt the measures necessary to ensure that new oil spills did not occur because of a lack of maintenance.

Another example is provided by the legal action taken against PETROPERÚ for the oil spill from the Norperuano pipeline into the River Chiriaco. In this case, on 1 July 2016 the Organización Regional de los Pueblos Indígenas de la Amazonía Peruana del Norte del Perú (ORPIAN-P [Regional Organisation of Indigenous Peoples of the Northern Peruvian Amazon]) brought a claim before the Combined Court of Bagua in Amazonas with the same aims as those pursued in the claim regarding the oil spill in San Pedro. The claim was brought after approximately 2,000 barrels of crude oil were spilled from the Norperuano pipeline operated by Petroperú on 25 January 2016. The leak occurred at kilometre 441 of the River Chiriaco connection in Villa Hermosa, district of Imaza, province of Bagua in Amazonas. In this case, the spill was the result of deterioration (external corrosion) of the pipeline, which affected the area adjacent to the pipeline, impacting both nearby agricultural land and water bodies (rivers and streams). As a result of this oil spill from the Norperuano pipeline, the native communities located downstream from the spill were also affected, as they took water from the above-mentioned bodies. These populations included the native communities of Puerto Pakui, Inayo, Pakun, Wachapea, Chiriaco, La Curva, Villa Hermosa, Chipe, Umukai, Nazareth Nuevo Progreso and Samaren, where the River Chiriaco joins the River Marañon, endangering their health and well-being.
At first, the state-owned company in charge contained the oil behind a retaining wall, but the lack of a viable contingency plan led to the spreading of the crude oil when it rained, causing this oil to reach the River Marañón since the protection barriers, initially put in place by Petroperú, were overrun when the water level rose. In this case, Petroperú staff approached the communities and publicly offered them money to clean up the oil spill. Due to their need for income, many members of these communities, among them several poor families, agreed to the offer and cleaned up the spill without employing any protective measures (e.g. appropriate suits and masks). Participants in the clean-up included 140 minors from the awajún communities in Nazareth and Wachapea.

In February 2016, the OEFA issued Directorial Resolution No 012-2016-OEFA/DS verifying that this oil spill was caused by a failure in a 36” pipe and ordering Petroperú to carry out, as a preventive measure, effective, immediate and comprehensive maintenance on the Norperuano pipeline. As a supplementary measure, it also ordered Petroperú to draft an update to its environmental management instrument and submit it to the Ministry of Energy and Mines. To date, Petroperú has not complied with these orders even though — as is evident — they are fundamental to preventing further pollution of the environment.

With a view to gathering information on the situation regarding the human rights of the indigenous communities affected by the oil spills in Peruvian Amazonia, on 8 and 9 July 2017 the IACHR made a visit to the native communities of Chiriaco, Cunicino and Puerto Alegría (located in Amazonas and Loreto), as well as visiting three areas affected by spills from the Norperuano pipeline. At the end of its visit, the IACHR urged the Peruvian State to continue and extend dialogue with the communities affected and requested that it take the measures necessary to provide adequate water, food and health care to communities affected by oil spills or by pollutants, such as mercury, produced by other activities.

B) How environmental rights are violated in this case

Over the past 20 years there have been 40 oil spills from the pipeline, 20 of which have occurred in the last 4 years. This has not only poisoned waters and forests, but has also left indigenous communities without food and water, thereby violating the rights of indigenous peoples to individual and collective health, communal property and access to food and water.

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113 The IACHR delegation consisted of Paulo Vannuchi, Commission Rapporteur for Peru, and staff from the Commission’s executive secretariat. It was supported by public officials from the ministries of Justice and Human Rights, Health, Culture, Energy and Mines, and Housing. The delegation also included public officials from the OEFA, the Organismo Supervisor de la Inversión en Energía y Minería (OSINERGMIN) [Oversight Body for Investment in Energy and Mining]) and Petroperú staff.

In accordance with Article 7 of the Political Constitution of Peru, ‘Everyone has a right to the protection of his health, that of his family and that of the community and has a duty to contribute to their promotion and defence.’ Meanwhile, Article 2.1 of ILO Convention 169, which Peru has ratified, lays down that ‘Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.’ Likewise, Article 4.1 states, ‘Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.’ Article 7.3 adds, ‘Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.’ And Article 4 states, ‘Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.’ In relation to the Peruvian State’s obligations to its indigenous peoples, Article 29.2 and Article 29.3 of the United Nations Declaration on the Rights of Indigenous Peoples (signed by Peru in 2007), lay down the following: ‘States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.’ And, ‘States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.’

The weakening of environmental auditing in Peru infringes all these rights and was worsened by Law No 30230, which had as its purported purpose the simplification of procedures and applications for permission to promote and stimulate investment in the country. One of the most significant legislative changes introduced by this Law is articulated in Article 19, which withdrew the power of the OEFA to impose penalties for environmental offences. The Law stated that for a period of three years the OEFA could not impose penalties for serious environmental infringements, leaving it solely the power to order corrective and preventive measures. The following were among the immediate consequences of application of this law: (i) the creation of perverse incentives for companies — among which those in the mining and hydrocarbons sectors are prominent — not to comply with environmental regulations; (ii) the impact on the OEFA budget.

Under this law, the rate of non-compliance with environmental standards by companies in the hydrocarbons sector increased from 24 % to 76 %. Similarly, non-compliance among companies in the fisheries sector rocketed to 76 % from just 2 % previously. Among mining companies, non-compliance rose from 10 % to 37 %. The President of the OEFA even went as far as to assert that Law No 30230 cannot be considered a preventive mechanism as it does not dissuade companies from breaching environmental standards. Moreover, the President pointed out that the percentage of non-compliance following adoption of Article 19 rose
because the incentive to commit infringements increased as the cost of committing them fell.115

### Análisis: ¿Enfoque preventivo?

#### Porcentaje de incumplimientos materia de PAS antes y después de la Ley 30230

<table>
<thead>
<tr>
<th>Sector</th>
<th>Incumplimientos antes de la Ley Nº 30230</th>
<th>Incumplimientos después de la Ley Nº 30230</th>
</tr>
</thead>
<tbody>
<tr>
<td>ELECTRICIDAD</td>
<td>33%</td>
<td>71%</td>
</tr>
<tr>
<td>HIDROCARBUROS MAYORES</td>
<td>24%</td>
<td>86%</td>
</tr>
<tr>
<td>INDUSTRIA</td>
<td>4%</td>
<td>0%</td>
</tr>
<tr>
<td>MINERIA</td>
<td>37%</td>
<td>10%</td>
</tr>
<tr>
<td>PESQUERÍA</td>
<td>2%</td>
<td>76%</td>
</tr>
</tbody>
</table>

Fuente: DFSAI-OEFA. Procedures concluded to date.

In the first eight months of implementation of Law No 30230 mining and oil companies paid over PEN 55 million less in penalties for environmental infringements, even though in several cases these were recurring.

Lamentably, and as mentioned before, although recently — by means of the draft of Law No 269-2016-CR — the Peruvian Government resolved that the OEFA should regain its power to

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impose penalties (by repealing Article 19 of Law No 30230), and even though the draft was approved on 12 April 2017, to date it has not entered into force.

In conclusion, the repeated oil spills from the Norperuano pipeline evidence not only the pollution of the environment, but also the violation of the rights of the indigenous peoples living in areas adjacent to environmental disasters.

This situation reveals the failure of Peru to fulfil the obligation to provide protection that it committed to as a State. In addition, not only does it violate the national laws cited above, but it also fails to comply with the provisions of various international treaties, such as ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples. Despite the fact that the Peruvian State has ratified a number of international human rights treaties, in practice it has not protected and upheld the rights of the communities affected.

Similarly, we suggest that it is in breach of Article 277 TA by failing to ensure that ‘its relevant laws and policies provide for and encourage high levels of environmental and labour protection.’ This in relation to Law No 30230 and, specifically, to the application of Article 19 of that Law. By withdrawing the OEFA’s powers to impose environmental fines and penalties, the Government created incentives for companies — mainly in the hydrocarbons and mining sectors — not to comply with the environmental commitments laid down in national law.

Article 19 is a product and clear example of the process of relaxing of environmental standards in the country and is not compatible with the Peruvian State’s obligations to ensure high levels of environmental protection. Nor does it promote the best standards in accordance with international environmental practice. Adopted with the intent of facilitating investment flows and attracting foreign capital, it caused irreversible harm to the environment and violated the rights of indigenous peoples. Although, in accordance with Law No 30230, the deadline for the temporary measure provided for in that article expired last July, the national regulation passed to implement it during the period of validity of the former also needs to be rendered ineffective, as otherwise its effects will be perpetuated. Likewise, the harm caused during the period of validity and application of that article must not go unpunished and the harm to the environment and to the communities affected must be remedied by means of the corresponding legal mechanisms.

3.2.2.2. The case of Las Bambas

a) Facts
The Las Bambas mining project is located at 4,000 metres above sea level in the districts of Challhuahuacho and Progreso in the provinces of Cotabambas and Grau, respectively, in the department of Apurímac. The project mines the skarn copper, molybdenum and gold deposits in Ferrobamba, Sulfobamba and Chalcobamba. It is an open-pit mine and its main products are copper concentrates and molybdenum. As by-products it also extracts gold and silver.¹¹⁶

In 2004, the company Xstrata Copper acquired the right, via international public tender, to explore the Las Bambas site. On 7 March 2011, the Ministry of Energy and Mines approved the project’s first Environmental Impact Assessment. In May 2013, the company Glencore acquired Las Bambas as part of its takeover of Xstrata. In parallel, the first amendment to the project’s EIA was approved. Since approval of the first EIA in 2011, the project’s initial EIA has been amended five times. Two amendments were made via the standard amendment procedure and three were made via approval of Supporting Technical Reports. In April 2014, the Glencore group sold its stake in Las Bambas to a consortium owned by MMG Limited. The consortium’s members comprise MMG (as majority shareholder (62.5%) and operator), a subsidiary of Gouxin International Investment (22.5%) and CITIC Metal Co., Ltd (15%). On 29 September 2015, as a result of the amendments made to the EIA without consulting the population affected, social conflict broke out. Confrontation between the authorities and the local population in Cotabambas resulted in 3 dead and 29 injured.

B) How environmental rights are violated in this case

The social conflict unleashed by the Las Bambas project was the product of successive approval of significant amendments to the project’s EIA without due consultation of or participation by the population affected. In two years, the EIA for the Las Bambas project was amended five times, three of them via the STR procedure and two via the standard EIA amendment procedure.

Public participation is one of the cornerstones of democracy, which cannot be conceived of without active public participation, since democracy is, by its very nature, a fundamentally participative system of government. Public participation makes a significant contribution to full human development and is a resource that allows people to develop all their aptitudes and abilities, which should serve the overall development and progress of the community.

The human right to participation is recognised in several international instruments to which Peru has acceded: the American Declaration of the Rights and Duties of Man of 1948, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights. Indigenous peoples have the right to participation under general human rights law, as well as the rights enshrined under laws exclusively applicable to them, such as ILO Convention No 169 or the UN Declaration on the Rights of Indigenous Peoples, which recognise their rights to participation and free, prior and informed consultation.

As a result of amendment of the environmental standards introduced after the entry into force of the TA, which reduced the permitted period within which to modify EIAs from 120 days to 15, as is the case now with the STRs, the thoroughness of these environmental assessments was jeopardised. In addition, the amendment affected the human right to public participation in the formulation of these, since before the amendment it was mandatory to invite public participation prior to amending the EIA. This generated trust among the population and

117 Declaration of the Rights and Duties of Man, Article XX: ‘Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.’

118 Universal Declaration of Human Rights, Article 21: ‘(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. [...] (3) The will of the people shall be the basis of the authority of government [...]’

119 International Covenant on Civil and Political Rights, Article 25: [Every citizen shall have the right] ‘(a) To take part in the conduct of public affairs, directly or through freely chosen representatives [...]’

120 International Labour Organisation Convention No 169, Article 2.1: ‘Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.’ Article 6.1: ‘In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly; (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them; (c) establish means for the full development of these peoples’ own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose. 2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.’ Article 7.1. ‘The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.’

121 United Nations Declaration on the Rights of Indigenous Peoples, Article 1: ‘Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.’ Article 18: ‘Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.’ Article 19: ‘States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.’
strengthened not only the relationship between this and the company holding the rights to the project, but also strengthened environmental management and institutional oversight.

The Las Bambas project exemplifies how the weakening of the STRs and the lack of public participation in approval of EIAs can trigger social conflicts that affect the investment projects involved. This includes, of course, those implemented under the framework of the TA between the EU and el Perú.

In this case, among the amendments made to the initial EIA of the Las Bambas project, one in particular met with huge public resistance. This was the STR approved in 2013 allowing the relocation, without consultation, of the filtration plant that processes 2,995 tonnes of concentrate per day and separates the molybdenum and copper. In addition, the capacity of the concentrates warehouse was increased by over 50% when the maximum increase permitted by law is 20% (as per Ministerial Resolution No 310-2013-MEM/DM). Approval of substantial amendments to the project’s EIA without prior public participation or consultation led to violent conflict between the police and the local population in Cotabambas, resulting in 3 dead and 29 injured.

This social conflict is not an isolated case and graphically illustrates how these modifications impact mining projects in Peru. It is no minor detail that Peru has one of the highest rates of social conflict in the region. According to information provided by the Ombudsman’s Office, in June 2017 a total of 177 social conflicts were reported, of which 123 remain active and 54 are latent. Of the number of conflicts referred to, 72.9% (129 cases) fall within the socio-environmental sphere and, of these, 103 are under the jurisdiction of the national government. Added to these are 129 active and latent socio-environmental conflicts, 64.3% of which (83

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123 Ministerial Resolution No 310-2013-MEM/DM, Article 1: ‘To approve the criteria governing the modification of the mining components or the extension and technological improvement of the mining units of exploration and extraction projects with no significant environmental impact that hold environmental certification, as well as the minimal structure of the Technical Report to be provided by the holder of the mining right.’

TECHNICAL CRITERIA FOR THE ASSESSMENT OF MODIFICATION OF THE MINING COMPONENTS OR THE EXTENSION OF THE MINING UNITS OF EXPLORATION AND EXTRACTION PROJECTS WITH NO SIGNIFICANT NEGATIVE IMPACTS OR TECHNOLOGICAL IMPROVEMENTS TO OPERATIONS THAT HOLD ENVIRONMENTAL CERTIFICATION, Supreme Decree No 054-2013-PCM, (...) C. MINING COMPONENTS, C.1. Extraction projects: Principal components: (as applicable), (...) 4. Waste rock dump: (...) Modification of height and/or area of no more than 20% of the values approved.’
124 Although this conflict was one of the most serious to arise in relation to the project, tension and conflict also occurred in 2005, 2011 and 2015. For example, the first protests and strikes by the local population were linked to its anger at the actions of the Board of Directors of the Trust, formed in October 2014. The population protested mainly about the lack of representation of the communities living in the project’s direct area of influence. This lack of representation meant that they did not form part of, nor had access to, the decision-making process affecting the use of the Trust’s resources and the prioritisation of projects.
cases) are related to mining, 13.2 % (17 cases) to hydrocarbon-related activities, and 8.5 % (11 cases) to energy activities. (Ombudsman’s Office, 2017).

A country that has a high rate of social conflict cannot further lower the environmental management and governance criteria applied to investment projects and, further, it cannot exclude the population affected by the project from the decision-making process.

In the Las Bambas case, STR approval procedure was applied improperly. This is because the changes made via the STR were not non-significant — as the law indicates and requires — but were substantial modifications with significant impact on the project and its surrounding populations. As a consequence, these changes should have been made via the standard procedure. Processing these substantial changes via the STR procedure reduced the criteria required for amendment of the EIA, thereby avoiding the prerequisite of prior consultation and public participation.

In conclusion, the Las Bambas project exemplifies improper use of STRs to exclude prior consultation and public participation, both rights recognised internationally and binding on the Peruvian State. Similarly, this improper application of the STRs created by Supreme Decree No 0542014-EM does not comply with the obligation laid down in Article 268 TA as it does not ensure that ‘relevant laws and policies provide for and encourage high levels of environmental and labour protection.’ This Decree is the product of the process of relaxing environmental standards described above and the incentives provided by the Peruvian State to attract investment and facilitate implementation of mining projects. Its improper application not only infringes the right to prior consultation and public participation, but also fails to encourage the sustainable development criteria to which all investments promoted by the Peruvian State are subject.

For its part, Article 277 of Title IX lays down that no party shall encourage trade or investment by reducing the levels of protection afforded in its environmental and labour laws. Accordingly, no Party shall waive or otherwise derogate from its environmental and labour laws in a manner that reduces the protection afforded in those laws, to encourage trade or investment. Lamentably, by changing legislation to encourage investment in the extractive sectors of our economy the Government of Peru is not fulfilling this obligation.

3.2.2.3 The case of the Sur Peruano pipeline

a) Facts
The Sur Peruano pipeline project\textsuperscript{125} (1 124 km) encompasses the development of pipeline infrastructure to carry natural gas and natural gas liquids. The pipeline will start in the Cusco region (Falkland Islands) and will pass through the regions of Arequipa and Moquegua in the south of Peru. It forms part of the energy policy intended to contribute to the country’s development.\textsuperscript{126}

The project was awarded to the company Gaseoducto Sur Peruano S.A. and the concession contract was signed in July 2014. The consortium that won the contract was made up of Brazilian company Odebrecht Latinvest (75 \%) and Spanish firm Enagás International SL (25 \%).

In September 2015, Peruvian company Graña y Montero SA acquired 20 \% of the shares in the pipeline after signing a memorandum of understanding with Odebrecht. The investment made by Graña y Montero totalled USD 215 million.


b) How environmental rights are violated in this case

It is first worth mentioning in this case that the right to public participation in approval of the project’s STRs has not been upheld. Neither did the project respect the right to prior consultation, despite the fact that Peru is bound to uphold this right under ILO Convention No 169. In addition, as the project involves a concession contract under the PPP model, the current legal framework (Legislative Decree No 1251) does not guarantee standards of transparency and accountability in accordance with national law.

This project therefore infringes Article 277 TA, according to which ‘A Party shall not fail to effectively enforce its environmental and labour laws through a sustained or recurring course

\textsuperscript{125} Called ‘Mejoras a la Seguridad Energética del País y Desarrollo del Gasoducto Sur Peruano’ [Improvements to National Energy Security and Development of the Sur Peruano Pipeline].

\textsuperscript{126} For further information, see PROINVERSIÓN.
of action or inaction, in a manner affecting trade or investment,’ as prior consultation did not take place, public participation did not occur and the transparency and accountability standards were not met.

Lamentably, the case of the Sur Peruano pipeline is not the only example of the threats to environmental rights and to the rights of indigenous peoples generated by this policy. Designed to promote investment, the legislative reforms adopted were to the detriment of institutional oversight of the environment. Moreover, they were adopted despite strong criticism from experts in environmental issues, as well as from bodies such as the Ombudsman’s Office and the UN System’s coordinating office in Peru. And, as has been recognised by the Presidency of the Council of Ministers itself, of the 62 social conflicts recorded since the start of 2013, the vast majority have been over natural resources and the actions of extractive industries. In several of them, liability could be borne by European companies like Pluspetrol (Holland), Maurel & Prom (France), Perenco (France/UK) or Nyrstar (Belgium).

<table>
<thead>
<tr>
<th>COMPANY</th>
<th>COUNTRY</th>
<th>IMPACT</th>
<th>POPULATION AFFECTED</th>
</tr>
</thead>
<tbody>
<tr>
<td>PLUSPETROL</td>
<td>Holland</td>
<td>Oil pollution</td>
<td>Population of the basins of the rivers Tigre, Pastaza, Corrientes and Marañón in Loreto</td>
</tr>
<tr>
<td>MAUREL &amp; PROM</td>
<td>France</td>
<td>Oil pollution</td>
<td>Population adjacent to lots 67 and 116 in Loreto and Amazonas</td>
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<tr>
<td>PERENCO</td>
<td>France/United Kingdom</td>
<td>Oil pollution</td>
<td>Population adjacent to the Norperuano pipeline</td>
</tr>
<tr>
<td>NYRSTAR</td>
<td>Belgium</td>
<td>Poor management of toxic waste</td>
<td>Population in the city of Lima and the basin of the River Rímac</td>
</tr>
</tbody>
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The tender procedure and award of the contract to Gaseoducto Sur Peruano SA was investigated in 2015 by the Contraloría General de la República [Office of the Comptroller General of the Republic], which submitted the following comments on the process: (i) that a bidder was disqualified without having infringed the rules of the tender; (ii) that the rules
prevented assessment of the quality of the bidders’ proposals; (iii) that in the final version of the contract clauses were changed for the benefit of the winner; (iv) that the project’s sustainability was not guaranteed; and finally, (v) that there was no guarantee that gas reserves were available.

In addition to these irregularities in the tender process, questions about the gas pipeline have also been raised because of the number of STRs submitted since the concession was approved. In fact, Consorcio Gaseoducto Sur Peruano submitted 22 STRs to the MINEM, 16 of which were approved. These instruments have changed significant parts of the project. Submission and assessment of the STRs did not take into account public participation mechanisms. Similarly, adopting the argument that the environmental management instruments and permits were approved before the entry into force of the Ley de Consulta Previa [Law on Prior Consultation], free, prior and informed consultation of the indigenous peoples affected by the project did not take place, despite the fact that Peru ratified ILO Convention 169 in 1994. The Sur Peruano pipeline project also lacked information about the technical staff and decision makers involved in the tender process, which restricted public knowledge regarding potential conflicts of interest.

Due to the scandals and corruption associated with Odebrecht — and which implicate the past three governments of Peru — this Brazilian company’s membership of the consortium likewise required levels of transparency and accountability to be even higher than usual, more so when financing for the project amounted to over USD 7 billion implemented via a PPP, the legal framework for which — despite being recently reformed — did not meet the same standards of transparency and accountability as public works contracts.

3.2.3.4 The case of Pluspetrol

a) Facts

The company Pluspetrol Resources Corporation B.V. is a private limited holding company with a diversified energy portfolio. It is headquartered in Holland, where it was registered in 2000 in the form of Pluspetrol Resources Corporation, an entity that in turn was

127 See CAMPANARIO BAQUÉ, Yaizha and DOYLE, Cathal. ‘EL DAÑO NO SE OLVIDA. Impactos socioambientales en los pueblos indígenas de la Amazonía Norperuana afectados por las operaciones de la empresa Pluspetrol’ [The harm is not forgotten. Socio-environmental impacts on the indigenous peoples of northern Amazonia affected by the operations of Pluspetrol]. Centro de Políticas Públicas y Derechos Humanos Perú Equidad. 2017. At http://www.iwgia.org/iwgia_files_publications_files/0757_El_Dano_no_se_Olvida_PDF.pdf

128 In 2012, the company was changed from a public limited company (N.V.) to a private limited company (B.V.).

registered in the Cayman Islands in 1995.\textsuperscript{130} This latter firm is the main shareholder in the Pluspetrol subsidiaries.\textsuperscript{131}

Pluspetrol Resources Corporation B.V. has subsidiaries in Latin America (Bolivia, Chile, Colombia, Peru and Venezuela) and Angola engaged in exploration, development, production, transport and sale of gas and oil and generation of electricity.\textsuperscript{132} In Peru, Pluspetrol Resources Corporation B.V. operates the following subsidiaries: Pluspetrol Camisea (lots 56 and 88), Pluspetrol E&P (lots 108 and 115) and Pluspetrol Norte SA (lot 8 and, until 2015, lot 1AB (now lot 192)).

In 2000, Pluspetrol acquired the rights to lot 1AB from American company Oxy (which acquired the lot originally in 1971). This concession lasted until August 2015, when Pluspetrol (now Pluspetrol Norte SA) withdrew from the lot without having remediated the more than 2,000 contaminated sites within it. In 1996 it acquired the concession for lot 8 from state-owned oil company Petroperú. This lot includes the Pacaya Samiria National Reserve and the state of its environment is just as serious as that of lot 1AB. Pluspetrol’s contract for lot 8 will end in 2024. Both lots include the basins of the rivers Pastaza, Corrientes, Tigre and Marañón, affecting indigenous peoples belonging to the Quechua, Achuar, Urarina, Kichwa and Kukama ethnic groups.

The main sources of environmental pollution in these lots are as follows:

- Discharge of produced water into the main sources of drinking water of indigenous communities between 2000 and 2009: 5 tonnes of lead, 0.3 tonnes of cadmium and 370 tonnes of barium are suspected to have been dumped in rivers in 2008, as well as chloride and other metals such as chromium and hexavalent chromium, according to a scientific study conducted by the Autonomous University of Barcelona.\textsuperscript{133}

- Spills: ‘these are mainly due to the poor state of repair of the ducts and pipes that carry the crude oil. In 45 years of operation, comprehensive replacement of the pipes has yet to take place, which means that further spills in the future — and which are happening today —

\textsuperscript{130} Pluspetrol Resources Corporation was incorporated and registered in the Cayman Islands on 13 September 1995 by its agent Appleby Trust (Cayman) Ltd, domiciled at Clifton House, 75 Fort Street, PO 1350, George Town.


\textsuperscript{132} Campanario, Y and Doyle, C: ‘El Daño no se Olvida’ [The harm is not forgotten]. Perú EQUIDAD. Lima. 2017

\textsuperscript{133} http://www.sciencedirect.com/science/article/pii/S0269749116321674
are still not being prevented.¹³⁴ No aggregate data on the total number of oil spills are available, but between 2011 and 2014 alone 112 spills were reported by community environmental monitoring groups.

- Poor environmental remediation practice, such as burning or burying oil spills: In 2012, before the arrival of the OEFA, Pluspetrol made a water body it had polluted disappear following a complaint filed by indigenous communities. It was fined PEN 20 million for this action, though the fine was reduced to PEN 5.4 million thanks to adoption of Law 30230.¹³⁵

- Non-payment or judicialisation of fines: OSINERGMIN, the agency responsible for overseeing infrastructure, has issued Pluspetrol Norte SA with 286 fines. These are joined by the fines imposed by the environmental assessment body (which have yet to be entered in the system). In addition, it has gone to court over official State reports such as the OEFA report in October 2014 that declared Pluspetrol liable for 92 contaminated sites in lot 192. Pluspetrol Norte has been one of the main beneficiaries of the reductions in the fines introduced by Law 30230.¹³⁶

- Misuse of international arbitration against the State: In 2015, Pluspetrol took Perupetro — the state agency that signed the contracts with the concessionaires — to international arbitration in an attempt to absolve itself of environmental liability for lot 192, arguing that this was the result of operations carried out by OXY. In February 2017, the tribunal found in favour of the State, declaring that Pluspetrol had acquired all the obligations as well as the rights when OXY ceded it the right to the lot.

B) How environmental rights are violated in this case
The activity carried out by Pluspetrol (a company headquartered in Holland), facilitated by the relaxing of environmental standards and the gross indifference shown by the Peruvian State to the violations of the rights of the indigenous peoples affected, has affected several rights, among them (i) the right to health, recognised under Article 12 of the International Covenant on Economic, Social and Cultural Rights and under Article 25 of ILO Convention No 169; (ii) the right to food recognised under Article 25 of ILO Convention No 169; (iii) the right to territory recognised under Article 13 of ILO Convention No 169; and (v) the right to a healthy environment.

¹³⁵ http://convoca.pe/investigaciones/los-millones-perdonados-las-petroleras
¹³⁶ Idem.
These rules derive from the State’s obligations under the international treaties on human rights it has signed and must be fully complied with by the State; they must also be aligned with the provisions of the TA. Specifically, we suggest that the violation of these rights constitutes a breach of Article 268 on the grounds of failure to guarantee the highest levels of environmental protection, and of Article 277 on the grounds of failure to apply the relevant legislation, to encourage trade.

In relation to the impact on the right to health, to date only two studies of specific health issues have been conducted on the River Corrientes. The first of the two studies, which was conducted in 2005 and covered seven communities, states ‘[t]he results for lead in blood show that of 74 blood samples taken from residents aged under 18, 66.21 % of the total sample exceeds the limit set for lead in children.’ In relation to the presence of cadmium, the report states ‘testing of persons aged under 18 (n = 74) in the communities in the basin of the River Corrientes reveals that 98.65 % exceed the limit set for cadmium in blood.’ The other study, conducted in 2006 by Loreto’s Regional Department of Health, revealed that in the two communities analysed 12.5 % of the children had above-normal levels of lead in their blood, these being between 10 and 14.9 Pb/dl, another 12.5 % had levels between 15 and 19.9 Pb/dl and 7 % had between 20 and 25 Pb/dl. These studies have not prompted State action to mitigate and monitor the implications of their findings. In 2015, at the request of indigenous communities the first epidemiological and toxicological study of rivers was conducted. The results have yet to be published.

The right to water is a fundamental human right and an essential prerequisite for the full enjoyment of other human rights such as the right to health, as this cannot be enjoyed without access to safe good-quality drinking water. Although the right to water is not expressly recognised as a separate human right in the international treaties, international human rights laws set out specific obligations in relation to access to drinking water. These obligations require states to ensure that everybody has access to a sufficient quantity of drinking water for personal and domestic use, and they also require states to protect the quality of drinking water resources and supplies. However, in the study conducted by the Autoridad Nacional del Agua (ANA [National Water Authority]) in 2013 on the River Pastaza, of the 17 points monitored at least 14 exceeded the standards for at least one substance (heavy metal or hydrocarbon), this number representing 82.4 % of the sediments analysed. It was not until 2015 that the State, after repeated demands by communities, installed 66 temporary water plants in communities as part of a plan to implement a definitive drinking water system in 2017. At present, the definitive system proposed by the State consists of collecting rainwater in elevated tanks, which represents a step backwards in the drive to guarantee the right to drinking water.
Given the indivisible and interdependent nature of human rights and the relationship between environmental rights and other rights, the section below briefly describes how the rights violations by Pluspetrol in the context of the Peruvian State’s inaction have impacted other rights of the indigenous peoples affected. In relation to the infringement of the right to food, the scientific evidence shows that the main sources of protein consumed by these communities are directly exposed to pollution. The Instituto de Investigación de la Amazonía Peruana [Institute for Research in Peruvian Amazonia] has published two studies of aquatic species (one in the 1980s and another in 1995) that evidence the existence of mercury, cadmium and copper above the maximum permitted levels. In 2010, it presented findings that demonstrated the presence of cadmium above the maximum levels permitted in all fish and of lead in two varieties of fish widely consumed in Cocha de San Pablo de Tipishca in kukama territory.

Concerning game, in 2013 the Autonomous University of Barcelona published a study conducted using camera traps that demonstrates that at least four species of wild animals that are traditionally consumed by these communities mistake oil waste and dumped produced water for mineral rocks or brine lakes and eat/drink them. Hunters in these communities know these abandoned wells and, knowing that a high number of wild animals are attracted to them, tend to hunt there.

In relation to the right to their territories, in 2006 Pluspetrol applied to the Peruvian State for free easement on the entire lot, arguing that the territories had no ‘useful use’ despite knowing of the existence of indigenous peoples and communities that subsisted on those territories’ natural resources. The Government, by means of Legislative Decrees Nos 060 and 061, granted that prerogative, making it impossible for the communities that had long been demanding recognition of their ancestral property rights to gain collective title to the land and thereby annulling the company’s obligation to pay for easement.

Everyone has the right to an adequate environment. An adequate environment is considered to be a prerequisite for the enjoyment of other human rights, including the rights to life, food, health and an adequate standard of living. Partial reference is made to this in the right to health established in the International Covenant on Economic, Social and Cultural Rights, which lays down that States must guarantee the right to health by, among other means, improving all aspects of environmental hygiene. It has also been recognised in a wide range of regional human rights instruments, such as the Additional Protocol to the American Convention on Human Rights in relation to Economic, Social and Cultural Rights (Protocol of San Salvador), as well in the establishment of UN special procedures on human rights and the environment in 2012. In relation to the violation of this right, according to a report by
Pluspetrol Norte SA there are 2,014 contaminated sites in lot 1AB/193 alone. This lot still lacks an approved Withdrawal Plan that provides for remediation of these sites by Pluspetrol, which withdrew from the lot in August 2015 without any guarantee it would carry out remediation.

3.2.2.5 The case of Tamboraque (Nyrstar)

a) Facts

Cerro Tamboraque is the location of four tailings produced by mining company Nyrstar Coricancha. Nyrstar is a Belgian-owned company considered one of the world’s largest producers of refined zinc. In 2009, it acquired the Coricancha mine (previously known as the San Juan mine). The mine has been operating for 60 years and is located in the region of Lima, province of Huarochirí, district of San Mateo de Huanchor, about 90 kilometres from the city of Lima. The mine processes an average of 600 tonnes of material per day and has reserves of zinc, gold, silver, copper and lead. To provide an idea of its production volume, in 2013 it produced 2,600 oz of gold, 164,000 oz of [sic], 1,000 tonnes of zinc concentrate, 200 tonnes of lead concentrate and 100 tonnes of copper concentrate.\(^{137}\)

Cerro Tamboraque is the location of four tailings, called 1, 2, Extensión Sur and Triana. These tailings contain about 600,000 tonnes of toxic waste. Due to its location just a few metres from the River Rímac — the capital’s main water source — the stability of these tailings began to concern the population and authorities. Various authorities and institutions have since confirmed that there is a grave risk of slippage in Cerro Tamboraque if heavy rain causes the river to flood and/or increases the flow of an adjacent stream or if a major earthquake occurs. Both of these scenarios are likely, since Peru is located on the seismically active Pacific Ring of Fire and is likewise regularly affected by the El Niño weather phenomenon that produces heavy rains and flooding. In addition, climate change increases the risk of situations of this nature arising.

The Instituto Geológico, Minero y Metalúrgico (INGEMET [Institute of Geology, Mining and Metallurgy]) has reported that the slope of the Cerro Tamboraque hill is unstable and, in the event of an earthquake, a landslide would lead to approximately 4 tonnes of material descending into the river. For its part, the Instituto Nacional de Defensa Civil (INDECI [National Institute for Civil Defence]) indicates that due to the physical characteristics of the site, extreme water ingress would produce a considerable landslide that would carry the

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If a landslide were to occur in the area, the toxic tailings would pollute the River Rímac. Given that the treatment plants operated by the drinking water company (SEDAPAL) are not designed to decontaminate water containing such high volumes of heavy metals, this could leave 10 million people in Lima without this vital resource for an unknown period of time, causing a major humanitarian and environmental disaster.

In June 2008, by means of Resolution No 016-2008-OS/GFM OSINERGMIN ordered the suspension of operations after detecting instability in the Cerro Tamboraque hill. A few days later, by means of Supreme Decree 0502008-PCM, which has since been extended 13 times, the Government declared the area an emergency zone. Months later, the Comité de Crisis para la Atención de la Declaratoria de Estado de Emergencia del Cerro Tamboraque [Crisis Committee on the Declaration of State of Emergency in Cerro Tamboraque] was set up. The following stakeholders were represented: Agriculture, Energy and Mines, Health, Transport and Communications, Housing, Environment, INDECI, Regional Government of Lima, Municipal District of San Mateo and the subsistence farming community of San Antonio.

In light of the grave risk these tailings represent, in January 2010 the Ministry of Energy and Mines approved the company’s Mine Closure Plan, which included removal of tailings 1 and 2. In addition, on 21 October 2010, by means of Resolution No 009-2010-OS/GFM OSINERGMIN ordered Nyrstar to move the contents of tailings 1 and 2 to a new authorised tailings site, called Chinchán, within 18 months.

In 2014, OSINERGMIN imposed its first penalty for failure to comply with this order, fining the company 206 tax units (ITU). This body has imposed a further five fines for non-compliance with other safety measures and orders referring to the tailings. Of these, only one has been paid to date, while the others are subject to administrative proceedings.

It is pertinent to mention here that after five years of non-compliance, in February 2014 Nyrstar submitted a study titled ‘Actualización de la Estabilidad Física del Depósito de Relaves N° 1 y 2’ [Update on the Physical Stability of Tailings 1 and 2], which concluded that the tailings are stable and that it is not necessary to remove them. Armed with that information, it requested the Ministry of Energy and Mines to amend its Closure Plan accordingly. However, in 2015, by means of Resolution No 483-2015-MEM/CM the request for a new amendment to the Closure Plan was declared inadmissible. To date, the MINEM has not approved any amendments in that regard and the company remains obliged to remove all the tailings.
In 2015, by means of Resolution No 2-2015-OS/GFM OSINERGMIN issued a new order to Nyrstar, instructing it once more to remove tailings 1 and 2 in accordance with the conditions and deadline laid down in the Mine Closure Plan.

The company has also been penalised by the environmental authorities. In April 2011, a special inspection by the OEFA verified that only 9.86% of the Tamboraque tailings had been removed. In response, in 2012 the OEFA opened an infringement procedure for non-compliance with the environmental management instrument. The penalty was appealed by the company.

In 2015, by means of OEFA Resolution No 404-2015 it was resolved that the company ‘failed to comply with the timeline for relocation of tailings 1 and 2 from Tamboraque to the new site in Chinchán.’ However, this resolution also points out that under Law 30230 ‘imposition of corrective measures is not appropriate,’ since the timeline committed to was modified in 2012 (by means of Resolution No 219-2012 MEM/AAM) and a 39-month extension was granted.

Law No 30230, adopted in 2014, limited the OEFA’s power to impose penalties on the grounds that it would facilitate investment and reactivate the economy. This specific case reveals how it reduced the OEFA’s power to address situations like this one.

B) How environmental rights are violated in this case

This case once again shows the consequences of diminishing the OEFA’s power to impose penalties by means of above-mentioned Article 19 of Law No 30230. Even though the company failed to comply with the timeline for the removal of tailings 1 and 2 and should therefore have been fined, the OEFA lacked the authority to do so because that power had been withdrawn by Law 30230. In this regard, referring to one of the regulations that contributed to the relaxing of environmental standards highlights that there has been a breach of Article 268 TA, since amendment of domestic laws did not encourage a high level of environmental protection. On the contrary, it created perverse incentives for companies not to meet their environmental obligations.

In conclusion, it should be pointed out that, lamentably, the cases of the Sur Peruano Pipeline, Pluspetrol or the Tamboraque tailings are not the only examples of the threat to environmental rights and to the rights of indigenous peoples and communities posed by this policy. Designed to encourage investment, the legislative reforms adopted, and which have been summarised above, were to the detriment of institutional oversight of the environment. Moreover, they were adopted despite strong criticism from experts in environmental issues, as
well as from bodies such as the Ombudsman’s Office and the UN System’s coordinating office in Peru. And, as has been recognised by the Presidency of the Council of Ministers itself, of the 62 social conflicts recorded since the start of 2013, the vast majority have been over natural resources and the actions of extractive industries. This, of course, is not coincidental.

3.2.2.6 The case of agricultural exports in Ica

a) Facts

The EU is one of Peru’s strategic trading partners. Under the TA, Peru has obtained preferential access for 99.3% of its agricultural products and for 100% of its industrial products. As a consequence, products of interest from Peru, such as asparagus, avocados, coffee, fruit of the capsicum genus and artichokes, among others, began entering the European market tariff-free when the FTA came into force.

The products exported to the EU can be divided into two groups: traditional and non-traditional. Traditional mining products include copper, zinc, lead, gold, tin, minor metals, iron and refined silver; traditional agricultural products include coffee, sugar/brown sugar, cotton, grapes and asparagus, among others; oil and natural gas products include derivatives of both; and fishery products include fish oil and fish meal. Non-traditional products include agricultural products, fishery products, iron and steel products, chemicals, textiles, manufactured metal products, wood and paper, non-metallic mining products, hides and skins, crafts, etc. Analysis of the flow of exports and imports between Peru and the EU since the Treaty came into force reveals that the main export products are copper ores and coffee, with exports of asparagus also accounting for a significant proportion. In the case of this latter product, total exports in the TA’s third year in force amounted to USD 124.8 million and rose to USD 126.6 million in its fourth year in effect.

In this regard, while the flow of exports may bring economic benefits to some sectors, there is also a negative correlation between the high demand for certain exports and the environmental impact of meeting that external demand. For example, increased demand for traditional products has changed access to natural resources for some of the social groups that form part of the process of producing these goods for export.138

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Transformation of the world asparagus market has brought an increase in demand for fresh asparagus that has displaced sales of tinned asparagus worldwide. In the case of Peru, most asparagus production takes place in Ica.\textsuperscript{139}

The rise in the production and export of asparagus is linked to the State’s role in regulating and planning agricultural production nationwide.\textsuperscript{140} In the 1990s, a series of structural reforms were made that encouraged larger-scale agro-industry in Peru and created a favourable environment for asparagus production. This in turn was supplemented by preferential tariffs on this product under a series of trade agreements, such as the one signed with the European Union.

Expansion of land devoted to agriculture and intensive asparagus production in Ica have had an impact on access to water resources in the Ica valley and Villacurí. New agricultural production technologies, such as drip irrigation, were applied to asparagus cultivation and large-scale enterprises began extracting groundwater to irrigate their crops. Both use of drip irrigation and greater extraction of groundwater are essential to understanding the subsequent shortage of drinking water in Ica. While drip irrigation has its advantages — from a production perspective — it nevertheless has a high ecological impact. The technology impedes aquifer recharge, as aquifers are mainly recharged by river water and by the water distributed artificially via irrigation channels and crop irrigation (gravity-fed irrigation). By eliminating the excess associated with gravity-fed irrigation and by only providing the exact amount of water needed by each plant via drip irrigation, the water only reaches root level and the little excess water evaporates rather than percolating through the soil.\textsuperscript{141} This is exacerbated by greater extraction of groundwater by companies, making the impact even greater. Currently, production of fresh asparagus for export consumes 35\% of all the valley’s water and practically all of the water consumed is groundwater.\textsuperscript{142}

This situation has led to overexploitation of the Ica aquifer. The main group affected is the local population, which no longer has access to this essential resource. At first, the shortage of water resources affected small and medium-sized farmers who did not have the financial means to remedy the shortage since it is the agricultural export firms that own most of the groundwater extraction wells in the valley and, in addition, have the means to buy or rent existing wells and restore collapsed ones. The problem, however, is even more serious.

\begin{itemize}
\item \textsuperscript{139} Idem.
\item \textsuperscript{140} Idem.
\item \textsuperscript{141} Idem.
\item \textsuperscript{142} Idem.
\end{itemize}
According to ANA projections, if agro-industrial production in the area is maintained at current levels access to water will be lost in a matter of years.\footnote{Damonte, Gerardo. ‘La construcción del poder hídrico: agroexportadores y escasez de agua subterránea en el valle de Ica y las pampas de Villacuri.’ [Water power: agro-exporters and groundwater shortages in the Ica valley and the Villacuri prairies.]}  

B) How environmental rights are violated in this case

Giving preference to overexploitation of agricultural resources to encourage exports of a particular product over protection of access to natural resources like water contravenes Article 277 TA. State promotion of agricultural exports through public-private partnerships has consolidated the control exerted by export companies over groundwater resources in the region, leaving them accessible only to those with the means to pay for them — in this case companies.\footnote{Damonte, Gerardo. ‘La construcción del poder hídrico: agroexportadores y escasez de agua subterránea en el valle de Ica y las pampas de Villacuri.’ [Water power: agro-exporters and groundwater shortages in the Ica valley and the Villacuri prairies.]} By allowing agro-exporters to overexploit aquifers in the region analysed in order to encourage exports of asparagus, the State’s capacity and role as public regulator of use of a scarce public resource like water is called into question. In this context, it is precisely the State that should guarantee efficient use of this resource to ensure adequate supply to the general population and not solely for the benefit of agro-exporters.

In accordance with Article 280 of Title IX TA on Trade and Sustainable Development, the Parties shall set up a Sub-committee on Trade and Sustainable Development comprising high-level representatives from the administrations of each Party, responsible for labour, environmental and trade matters. The Sub-committee on Trade and Sustainable Development shall meet in sessions in which only the EU Party and one of the signatory Andean Countries participate when the subject relates exclusively to the bilateral relationship between the EU Party and such signatory Andean Country. Similarly, in accordance with Article 282 TA, the Sub-committee on Trade and Sustainable Development shall convene once a year, unless otherwise agreed by the Parties, a session with civil society organisations and the public at large, in order to carry out a dialogue on matters related to the implementation of Title IX; and the Parties shall agree on the procedure for such sessions with civil society no later than one year following the entry into force of the Agreement.

The TA provides that each Party define an internal mechanism for consulting civil society. This mechanism is known as a Domestic Advisory Group (DAG). In the European case, the DAG is composed of 12 members comprising representatives of the European Economic and Social Committee, civil society (NGOs and business) and trade unions (European and international federations).

In the Peruvian case, the government of Peru decided to channel this participation through the existing mechanisms listed below.

### 4.1 Mechanisms for participation in labour matters

**a. Consejo Nacional de Trabajo y Promoción del Empleo (CNTPE [National Council for Labour and the Promotion of Employment])**\(^{145}\)

The CNTPE encompasses bodies representing employers and workers, such as the Confederación Nacional de Instituciones Empresariales Privadas (CONFIEP [National Confederation of Private Business Institutions]), the Sociedad Nacional de Industrias (SNI

[National Enterprise Society], the Cámara de Comercio de Lima (CCL [Chamber of Commerce of Lima]), the Asociación de Pequeños y Medianos Industriales del Perú (APEMIPE [Peruvian Association of Small and Medium-Sized Enterprises]), the Confederación General de Trabajadores del Perú (CGTP [General Workers’ Confederation of Peru]), the Central Unitaria de Trabajadores del Perú (CUT [Unitary Workers’ Federation of Peru]), the Confederación de Trabajadores del Perú (CTP [Confederation of Workers of Peru]) and the Central Autónoma de Trabajadores del Perú (CATP [Autonomous Federation of Workers of Peru]). In April 2017 the Peruvian trade union federations withdrew from the CNTPE after accusing the Government of ignoring policy on social dialogue.\textsuperscript{146}

b. Consejo Nacional de Seguridad y Salud en el Trabajo [National Council for Occupational Health and Safety]\textsuperscript{147}

The Council was created as a consultation body and is comprised of representatives of the State and workers’ and employers’ organisations. The objective of the Council is to promote a culture of prevention of occupational health hazards, to which end implementation of a national occupational health and safety policy that emphasises employers’ duty of prevention, the State’s role in monitoring and auditing workplaces and workers’ and union participation via social dialogue are considered to be fundamental.

c. Comisión Nacional de Lucha contra el Trabajo Forzoso\textsuperscript{148} [National Commission to Combat Forced Labour] and Comité Directivo Nacional para la Prevención y Erradicación del Trabajo Infantil [National Executive Committee on the Prevention and Eradication of Child Labour]\textsuperscript{149}

Both are multisectoral bodies led by the Dirección General de Derechos Fundamentales [Directorate-General for Fundamental Rights] at the MTPE. Participants include representatives from workers’ and employers’ organisations who contribute to implementation and execution of policies and actions in the respective areas.

\textsuperscript{147} The Council was created by means of Law No 29783 of 11 August 2011 on occupational health and safety. See http://www.munlima.gob.pe/images/descargas/Seguridad-Salud-en-el-Trabajo/Ley%2029783%20_%20Ley%20de%20Seguridad%20y%20salud%20en%20el%20Trabajo.pdf
\textsuperscript{149} Created by Supreme Resolution No 018-2003-TR. See http://www.mintra.gob.pe/contenidos/sst/0182003-TR.pdf
4.2 Mechanisms for participation in environmental matters

In accordance with Article 31 of the Regulation implementing Framework Law No 28245 on the national environmental management system adopted by Supreme Decree No 008-2005-PCM, a number of National Commissions have been set up and are chaired by the Ministry of the Environment. These perform the functions assigned to them both by the law that created them and by other applicable legislation and operate in accordance with the provisions of that legislation. These National Commissions are composed of representatives of public bodies from various levels of government and by representatives of the private sector and civil society.

By way of example, several of the National Commissions or Technical Groups chaired by the MINAM are listed below.

a. Comisión Nacional sobre la Diversidad Biológica (CONADIB [National Commission on Biodiversity]), whose scope of action is the Convention on Biological Diversity and the Cartagena Protocol, Nagoya Protocol and Aichi Targets thereof.\(^\text{150}\)

b. Comisión Nacional sobre el Cambio Climático [National Commission on Climate Change] whose scope of action is the United Nations Framework Convention on Climate Change and the Kyoto Protocol thereof.\(^\text{151}\)

c. Comisión Nacional de Lucha contra la Desertificación y Sequía [National Commission on Combating Desertification and Drought] whose scope of action is the United Nations Framework Convention to Combat Desertification.\(^\text{152}\)

d. Comité Nacional de Humedales [National Committee on Wetlands], whose scope of action is the Convention on Wetlands of International Importance, especially as Waterfowl Habitat.\(^\text{153}\)

\(^{150}\) Created by Supreme Decree No 007-2009-MINAM (prior legislation: Supreme Resolution No 227-93-RE).

\(^{151}\) Created by Supreme Decree No 006-2009-MINAM (prior legislation: Supreme Resolution No 359-93-RE).

\(^{152}\) Created by Supreme Decree No 001-2014-MINAM (prior legislation: Supreme Decree No 022-2006-AG).

\(^{153}\) Created by Supreme Decree No 005-2013-PCM.

f. Working Group in charge of coordinating and monitoring proper management of the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), whose scope of action is the CITES Convention.\textsuperscript{155}

After signing the TA, both Peru and Colombia drew on their own public participation mechanisms that include representatives of the State and other stakeholders in the environmental and labour fields.

In this regard, Peruvian civil society has insistently questioned whether the participation bodies referred to above can be considered appropriate means of monitoring compliance with the obligations assumed under the TA and as a means of channelling concerns, contributions and proposals both from and within civil society.

The reason for this questioning lies in the fact that all of these bodies are chaired and led by official authorities, which robs them of the independence and autonomy necessary to ensure genuine unconditioned participation by civil society organisations.

To this is added the fact that although Article 280 TA explicitly states, ‘\textit{Each Party shall consult domestic labour and environment or sustainable development committees or groups, or create such committees or groups when they do not exist,}’ and although these groups could have submitted opinions and made recommendations under Title IX during the four years that the TA has been in force, the Peruvian Government has \textbf{never} placed the issue of implementation of the Trade Agreement with the European Union on the agenda of these Commissions and Working Groups. As a consequence, the issues that are addressed in this claim have not had an appropriate channel via which they could be properly examined and resolved.

\textsuperscript{154} Its scope of action is the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

\textsuperscript{155} Created by Ministerial Resolution No 266-2009-MINAM.
5. Conclusions and petitions

As can be seen from the contents of the previous sections, the Peruvian State has repeatedly failed to meet its obligations under Title IX of the TA. Failing to uphold the human, labour and environmental rights referred to by that Title of the TA constitutes a **material breach** of the Trade Agreement between the European Union and Peru.

Under international public law, this should give rise to the adoption of pertinent measures. This is essentially because, in accordance with Articles 26 and 27 of the Vienna Convention on the Law of Treaties,\(^\text{156}\) not only ‘*Every treaty in force is binding upon the parties to it and must be performed by them in good faith,*’ but also ‘*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.*’

To ensure that sustainable development and human rights are effectively upheld in its trading partners while protecting socioeconomic development, health and the environmental model of the European Union and its Member States, as well as contributing to sustainable development, the reduction of poverty and inequality and combating global warning, Peru is required to commit to an **Action Plan** with specific goals and a clear and effective timetable that guarantees implementation of the foregoing. Similarly, the penalties that will be applied if these obligations are disregarded must be clearly specified.

To ensure that this occurs, the organisations filing this claim call for the following:

(i) The convening of government consultations to investigate Peru’s reported non-fulfilment of its obligations under Title IX of the Agreement;

(ii) The creation of an expert group to examine in depth the violations described in this document;

(iii) The adoption by the European Union of a public position, if our concerns are confirmed, and making of the corresponding recommendations; and

(iv) Respect of the right of Peruvian civil society to organise, participate in and be consulted as an autonomous and independent **Advisory Group** on all matters relating to proper implementation of Title IX of the TA on Trade and Sustainable Development.

ANNEX 1
Peruvian civil society letters to the European Union delegation in Peru and to the MINCETUR, both dated 17 June 2015.
ambiental, además de poner en riesgo los territorios y derechos de los pueblos indígenas. Cabe mencionar, que actualmente se encuentra para ser debatido en el Pleno del Congreso de la República, el Proyecto de Ley N° 3942 “Ley para la implementación de acuerdos binacionales entre Perú y Ecuador y ejecución del Proyecto Binacional Puyango-Tumbes” que propone expropiar por primera vez en el Perú un área Natural Protegida de carácter intangible (Parque Nacional Cares de Amotape, que forma parte de la Reserva de Biosfera del Nordeste) en pro de hacer efectivo un proyecto de infraestructura.

Es evidente que no existe un equilibrio entre las políticas públicas de promoción de la inversión (pública y privada) y la protección socio-ambiental por parte del gobierno, por ello nos preocupa que a través de los llamados “paquetes reactivadores” o de “promoción de la inversión” se siga debilitando los procedimientos y estándares ambientales y sociales. Cabe señalar, que todos estos cambios se han promovido sin un proceso de debate público, amplio y transparente, sin canales accesibles de información y participación de los ciudadanos y ciudadanas, sobre todo con los pueblos indígenas quienes son los más afectados, por lo que es importante promover el fortalecimiento de estos espacios de discusión y transparencia.

Asimismo, nos preocupa que a pesar de los compromisos asumidos por el gobierno del Perú, en el plano laboral, aún existe una dispersión en la legislación laboral y que los niveles de protección que dicha legislación contemplaba antes de la vigencia del Acuerdo han evolucionado de manera regresiva y se han debilitado deliberadamente con los medios con los cuales cuenta el Estado para hacerla efectiva. Es así, a pesar de la aprobación de la ley de seguridad y salud en el trabajo y la creación de la Superintendencia Nacional de Fiscalización Laboral, se retrocede por acciones del mismo gobierno, como la modificación de la Ley 30222, “Ley de Seguridad y Salud en el Trabajo”, que permite tercerizar la gestión, implementación, monitoreo y cumplimiento de las disposiciones legales y reglamentarias sobre seguridad y salud en el trabajo, entre otros.

Cabe resaltar que, la iniciativa de consolidar la legislación laboral a través de una Ley General del Trabajo y modificarla con el objeto de mejorar las observaciones de los órganos de control de la OIT, fue objeto de un diálogo tripartito, pero a pesar de alcanzarse más del 90% de consensos en su contenido, la tramitación ha sido paralizada por el actual gobierno. Asimismo, se ha incrementado desmesuradamente la contratación temporal contempladas en la legislación general (Decreto Legislativo N° 738), sobre todo, en los sectores vinculados a las actividades de exportación, con los graves efectos que ello tiene en la seguridad de los trabajadores en sus empleos y sus ingresos y el ejercicio de sus libertades sindicales, entre otros.

A ello se suma la ampliación progresiva y desmedida de la cobertura de “regímenes especiales promocionales”1 que rebajan los estándares de protección laboral, fundados en la equívoca creencia de que la reducción de la protección laboral promueve la formalidad y el desarrollo empresarial, generando diferencias de trato que crean subcategorías de trabajadores con condiciones precarias, sobre todo en sectores directamente vinculados con las actividades exportadoras; sin prever mecanismos de evaluación que permitan medir el nivel de logro alcanzado en lo que refiere a sus supuestos objetivos de promoción de las exportaciones, formalización o desarrollo empresarial.

Por otro lado, existe una escasa inversión pública y ausencia de resultados concretos en las políticas sobre trabajo infantil y trabajo forzoso, así como la insistencia de políticas de acciones integrales, en materia de igualdad y no discriminación en el empleo, y en garantía del derecho de sindicación y fomento de negociación colectiva. Asimismo, existe un debilitamiento de los sindicatos en los últimos 10 años, sin que exista a la fecha ninguna reforma orientada a compatibilizar la legislación con los convenios de la OIT. En el caso del sector Público, la expedición

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de la Ley de Servicio Civil (N° 30057, 2011) apudizó las restricciones e imposiciones de negociación colectiva de remuneraciones, sin ningún mecanismo alternativo de participación para los trabajadores y trabajadoras.

Finalmente, hay que mencionar el debilitamiento de la normativa en materia de seguridad y salud en el trabajo y la ausencia de medidas para hacer efectiva la Política Nacional de Seguridad y Salud en el Trabajo, así como el de las instancias de diálogo tripartito en materia laboral y de la participación de los trabajadores en las políticas de fomento de la competitividad, sobre todo a partir de la expedición de leyes sin consulta con las organizaciones de trabajadores.

Ante lo expuesto, creemos que estas acciones del Gobierno mermarán las perspectivas de contratación concertada de un escenario democrático y seguro para los peruanos y peruanas, evidenciando el desequilibrio existente a favor de un sector. Por dichas razones, solicitamos a las fuerzas que puedan transmitir al Subcomité conjunto de Comercio y Desarrollo Sostenible del Acuerdo de la Implementación de los Objetivos del Milenio en las Naciones Unidas, que se inste al Gobierno peruano al cumplimiento del compromiso que asumió en orden a garantizar el respeto de los derechos humanos laborales y políticos.

Agradecemos su atención a la presente y adjuntamos en Anexos los diversos documentos que actores de la sociedad civil hemos elaborado manifestando nuestra preocupación con relación a la normativa antes referida y las propuestas que venimos discutiendo actualmente. Asimismo, le manifestamos que el hemos hecho llegar la misma carta a la Ministra de Comercio Exterior, Magaly Silva.

Atentamente,

Ana Romero Cano
Coordinadora Ejecutiva - RedGE

Asociación Pro Derechos Humanos - APIRODEH
Centro Autónomo de Trabajadores del Perú - CATP
Centro Unitaria de Trabajadores del Perú - CUT Perú
Centro de Derechos y Desarrollo - CEDAL
Centro Peruano de Estudios Sociales - CEPI
Confederación Campesina del Perú - CEP
Confederación General de Trabajadores del Perú - CGTP
Conferencia Nacional sobre Desarrollo Social - CONADES
Derecho Ambiental y Recursos Naturales - DARE
Equidad - Centro de Políticas Públicas y Derechos Humanos
Federación Nacional de Mujeres Campesinas, Artesanas, Indígenas, Nativas y Asalariadas del Perú - FEMUCARNAP
Marcha Mundial de las Mujeres
Programa Laboral de Desarrollo - PIADES

1 Impuestos desde el año 1998 en la Ley de Analitos de Presupuesto
2 Estas prácticas antropológicas se aplicaran en sectores de donde se proponen los contratos temporales, bajo el ámbito de los regímenes promocionales que, aunque tienen reconocido por la legislación, su derecho de sindicación. En la práctica van limitando la posibilidad de hacer efectiva, sobre todo en los contratos temporales se encuentran desarrolladas en necesidades temporales que tienen en el futuro, incluso tras la extinción de "no renuevan" es útil para impedir la conformación a ti la cualidad.
Señora Ministra
Magali Silva Velarde-Alvarez
Ministerio de Comercio Exterior y Turismo

Presente:

cc.
Señora Embajadora
Irene Horeja
Unión Europea en el Perú

De nuestra mayor consideración

Por medio de la presente, las y los abajo firmantes, miembros de organizaciones de la sociedad civil, nos dirigimos a Usted a efectos de hacerle llegar nuestras preocupaciones en torno al actual debilitamiento de la gestión ambiental y social para la promoción de inversiones, así como de la situación del mercado de trabajo y las relaciones laborales en el Perú, que actualmente se viene promoviendo desde el Gobierno. En ese sentido, en el marco de la Segunda Reunión de Subcomités y Comités de Comercio en el marco del Acuerdo Comercial entre el Perú, Colombia y la Unión Europea a celebrarse del 11 al 19 de junio del presente año, creemos importante que se pueda tener en cuenta estas preocupaciones y que sean evaluadas en el seguimiento al cumplimiento de dicho acuerdo.

Cabo señalar, que el 1º de marzo de 2013 entró en vigor el Acuerdo Comercial entre la Unión Europea (UE) y Colombia y Perú, en cuyo Título IX "Comercio y Desarrollo Sostenible" se señala un conjunto independiente de disposiciones relativas a las normas medioambientales y laborales cuya finalidad es preservar un alto nivel de protección laboral y ambiental de todas las partes.

No obstante, la Sociedad Civil ve con gran preocupación la manera en que el Estado peruano viene apropiando una serie de normas que debilitan claramente la institucionalidad y gestión ambiental, lo cual viene poniendo en riesgo la estabilidad y legitimidad del mismo. Desde el año 2013, estas disposiciones se dan con el fin de agilizar los procedimientos administrativos de autorizaciones y certificaciones para los proyectos de inversión en el territorio nacional en el Sector de Energía y Minas (Decreto Supremo N° 054-2013-PCM1 y el Decreto Supremo N° 060-2013-PCM), estableciendo la adecuación de procedimientos en material de Certificado de Inexistencia de Restos Arqueológicos - CIRA, derechos de uso de agua, reducción de los plazos en el proceso de certificación ambiental para el sector Energía Minas, entre otros.

En este mismo marco de impulso a las inversiones privadas sin asegurar estándares socio ambientales, en julio de 2014 el Congreso de la República aprobó la Ley N° 30230, "Ley que establece medidas tributarias, simplificación de procedimientos y permisos para la promoción y dinamización de la inversión privada en el país", presentada por el Ejecutivo, con la cual se limitaron las funciones y el presupuesto asignado del Organismo de Evaluación y Fiscalización Ambiental (OFEA), se eurocratizó el trámite de establecimiento de las Zonas Reservadas (categoría transitoria hacia el establecimiento de una área protegida); se reducen plazos para la emisión de las opiniones técnicas en el marco de la certificación ambiental de los proyectos de inversión (45 días hábiles) poniendo en riesgo la validez y rigurosidad técnica de la evaluación, y se debilita el marco normativo del Ordenamiento Territorial indicando que este es referencial.

Red Peruana por una Globalización con Equidad - RedGE
Calle Río de Janeiro N° 371 Jesús María, Lima 1, Perú. Tel.: (511) 461-2221 / 461-3864 | Correo: redge@redge.org.pe
www.redge.org.pe
Asimismo, a fines del 2014 a través del Decreto Supremo N° 035-2014-EM se aprobó el “Reglamento para Protección Ambiental en las Actividades de Hidrocarburos”, el cual disminuyó estándares ambientales y sociales, con procedimientos menos exhaustivos. Asimismo, en mayo de 2015, se aprobó la Ley N° 30327 “Ley de Promoción de las Inversiones para el Crecimiento Económico y el Desarrollo Sostenible”, la misma que no resuelve problemas de fondo como son las debilidades técnicas y de estudios científicos de las autoridades que realizan la evaluación ambiental, además de no poner en riesgo los territorios y derechos de los pueblos indígenas. Cabe mencionar, que actualmente se encuentra para ser debatido en el Pleno del Congreso de la República, el Proyecto de Ley N° 3940 “Ley para la implementación de acuerdos binacionales entre Perú y Ecuador y ejecución del Proyecto Binacional Puyango-Tumbes” que propone recortar por primera vez en el Perú un Área Natural Protegida de carácter Intangible (Parque Nacional Cerros de Amotape, que forma parte de la Reserva de Biosfera del Noroeste) en pro de hacer efectivo un proyecto de infraestructura.

Es evidente que no existe un equilibrio entre las políticas públicas de promoción de la inversión (pública y privada) y la protección socio-ambiental por parte del Gobierno, por ello nos preocupa que a través de los llamados “paquetes reactivadores” o de “promoción de la inversión” se siga debilitando los procedimientos y estándares ambientales y sociales. Cabe señalar, que todos estos cambios se han promovido sin un proceso de debate público, amplio y transparente, sin canales accesibles de información y participación de los ciudadanos y ciudadanas, sobre todo con los pueblos indígenas quienes son los más afectados, por lo que es importante promover el fortalecimiento de estos espacios de discusión y transparencia.

Asimismo, nos preocupa que a pesar de los compromisos asumidos por el gobierno del Perú, en el plano laboral, aún existe una dispersión de la legislación laboral y que los niveles de protección que dicha legislación contemplaba antes de la vigencia del Acuerdo han evolucionado de manera regresiva y se han debilitado deliberadamente los medios con los que cuenta el Estado para hacerlo efectiva. Es así, que a pesar la aprobación de la Ley de Seguridad y Salud en el Trabajo y la creación de la Superintendencia Nacional de Fiscalización Laboral, se retrocede por acciones del mismo gobierno, como la modificación de la Ley 30222, “Ley de Seguridad y Salud en el Trabajo”, que permite tercerizar la gestión, implementación, monitoreo y cumplimiento de las disposiciones legales y reglamentarias sobre seguridad y salud en el trabajo, entre otros.

Cabe resaltar que, la iniciativa de consolidar la legislación laboral a través de una Ley General del Trabajo y modificara con el objeto de levantar las observaciones de los órganos de control de la OIT fue un intento triunfista, pero a pesar de alcanzarse más del 90% de consensos en su contenido su tramitación ha sido paralizada por el actual Gobierno. Asimismo, se ha incrementado desmesuradamente la constante temporal contemplada en la legislación general (Decreto Legislativo N° 728), sobre todo en los sectores vinculados a las actividades de exportación, con los graves efectos que ello tiene en la seguridad de los trabajadores en sus empleos y sus ingresos y el ejercicio de sus libertades sindicales, entre otros.

A ello se suma la ampliación progresiva y desmedida de la cobertura de “regímenes especiales promocionales” y que rebajan los estándares de protección laboral, fundadas en la equívoca creencia de que la reducción en la protección laboral promueve la formalidad y el desarrollo empresarial, generando diferencias de trato que crean subcategorías de trabajadores con condiciones precarias, sobre todo en sectores directamente vinculados con las actividades exportadoras; sin prever mecanismos de evaluación que permitan medir el nivel de logro alcanzado en lo que refiere a sus supuestos objetivos de promoción de las exportaciones, formalización o desarrollo empresarial.

Por otro lado, existe una escasa inversión pública y ausencia de resultados concretos en las políticas sobre trabajo infantil y trabajo forzoso, así como la inexistencia de políticas o acciones

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1 Ley para la Promoción de Exportaciones no Tradicionales vigente desde 1978, Ley de promoción del sector agrario desde el 2000, Regímen promocional para la microempresa del 2000

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CARGO

integrales, en materia de igualdad y no discriminación en el empleo, y en garantía del derecho de sindicación y fomento de negociación colectiva. Asimismo, existe un debilitamiento de los sindicatos en los últimos 10 años, sin que exista a la fecha ninguna reforma orientada a compatibilizar la legislación con los convenios de la OIT. En el caso del Sector Público, la expedición de la Ley de Servicio Civil (N° 30057, 2013) agudizó las restricciones e impidió la negociación colectiva de remuneraciones, sin ningún mecanismo alternativo de participación para los trabajadores y trabajadoras.

Finalmente, hay que mencionar el debilitamiento de la normativa en materia de seguridad y salud en el trabajo y la ausencia de medidas para hacer efectiva la Política Nacional de Seguridad y Salud en el Trabajo; así como el de las instancias de diálogo tripartito en materia laboral y de la participación de los trabajadores en las políticas de fomento de la competitividad, sobre todo a partir de la expedición de leyes sin consulta con las organizaciones de trabajadores.

Ante lo expuesto, creemos que estas acciones del Gobierno menorean las perspectivas de construcción concertada de un escenario democrático y seguro para los peruanos y peruanas; evidenciando el desequilibrio existente a favor de un sector. Por dichas razones, solicitamos a Ud. pueda transmitir al Subcomité conjunto de Comercio y Desarrollo Sostenible del Acuerdo atender nuestras preocupaciones y que se inste al Gobierno peruano al cumplimiento del compromiso que asumió en orden a garantizar el respeto de los derechos ambientales y laborales.

Agradecemos su atención a la presente y adjuntamos en Anexo los diversos documentos que actores de la sociedad civil hemos elaborado manifestando nuestra preocupación con relación a la normativa antes referida y las propuestas que vienen discutiéndose actualmente.

Atentamente,

Ana Romero Cecco
Coordinadora Ejecutiva - RedGE

Asociación Pro Derechos Humanos - APRODEH
Central Autónoma de Trabajadores del Perú – CATP
Centro Peruano de Estudios Sociales – CEPES
Confederación Campesina del Perú – CCP
Derecho, Ambiente y Recursos Naturales – DAR
Equidad – Centro de Políticas Públicas y Derechos Humanos
Federación Nacional de Mujeres Campesinas, Artesanas, Indígenas, Nativas y Asalariadas del Perú – FEMUCARINAP
Programa Laboral de Desarrollo – PLADES
Red Peruana por una Globalización con Equidad – RedGE

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1 Impuestos desde el año 1993 en las leyes Anuales de Presupuesto
2 Estas prácticas antisuénticas se siguen en sectores donde priman los contratos temporales, o bajo el ámbito de los regímenes promocionales que, aun cuando tienen reconocido por la legislación su derecho a existencia, en la práctica son obviados o, en el caso de los trabajadores, se encuentran desvirtuados a necesidades temporales de las empresas, en cuyo caso la amenaza de "no renuncia" es utilizada para imponer la conformidad o acatar a sindicatos.
ANNEX 2

Peruvian civil society letter to the European Union delegation in Peru dated 17 March 2016

Señora Embajadora
Irene Horajs
Unión Europea en el Perú
Presente:

Excelentísima Señora Embajadora,

Es gratos dirigirme a Usted para saludarla a nombre de la Red Peruana por una Globalización con Equidad (RedGE), en representación de un colectivo de organizaciones de la sociedad civil que el pasado 18 de junio de 2015 le hicimos llegar una carta expresando nuestras preocupaciones en torno al actual debilitamiento de la gestión ambiental y social para la promoción de inversiones, así como de la situación del mercado de trabajo y las relaciones laborales en el Perú, que actualmente se viene promoviendo desde el Gobierno peruano, en el marco del Acuerdo Comercial entre el Perú, Colombia y la Unión Europea.

Al no haber obtenido ninguna respuesta a la resuva entregada, por parte de usted o de su despacho que digne dirigir consideramos importante volver a exponer nuestra preocupación a las acciones del Gobierno que menoscaban las perspectivas de construcción concertada en un escenario democrático y seguro para los peruanos y peruanas. Por dichas razones, solicitamos a Ud. pueda transmitir al Subcomité Conjunto de Comercio y Desarrollo Sostenible del Acuerdo nuestras preocupaciones y que se inste al Gobierno peruano al cumplimiento del compromiso que asumió en orden a garantizar el respeto de los derechos ambientales y laborales.

Agradecemos su atención a la presente y adjuntamos copia de la carta enviada, así como los anexos de los documentos elaborados por organizaciones de la sociedad civil que sustentan estas preocupaciones.

Atentamente,

Ana Romero Caso
Coordinadora Ejecutiva - RedGE

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SEGURO
19 MAR 2016
UNIÓN EUROPEA
ANNEX 3
Peruvian civil society letters to the MINCETUR dated 20 December 2016 and to the European Union delegation in Peru dated 20 February 2017
CARGO

En ese sentido, y por lo expuesto anteriormente, seguimos creyendo que estas acciones merman las perspectivas de construcción concertada de un escenario democrático y seguro para los peruanos y peruanas y que evidencian la existencia de un desequilibrio existente a favor de las inversiones, por lo que es urgente promover e incrementar espacios de consulta y participación con diferentes actores donde se incluya a la sociedad civil para tener una visión más completa de estos temas.

Agradecemos su atención a la presente y adjuntamos copia de la declaración que se citara durante las reuniones realizadas en Bruselas los días 07 y 08 de diciembre de 2016.

Atentamente,

Ana Romero Cano
Coordinadora Ejecutiva - RedGE

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www.redge.org.pe
CARTA N°0710-2017-RDGGE

Lima, 10 de Febrero de 2017

Señora Embajadora

Irene Hermelín
Unión Europea en el Perú

Presunto:

Ref.: Envió de Declaración Conjunta de 5E nacional sobre preocupación por el debilitamiento de normativa ambiental y laboral en el Perú.

Excelentísima Señora Embajadora:

Es un placer dirigirme a Usted para solicitarle a nombre de la Red Peruana por una Globalización con Equidad (redGE), en representación de un colectivo de organizaciones de la sociedad civil que el pasado 28 de diciembre de 2016, emitieron una declaración conjunta en la que expresan su profunda preocupación por el debilitamiento de la normativa ambiental y laboral en el Perú en los últimos años con el fin de promover inversiones, lo cual, en nuestra opinión, es contrario a lo establecido en el artículo 277 del Título IX “Comercio y Desarrollo Sostenible” del Acuerdo Comercial entre Perú, Colombia y la Unión Europea.

El documento fue elaborado en el marco de la reunión que se realizaron los días 7 y 8 de diciembre en Bruselas, convocados por funcionarios de la Unión Europea, Colombia y Perú del Subcomité de Comercio y Desarrollo Sostenible. Luego, se informó a los y las representantes de la sociedad civil sobre temas relacionados con la implementación del Título, sobre Comercio y Desarrollo Sostenible del acuerdo, abordando en particular cuestiones laborales y ambientales relacionadas con el comerio.

Cabe resaltar que durante el 2016, los denominados “pequetes ambientales”, emitidos durante el Gobierno del Presidente Ollanta Humala, modificaron la gestión ambiental y debilitaron la protección al medio social y ambiental; así como generaron efectos perjudiciales en los congresos, vicios en el proceso de evaluación ambiental por parte del funcionario evaluador, vulnerando derechos de territorio de los pueblos indígenas. Casos como los derrames de petróleo en la Amazonía (ley N° 20220), Yacuίchos (Decreto Supremo N° 059-2013-PMA a través de los IT), uso de las líneas de base de otros proyectos y la defensa possesta en favor de las empresas como en el caso de Maxima Acuña (facilitados por la Ley N°30327 que modifica el art. 929 del Código Civil) y los conflictos socioambientales que emergen de anteriores impactos negativos de normativa aún vigentes.

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CARTA N°0110-2017-REGE

Sefora Embajadora
Irene Heredia
Unión Europea en el Perú
Preseante:

Red: Envío de Declaración Conjunta de SC nacional sobre preocupación por el debilitamiento de normativa ambiental y laboral en el Perú.

Excelentísima Sefora Embajadora:

Es grato dirigirme a Usted para sol·darse a nombre de la Red Peruana por una Globalización con Equidad (RedGE), en representación de un colectivo de organizaciones del sector civil que el pasado 08 de diciembre de 2016, emitimos una declaración conjunta en la que expresamos nuestra profunda preocupación por el debilitamiento de la normativa ambiental y laboral en el Perú en los últimos años con el fin de promover inversiones, lo cual, en nuestra opinión, es contrario a la establecida en el artículo 277 del Título IX “Comercio y Desarrollo Sostenible” del Acuerdo Comercial entre Perú, Colombia y la Unión Europea.

El documento fue elaborado en el marco de la reunión que se realizó en Bruselas, convocada por funcionarios de la Unión Europea, Colombia y Perú del Subcomité de Comercio y Desarrollo Sostenible bajo el acuerdo comercial UE-Colombia-Perú, donde se informó a las y los representantes de la sociedad civil sobre temas relacionados con la implementación del Título sobre Comercio y Desarrollo Sostenible del acuerdo, abordando en particular cuestiones laborales y ambientales relacionadas con el comercio.

Cabe recordar que durante el 2015, los denominados “paquetazos ambientales”, emitidos durante el Gobierno del Presidente Ollanta Humala, modificaron la gestión ambiental y debilitaron la protección al medio social y ambiental; así como generaron efectos perjudiciales en las empresas, incluidos en el proceso de evaluación ambiental por parte del funcionario evaluador y valoración de derechos de territorio de los pueblos indígenas. Casos como los derrames de petróleo en la Amazonía (ley N° 30230), las Barreras (Decreto Supremo N° 054-2013-PCM a través de los ITS), el uso de las líneas de base de otros proyectos y la defensa positiiva en favor de las empresas, como en el caso de Maxima Acuña (facilitadas por la Ley N°30327 que modifica el art. 929 del Código Civil y los conflictos socioambientales continúa sin tener los impactos negativos de normas aún vigentes.

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Con relación a los derechos laborales, la sociedad civil advierte que el gobierno peruano sigue fallando en garantizar la aplicación efectiva de sus propias leyes y no se respetan los estándares laborales contenidos en las normas internacionales de derechos humanos y en los Convenios sobre los derechos y las libertades fundamentales de los trabajadores de la Organización Internacional del Trabajo (OIT). Por ello, el Perú ha acumulado ya casi un centenar de quejas ante la OIT por violar sus compromisos respecto a los convenios de la OIT en materia de libertad sindical; y es el tercer país con más quejas en la región.

Por todo lo expuesto, creemos que es urgente promover e incrementar espacios de consulta y participación con diferentes actores donde se incluya a la sociedad civil para tener una visión más completa. En esa misma lógica es urgente establecer el grupo consultivo de la sociedad civil previsto en el sub comité del Capítulo de Comercio y Desarrollo Sostenible.

Agradecemos su atención a la presente y adjuntamos copia de la declaración conjunta firmada por 25 organizaciones de la sociedad civil peruana entregada en Bruselas. Para mayor información sírvase comunicarse a la Red Peruana por una Globalización con Equidad, a los teléfonos 461 2223 anexo 23 o correo electrónico redge@redge.org.pe

Atentamente,

[ Firmas ]

Ana Romanov Caní
Coordinadora Ejecutiva - RedGE

[ Sello ]
ANNEX 4
Summary of the report prepared by the Working Group of the Trade Commission of the Congress of Peru on the impact of the cooperation and trade agreements signed by Peru with the United States, the European Union, Canada and China

In August 2016, the Commission on Foreign Trade and Tourism of the Congress of the Republic of Peru approved the formation of a Working Group to assess and monitor the impact on public rights of the trade agreements and treaties signed by Peru (Working Group). The group was composed of the following members of congress from differing parties: Marisa Glave Remy (coordinator), Richard Arce Caceres, Ana María Choquehuanca Villanueva, Eloy Ricardo Narváez Soto and Paloma Noceda Chang.

After five meetings (held between January and March of this year), the Working Group approved a Final Report presenting the information gathered on the impact of the trade agreements and treaties signed by Peru on the following fields:

(i) Micro and small enterprises (commercial chains);
(ii) Right to health;
(iii) Right to work and employment; and
(iv) Right to the environment.

Three trade agreements were analysed by the Working Group: the Peru–United States Trade Promotion Agreement (TPA); the Trade Agreement between the European Union and Peru and Colombia (TA); and the Free Trade Agreement between Peru and China.

In relation to the impact of the TPA on the right to work and employment, the Working Group found that in June 2015 the International Labor Rights Forum (ILRF), Perú Equidad and seven Peruvian workers’ organisations submitted Communication 2015-01 to the Office of Trade and Labor Affairs (OTLA) of the Bureau of International Labor Affairs at the US Department of Labor.

In response to that Communication, the Bureau of International Labor Affairs at the US Department of Labor made a number of recommendations to the Peruvian State with view to better protecting the rights of workers.

In particular, it made recommendations related to the harmful impact that the Law on Non-Traditional Exports has on the exercise of workers’ collective rights (freedom of association), as well as on the need to strengthen the SUNAFIL labour inspectorate and the judiciary to ensure that they effectively ensure protection of labour rights.
In its Final Report, the Working Group warned that since receiving the communications from the MTPE the latter had not taken the actions necessary to ensure that the use of non-traditional export contracts did not impede the exercise of collective rights.

In particular, the SUNAFIL reported that in the first half of 2016 it had started drawing up an auditing protocol applicable to non-traditional export contracts. However, the process had to be suspended in favour of preparation of a draft MTPE regulation that would establish criteria regarding regulation of contracts and other aspects of employment applicable to the Law on Non-Traditional Exports.

However, neither the draft regulation for the Law on Non-Traditional Exports nor the auditing protocol applicable to the above-mentioned contracts were ever approved. As a consequence, at present there is no instrument that allows the labour inspectorate to verify compliance with the above-mentioned regulation and prevent its application impeding the exercise of freedom of association. For this reason, the Working Group emphatically recommended adoption of one of these regulatory instruments.

The Working Group stressed that, despite the existence of some policy changes on environmental matters that could be regarded as being positive, there is a lack of detailed information about the real impact of the trade agreements on the environment. It also highlighted the absence of indicators with which to assess the impacts of the trade agreements, making it extremely difficult to know in any depth how these instruments may or may not affect the exercise of certain rights.
ANNEX 5
Summary of the Conclusions and Recommendations of the University of Ghent paper titled ‘Labour rights in Peru and the EU trade agreement. Compliance with the commitments under the sustainable development chapter’

In August 2016, researchers Jan Orbie and Lore Van den Putte at the Centre for EU Studies at the University of Ghent (Belgium) published the paper titled ‘Labour rights in Peru and the EU trade agreement. Compliance with the commitments under the sustainable development chapter.’ The aims of the paper were as follows: (i) to assess the degree of compliance by the Peruvian State with the commitments assumed under Title IX of the TA, in particular protection of labour rights in the agricultural sector; (ii) to suggest recommendations for the stakeholders involved (European Union, NGOs and Peruvian and EU trade unions, among others); and (iii) to suggest areas for further research.

To meet those aims, the researchers gathered information from both primary and secondary sources. In the case of the former, they made field visits to the cities of Lima and Trujillo in Peru in the first half of 2016 and interviewed about 40 officials from the EU and Peru and representatives of NGOs and employers’ and workers’ organisations. They also attended the third meeting of the EU Domestic Advisory Group on the Trade Agreement, held in April 2016.

As regards the Peruvian State’s compliance with its labour obligations under the agreement, the study addressed three topics: (i) application of the ILO international labour standards; (ii) non-lowering of national or domestic labour standards; and (iii) promotion of social dialogue.

As regards the first topic, the paper found that Peru, despite having ratified the ILO core labour conventions, exhibited a series of shortcomings in their implementation and application. It stated, ‘Reports and indicators from international institutions show that practices of child labour, forced labour, discrimination, as well as violations of trade union rights, continue to exist in Peru (…)’.

In matters of freedom of association, the paper recalls that, according to the 2014 Global Rights Index drawn up by the International Trade Union Confederation (ITUC), Peru received a score of 4, where 1 indicates a country in which violations of freedom occur occasionally

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157 Available at http://www.oefse.at/fileadmin/content/Downloads/Publikationen/Workingpaper/WP58_Peru_Study.pdf
158 ORBIE, Jan and Lore VAN DEN PUTTE. ‘Labour rights in Peru and the EU trade agreement. Compliance with the commitments under the sustainable development chapter’. Austrian Foundation for Development Research, Working Document No 58, August 2016, pp. 19
and 5 indicates a country in which rights are not guaranteed due to a breakdown in the rule of law. In countries with that score (4), workers’ rights are violated by deliberate actions intended to prevent them exercising the right to freedom of association.

For this reason, the researchers stated that it is not surprising that the rate of trade union membership in Peru is so low (6 %), noting moreover that in the agricultural sector it is even lower (4.2 %).

As regards the second topic, the paper warns that there are serious indications that the level of protection of labour rights in Peru has been lowered since the entry into force of the Trade Agreement with the EU. This is reflected in three concurrent circumstances:

(i)  \textit{De facto} weakening of labour inspection;
(ii) \textit{De facto} continuation of special labour schemes; and
(iii) \textit{De jure} lowering of occupational health and safety standards.

As regards the first aspect, the University of Ghent researchers point out that labour inspection in Peru is carried out by the SUNAFIL (created in 2012), proper functioning of which has been impeded by underfunding and a lack of authority.

Referring to the second aspect, the researchers highlight the existence and continuation of special labour schemes (specifically the Law on Promotion of the Agricultural Sector and the Law on Non-Traditional Exports), which have been seriously questioned by the ILO’s governing bodies and that, according to the data collected by the researchers, are no longer justified.

For the third aspect, the researchers indicate that the amendments to the Law on Occupational Health and Safety (Law No 29783) and its implementing regulations have lowered the level of protection by requiring fewer occupational health examinations and lowering criminal liability for fatal work accidents, among other factors.

Finally, with regard to the promotion of social dialogue, the paper points out that Peru has failed to meet that commitment (assumed under the Trade Agreement with the European Union).

In addition, it states that the social dialogue councils are ineffective in practice and that the Peruvian State treats them as spaces where ‘you should send issues you don’t want to succeed.’

Taking the above into account, the paper makes the following recommendations:
• Further systematic research is needed on the real impact of the Trade Agreement with the European Union, as well as on the degree of compliance with the agreement, in consultation with civil society organisations and the ILO.

• The European Union should play a more proactive role in enhancing social dialogue between civil society and government.

• Although promoting corporate social responsibility could help improve conditions for Peruvians, it should be recognised that this by itself will not replace concrete actions to guarantee the protection of fundamental labour rights.

• Furthermore, it suggests that the European Union should urge Peru to make more specific labour reforms before the entry into force of Trade Agreements.

• Finally, it recommends funding and conducting wider research, bearing in mind that the paper reveals that the degree of the Peruvian State’s compliance with its labour laws is clearly insufficient.
ANNEX 6
Recommendations of the US Department of Labor concerning Peru’s breach of its labour obligations under Chapter 17 of the United States–Peru Trade Promotion Agreement

In the same way that under Title IX of the Trade Agreement between Peru and the EU Peru assumes certain commitments, so under chapters 17 and 16 of the Trade Promotion Agreements (TPA) concluded between Peru and the United States and Canada, respectively, it commits to adopting and maintaining in its statutes and regulations, and practices thereunder, ‘the (…) rights, as stated in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)’. Likewise, it has undertaken to not fail to effectively enforce its labour laws ‘(…) through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties, after the entry into force of this Agreement.’

Notwithstanding the above, in March 2016, and after reviewing a complaint filed by the International Labor Rights Forum (ILRF), the Centre for Public Policy and Human Rights (Perú EQUIDAD) and the trade union federations of Peru that referred to structural problems in this area and set out a series of cases evidencing Peruvian companies’ abuse of labour rights in order to benefit unduly from the commercial advantages conferred,159 the Office of Trade and Labor Affairs (OTLA) of the Bureau of International Labor Affairs at the US Department of Labor issued a public statement160 on the weaknesses reported in application of labour laws by the Peruvian Government. In parallel, a set of very precise recommendations were made. These were intended to help guide the subsequent commitment between the US and Peruvian governments to address the issues and concerns raised during review of the complaint filed by Peru’s trade union federations.161

159 See complaint at https://www.dol.gov/ilab/media/pdf/Comunicación%20pública_23%20julio%202015.pdf
161 These recommendations were: to adopt and implement legal instruments and other measures to ensure that the use of short-term contracts in the non-traditional exports (NTE) sectors does not restrict workers’ associational rights, which could include: placing a limit on the consecutive use of short-term employment contracts in the NTE sectors, similar to the five-year limit on such contracts contained in Article 74 of Law 728 (standard labour system); authorising the administrative labour authority to compel employers to renew workers’ contracts or convert workers employed on short-term contracts into permanent employees in cases of recurrent employer failure to comply with the requirements of Decree Law 22342 (which permits the unlimited use of short-term contracts) or when contract non-renewal is found to be due to anti-union discrimination, and not permitting stay of those actions during any subsequent administrative or legal proceedings; requiring the labour authority to verify and approve proactively, based on an established protocol, that contracts under Decree Law 22342 meet the legal requirements and establishing a time period for verification and approval that is appropriate for very short-term contracts; establish SUNAFIL offices in all regions of Peru as expeditiously as possible; increase support for SUNAFIL’s enforcement activities, including labour inspections and administrative sanction processes, in a manner that allows for more effective and expeditious enforcement of Peru’s labour laws in all regions of Peru; expand Labour Courts of First Instance and increase the judiciary’s budget for labour
However, not only did the Peruvian Government not implement any of the recommendations made by the USDOL, but — worse still — it adopted new measures that exacerbated the labour situation, eliminating formalities that were used to ensure that abusive use was not made of short-term contracts and reducing the fines imposed on companies that violate labour rights, setting a ceiling of 35% of the amount laid down by law.

In December 2016, the OTLA issued a new statement indicating ‘a number of areas where Peru has not addressed key recommendations’ and made further recommendations, indicating that together with the Office of the US Trade Representative and the US Department of State it would continue to monitor and assess progress by the Peruvian Government in addressing those issues over the following six months, which expired in June 2017 without the concerns of the US Government having been addressed.\(^{162}\)

\(^{162}\) See the review report at https://www.dol.gov/sites/default/files/documents/ilab/Declaración%20de%20Revisión%20Perú.pdf