

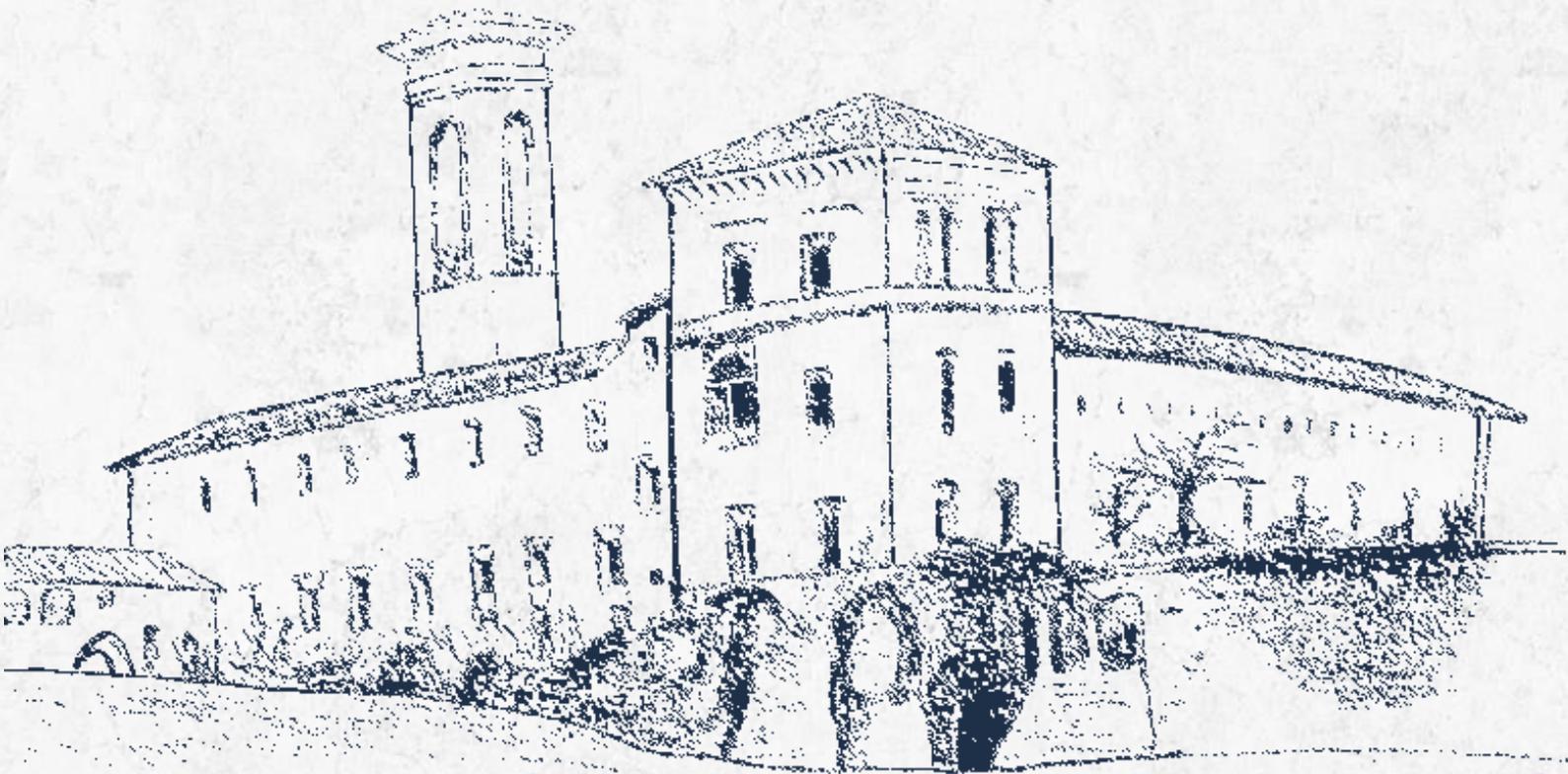
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# Trade Mechanisms as a Way to Improve Labor Rights Compliance and Its Policies. A Case Study from The United States-Peru Free Trade Agreement

Maria Eugenia Rodriguez-Florez <sup>1</sup>

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## Abstract

This paper documents the process behind the filing of the submission using the labor chapter of the Free Trade Agreement between Peru and the United States and how the submission has developed up to January 2020. In this case, Peruvian unions attempted to use international pressure to change the Decree 22342 (also known as the Traditional Export Law) that enables repeated use of short-term employment contracts for the export of 'non-traditional' products and therefore allows systematic violations of fundamental labor rights. The claim is still open, and there

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has not been any legislative change. The process of filing the submission also highlights the textile union's dependency on international aid to finance technical assistance.

*Keywords: free trade agreements; freedom of association; cross border solidarity; international aid; labor rights.*

## **Introduction**

Negotiations of a free trade agreement not only catch the attention of government and business. Trade union federations have learned that free trade agreements are also an opportunity for unions to strengthen their relationship, build cross border solidarity, and push for improvements in areas of labor rights' lack of compliance.

In this framework, the process of filing the submission using the labor chapter of the Free Trade Agreement between Peru and the United States is an example -of the many outcomes- that joint efforts achievements while they seek to improve worker rights and, take advantage of the opportunity offered by this milestone labor chapter in the history of American free trade agreements.

This paper documents the process behind filing the submission using the labor chapter of the Free Trade Agreement between Peru and the United States, and how the submission has developed up to January 2020. The paper also states the importance that the international aid to finance technical assistance played in the Peruvian case.

## **1. Submissions Backgrounds**

### *Advocacy Campaign for raising awareness about labor rights violations*

In 2009, the American Center for International Labor Solidarity (Solidarity Center or SC) published a report called "Peruvian Society, Workers and Labor Law" that portrays the status quo of Peruvian labor rights and offers some policy recommendations. This report was initiated during the free trade agreement's negotiations. Its goal was to identify legal loopholes, weak legal enforcements, and recurrent violations of labor rights. Among its findings, the report listed laws and regulations that

contradict fundamental workers' rights established by the International Labour Organization (ILO).<sup>2</sup>

A *consultant* [who prefers to remain anonymous] states that policymakers have understood that in order to increase the benefits of trade, it is essential to improve the institutions and actors that shape labor relations in the trade sector, rather than only guarantee the free trade-off of goods. Some of those actors are unions and civil societies that advocate for enhancing labor rights. For this reason, the implementation of the Free Trade Agreement –signed on February 1st, 2009- opened a window of opportunity to channel resources to the export-oriented sector. For example, USAID financed a project led by the Solidarity Center between February 2010 and March 2013 called "Empowering Workers, Strengthening Worker Organizations, and Improving Labor Rights Enforcement in Peru". The goal of this project was to "increase the active and constructive participation of unions with state and tripartite institutions and at the international level on topics of strategic importance to vulnerable workers."<sup>3</sup>

In this project the SC worked with sixteen economic sectors,<sup>4</sup> developing capabilities in the following areas: (i) training of vulnerable workers in economic literacy and fundamental labor rights, (ii) union organizational capacity building and, (iii) unions in networks and advocacy. A relevant outcome of this project was the design of a *form to document labor rights violations* (Box 1), that was developed between the SC and a Peruvian NGO called Programa Laboral de Desarrollo<sup>5</sup> (PLADES).<sup>6</sup>

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<sup>2</sup> The report describes how the slow judicial process and lack of enforcement, such as cases with unenforced fines, make it tough to get and enforce legally binding decisions and create a culture of impunity. It also pointed out other issues, such as legal restrictions and barriers preventing workers from striking, and the increase of indirect employment which undermining workers' protections, among other problems. See Solidarity Center Staff, *Peruvian Society, Workers and Labor Law*, 2009. Retrieved September 2019, from Yumpu: <https://www.yumpu.com/en/document/read/11354288/peruvian-society-workers-and-labor-law-solidarity-center>

<sup>3</sup> Solidarity Center, *Solidarity Center Trade Union Capacity Building Program: Empowering Workers, Strengthening Worker Organizations, and Improving Labor Rights Enforcement in Peru. USAID Cooperative Agreement #: CA AID-527-A-10-00002. Final Report*, 2013. Retrieved September 2019, from USAID: [https://pdf.usaid.gov/pdf\\_docs/PA00JP19.pdf](https://pdf.usaid.gov/pdf_docs/PA00JP19.pdf)

<sup>4</sup> Like cement, food, agribusiness, textile, mining, among others.

<sup>5</sup> PLADES also created a database to sort the cases.

<sup>6</sup> Solidarity Center (2013), *op. cit.*

Box 1: Labor Documentation Form's Information

**Plaintiff:** union name, filed case identification number, date, number of people involved, people involved characteristics -gender, age, is a union member or no.-

**Defendant:** business name, tax number, address, phone number, legal representative (lawyer), legal representative's phone number, industry.

**Description:** kind of legal case, prima facie case.

**Follow up:** case identification number, identify the forum -administrative, judicial, international-, and observations. Moreover, for each forum, there is a list of its stages. For example, administrative -conciliation, labor inspection, etc.-, international -ILO, national contact point OECD, etc.-

**Posture:** list of possible outcomes like liable, no liable, appeal, denied, accepted, conciliation process, etc.

**How was the case closed?** date, case identification number, administrative or judicial resolution on behalf of the defendant/plaintiff, report or conciliation proceedings on behalf of the defendant/plaintiff.

**Source:** Sample provided by the FTTP.

During this project, the two textile federations in Peru, Federación de Trabajadores en Tejidos del Perú (FTTP) and Federación Nacional de Trabajadores Textiles del Perú (FNTTP) received training on labor rights under the new trade agreement's legal framework. Furthermore, both federations "used the labor rights documentation form<sup>7</sup> to organize information regarding twelve new cases<sup>8</sup> and related labor inspections that demonstrate the linkage between temporary contracts and violations of trade union rights in the textile sector."<sup>9</sup> The information that they systematized using the labor documentation form served as evidence of how the Decree 22342<sup>10</sup> (a Peruvian law that enables repeated use of short-term employment contracts for the export of 'non-traditional'

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<sup>7</sup> This form was reviewed and edited by other actors involved in the labor rights defense. See Solidarity Center (2013), *op. cit.*

<sup>8</sup> During the project, the form was used to document 105 cases of labor rights violations across sixteen sectors. See Solidarity Center (2013), *op. cit.*

<sup>9</sup> Solidarity Center (2013), *op. cit.*

<sup>10</sup> For a deep discussion about this law, See: A. Solozarno. *International Pressure on the Peruvian Government to Repeal Decree 22342: Corporate Social Responsibility and Labor Reform in Peru*, 2015. North Carolina Journal of International Law and Commercial Regulation, 40, 805-848.

products) also known as the Non-Traditional Export Law (NTE) allows systematic violations of fundamental labor rights.<sup>11</sup>

Moreover, with those cases, the FTTP and the FNTTP highlighted the need for actions from the government to protect workers under this regulation and, developed a "joint advocacy campaign"<sup>12</sup> to raise awareness about the pervasive effects of the Decree 22342. During the joint advocacy campaign, both federations learned how to coordinate advocacy actions. They also built an advocacy network and multi-stakeholder alliances with global organizations like "Worker Rights Consortium, Social Accountability International, the Maquila Solidarity Network, the International Labor Rights Forum, and the U.S. Labor Education in the Americas Project"<sup>13</sup> and with some apparel brands.

One of the major lessons of the USAID & SC's project was that the unions learned that they are immersed in an international network that demands some commitment from its stakeholders and offers different mechanisms to enforce them. The union's leaders reinforced the idea that they could continue to use those mechanisms to highlight practices that undermine their labor rights and add pressure to change or improve those practices.<sup>14</sup>

### *The Relevance of Trainings and Technical Advice*

The labor chapter also established a "cooperation and capacity building mechanism"<sup>15</sup> allowing both parties to work together on labor issues of common interest to enforce the agreed-upon fundamental rights of the ILO.<sup>16</sup> To take action, the United States Department of Labor<sup>17</sup> (USDOL)

<sup>11</sup> Solidarity Center (2013), *op. cit.*

<sup>12</sup> According to the Solidarity Center's report, this was the first time that both federations worked together.

<sup>13</sup> Solidarity Center (2013), *op. cit.*

<sup>14</sup> Solidarity Center (2013), *op. cit.*

<sup>15</sup> According to Powell and Chavarro (2008) "The objective of the labor cooperative mechanism is the seeking of bilateral or regional cooperative activities regarding labor fundamental rights, law and practice related to the principles and rights of the ILO Declaration on Fundamental Principles and Rights at Work." See Powell, S. J.; Chavarro, P. A. *Toward a Vibrant Peruvian Middle Class: Effects of the Peru-United States Free Trade Agreement on Labor Rights, Biodiversity, and Indigenous Populations*. Fla. J. Int'l L., 2008, vol. 20, p. 93.

<sup>16</sup> USTR, *The United States - Peru Trade Promotion Agreement - Summary of the Agreement*, nd. Retrieved July 2019, from Office of the United States Trade Representative - USTR.GOV :

signed a two-year Cooperative Agreement<sup>18</sup> with the Solidarity Center to "support the implementation of union capacity strengthening projects in Peru" from December 27, 2012 to December 26, 2014.<sup>19</sup>

The Cooperative Agreement focused on activities, such as "training, technical assistance, and advocacy initiatives," and can be qualified as very ambitious due to its two short-term goals: "(1) strengthening unions' capacity to organize and effectively represent vulnerable workers in key export-oriented sectors, and (2) improving union advocacy for vulnerable workers in labor rights enforcement and policy reform."<sup>20</sup> Moreover, the project focused more on sectors characterized by high precarity due to outsourcing and the high prevalence of short-term contracts.<sup>21</sup> The project also offered trainings<sup>22</sup> designed to help the unions improve their abilities to protect their rights.

Since the unions usually go to governmental agencies to request inspections, or to file claims about labor rights violations, a key element during the training was learning about how to track their cases easily through the organization of their legal documents. For this reason, the Solidarity Center continued promoting the use of the rights documentation form that was created during the project financed by USAID between 2010 and 2013. As a result, the unions learned the criteria to identify emblematic cases of systematic labor rights violations. The criteria to identify it were: (1) if there are many employees affected; (2) if the failure is very severe; or (3) if the violations were against fundamental labor rights. These criteria helped them to prioritize cases.

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<https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/peru/Peru%20TPA%20Chapter%20Summaries.pdf>

<sup>17</sup> USDOL provided \$2.2 million to this project that also included Haiti, so the resources were split between both countries.

<sup>18</sup> See O'Brien and Associates International. *An Independent Final Evaluation of the Strengthening Unions to Promote Vulnerable Workers' Rights in Peru Project. Funded by the United States Department of Labor Cooperative Agreement No. IL-23987-13-75-K*. 2015. Retrieved October 2019, from DOL.GOV: <https://www.dol.gov/sites/dolgov/files/ILAB/reports/Final%20Evaluation%20Report%20Peru%20Strengthening%20Unions%20Project.pdf>

<sup>19</sup> However, the Solidarity Center requested and provided a no-cost extension until April 30, 2015.

<sup>20</sup> O'Brien and Associates International (2015), *op. cit.*

<sup>21</sup> For example, textile, mining, and agriculture sectors.

<sup>22</sup> These training sessions covered topics such as internal organizing, how to build capabilities, international mechanisms to protect labor rights, leadership, communications, and legal advice, among others.

Both projects -USAID and USDOL- created a virtuous circle because the unions used the information that they gathered and processed to raise a concern across different actors about the harmful effects of the NTE law during the advocacy campaign.<sup>23</sup> Although the institutional and political context has not changed, unions now have more skills to navigate through the system and raise their voices when their rights are vulnerable.

### *Cascade Effects of Multi-stakeholder Alliances*

During November 2012, the Fair Labor Association<sup>24</sup> (FLA) hosted a multi-stakeholder forum to discuss the causes of the precarious work in the Americas. In the case of Peru, the panel members identified the Decree 22342 as a key barrier to addressing the rise of precarious employment, enabling the abuse of short-term contracts under a suspect 'legal' justification.<sup>25</sup> As a result, there was a consensus to work closely on addressing strategies to support the repeal of Decree 22342.

One relevant change in 2011 by the Code of Conduct and Compliance Benchmarks of the FLA was to consider as a reiterate violation the use of multiple short-term contracts to perform permanent business activities. Consequently, brands or suppliers affiliated to the FLA would have to work together to eliminate the practice or gradually offer a reparation for the affected workers.

The first audit -in Peru- under the new rules was done to one of the firms that belong to the Forty-Seven Brand's supply chain in the apparel sector. The audit report pointed out as a second finding "It is a factory

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<sup>23</sup> Albertson, P. (2010) claims that a "framework for technical assistance and created tools for advocacy efforts" are an alternative example of how to address problems with labor law enforcement. Moreover, she states that "technical assistance has helped thousands of workers in trade partner countries and can help bridge divides surrounding FTA passage." See Albertson, P. *The Evolution of Labor Provisions in US Free Trade Agreements: Lessons Learned and Remaining Questions: Examining the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)*. Stan. L. & Pol'y Rev., 2010, vol. 21, p. 493.

<sup>24</sup> The FLA has the mission to promote the improvement of labor standards. In 2011, the organization changed the norm No. 9 of the Employment Relationship of its Code of Conduct and Compliance Benchmarks (See Annex 1). Since then, brands affiliated to the FLA (and their supply chain) shall not use contingent or temporary workers for regular activities of the business and shall not hire the same employees for this work multiple and consecutive times.

<sup>25</sup> FLA, *FLA Hosts Americas Group Meeting on Precarious Work*, 2012a. Retrieved October 2019, from Fair Labor Association: <https://www.fairlabor.org/blog/entry/fla-hosts-americas-group-meeting-precarious-work>

employment practice to use temporary contracts on a regular basis for multiple short-term periods. All production employees renew their employment agreements every three months." Moreover, the audit report recommended ending this practice, and defined a two-year action plan between the factory and the company to address this issue.<sup>26</sup> According to Jessica Vasquez, the Regional Manager for the Americas from FLA, the textile industry in Peru did not welcome this new practice; the firms' CEOs did not understand why an NGO was considering a legal practice as a violation of the FLA's code of conduct.

However, Martín Reaño, manager director of Comité Textil y Confecciones de la Sociedad Nacional de Industrias,

highlights that the auditory processes have been part of their client's requirements every time the industry sells products abroad, and that the textile sector's exports has been growing since 1992.<sup>27</sup>

Meanwhile, the congressman and former trade unionist, Justiniano Apaza, introduced, endorsed by the FNTTP, a draft law/bill N° 761/2011-CR aimed at changing the Decree 22342. Apaza proposed to repeal the articles 32, 33, and 34. The draft proposed that workers under Decree 22342 would be under the Decree-Law 728 that rules the private sector. As of January 2020, this draft is still waiting for approval. The draft law also was endorsed by the IndustriAll Global Union's General Secretary Jyrki Raina, who visited Peru in May 2013 to advocate for the 80 thousand textile workers who are hired under this system.<sup>28</sup>

In this framework, two correspondences to President Humala in March 2013 helped to raise awareness in the textile sector, specifically about the importance of improving their labor practices and their compliance with international labor codes:

- The Executive Director of the FLA expressed to the affiliated brands' concerns about the "legislation that permits the employment of workers through the use of repeated short-term

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<sup>26</sup> FLA, *Independent External Assessment Report - Company Forty Seven Brand in Peru - Assessment Number AA000000021*. 2012b. Retrieved October 2019, from Fair Labor Association: <https://www.fairlabor.org/transparency/workplace-monitoring-reports>

<sup>27</sup> Indeed, Reaño states that Sociedad Nacional de Industrias (SDI) has also served as a connecting point or mediator between brands and firms when a firm has refused to comply with the audits because they embrace and promote a strong commitment with good business practices.

<sup>28</sup> J. Paucar. *El actual régimen laboral textil es una amenaza para trabajadores y empresarios*, 2013, Lima, Peru. Retrieved July 2019, from <https://lamula.pe/2013/5/14/el-actual-regimen-laboral-textil-es-una-amenaza-para-trabajadores-y-empresarios/jorgepaucar/>

employment contracts." Moreover, the letter explains that "this practice does not provide stability to workers in employment and erodes workers' access to fundamental labor rights."<sup>29</sup>

- The corporations 47 Brand, The Life is Good Company, New Balance, Nike, PVH Corp, and VF Corporation expressed: "We are also concerned that Decree Law 22342, which allows 'non-traditional' exporting companies to employ workers on fixed-term contracts, acts to encourage and condone violations of labour rights and therefore poses an obstacle to the proper application of our codes of conduct."<sup>30</sup> Moreover, they requested President Humala's support to repeal the labor provisions of DL 22342 in Congress.

However, the Executive branch sent a clear message through the Ministerio de Trabajo y Promoción del Empleo (MTPE). The Minister Nancy Laos Caceres claimed that it was not a good time to change the law.<sup>31</sup> In fact, during the first trimester of 2013, most of the nontraditional export sector decreased. For example, the exports in the textile sector decreased by 20 percent during the first trimester of 2013 -compared to the first trimester 2012-<sup>32</sup> and this negative trend continued up to 2016 (Figure 1).

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<sup>29</sup> FLA, *Open letter to Ollanta Humala Tasso - President of Peru, from Jorge Perez-Lopez Executive Director - Fair Labor Association*, 2013. Retrieved October 2019, from Fair Labor Association:

[https://www.fairlabor.org/sites/default/files/lettertoperupresident\\_fla\\_march\\_4\\_2013.pdf](https://www.fairlabor.org/sites/default/files/lettertoperupresident_fla_march_4_2013.pdf)

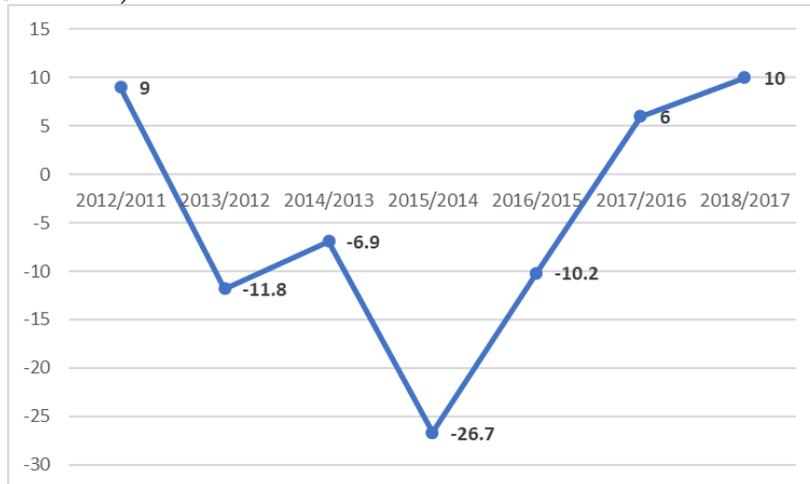
<sup>30</sup> 47 Brand, The Life is Good Company, New Balance, Nike, PVH Corp and VF Corporation, *Joint Letter to President Ollanta Humala Tasso from 47 Brand, The Life is Good Company, New Balance, Nike, PVH Corp and VF Corporation*, 2013. Retrieved October 2019, from Maquila Solidarity: <https://en.archive.maquilasolidarity.org/sites/maquilasolidarity.org/files/Joint-Letter-to-President-Ollanta-Humala-March-4-2013.pdf>

<sup>31</sup> Asociación de Exportadores, *ADEX defiende régimen de contratación laboral para impulsar exportaciones no tradicionales*. *Peru Exporta*, 2013, p. 36. Retrieved November 2019, from [https://issuu.com/adex\\_1/docs/385final/36](https://issuu.com/adex_1/docs/385final/36)

<sup>32</sup> Mincetur, *Reporte Mensual de Comercio Exterior*, 2013. Retrieved December 2019, from [https://www.mincetur.gob.pe/wp-content/uploads/documentos/comercio\\_exterior/estadisticas\\_y\\_publicaciones/estadisticas/exportaciones/2013/RM\\_Expo\\_Marzo\\_2013.pdf](https://www.mincetur.gob.pe/wp-content/uploads/documentos/comercio_exterior/estadisticas_y_publicaciones/estadisticas/exportaciones/2013/RM_Expo_Marzo_2013.pdf)

x

Figure 1: Percentage Change of Peruvian Textile Sector's Total Export (US\$ Millions)



Source: Monthly Report (December) on Foreign Trade (2011- 2018) – Mincetur.

Jessica Vasquez states that the letters also sent a message to the firms: their clients favored repealing the law that allows employers in the textile sector to hire workers on consecutive short-term employment contracts and limits workers to exercise their labor rights freely. Consequently, the clients will pressure to implement sustainable remediation actions to revert this practice in the garment sector.

Therefore, trade associations<sup>33</sup> representing the employers in Peru sent a letter to the brands' CEOs as a reply to the letter signed by the heads of HR or Corporate Compliance's departments.—In this letter, representatives from those trade associations expressed that "the amendment and/or repeal of the Decree No. 22342, which your office intended to recommend to our authorities, is not subject to any international commitment of Peru, and therefore, our country is free to maintain this regimen."<sup>34,35</sup>

<sup>33</sup>Such as Sociedad Nacional de Industrias (SDI), Cámara de Comercio Americana del Perú (AMCHAM), Asociación de Exportadores (ADEX), Sociedad de Comercio Exterior de Perú (COMEXPERU), Cámara de Comercio Lima (CCL) and, Confederación Nacional de Instituciones Empresariales Privadas (CONFIEP).

<sup>34</sup> See SDI, et al. Joint letter to 47 Brand, The Life is Good Company, New Balance, Nike, PVH Corp, and VF Corporation; from SDI, AMCHAM, ADEX, COMEXPERU, CCL, and CONFIEP. 2013, March 18. Lima, Peru.

Furthermore, Reaño highlights that "some of the brands that signed the letter to President Humala, did not have their principal activities in Peru." He argued that "Peru is sometimes the second best and, others the serving because Peruvian prices are higher than other countries." To illustrate, during 2011 Peru accounted for only 2.5% of American imports of clothing made with cotton.<sup>36</sup> By extension, it would be fair to say that FLA indirectly acknowledged Reaño's point in its Annual Report 2014 when they mention that "despite a very small commercial presence (less than five percent of the factory [in Peru] total production capacity), New Balance took an active role in investigating the initial complaint"<sup>37</sup> The FLA statement made reference to the third-party complaint against the Hilandería de Algodón Peruano S.A. (HIALPESA) accepted in 2013.<sup>38, 39</sup> According to Solorzano (2015) "from the Peruvian, pro-business perspective, perhaps most repugnant was the idea that such foreign, international companies were trying to undermine Peru's recent competitiveness in the global market."<sup>40</sup> Thus, the reason why the business sector strongly resists any attempt to change the Decree 22342 is because this law allows them to reduce non-wages costs. Under the General Regime, the non-wages costs represent about 60 percent of the total labor cost.<sup>41</sup> Otherwise, the Peruvian export sector claims that they would not be able to compete (e.g., against Asian countries who have lower labor costs) and therefore gain a share of the U.S. market.

<sup>35</sup> Although there was not a real change in the regulations, both letters were discussed in different news outlets.

<sup>36</sup> "Evaluación del Proyecto," *Evaluación del Proyecto de Ley 761 que propone derogar el régimen laboral de las exportaciones no tradicionales. Exposición a la Comisión de Comercio Exterior y Turismo*, 2012. Retrieved September 2019, from Doc Player: <https://docplayer.es/78109087-Evaluacion-del-proyecto-de-ley-761-que-propone-derogar-el-regimen-laboral-de-las-exportaciones-no-tradicionales.html>

<sup>37</sup> FLA, *2014 Annual Report*, 2014a. Retrieved October 2019, from ISSUU: [https://issuu.com/fairlabor/docs/2014\\_fla\\_apr](https://issuu.com/fairlabor/docs/2014_fla_apr)

<sup>38</sup> FLA, *Final Report: Third Party Complaint - HIALPESA (Peru)*, 2014b. Retrieved October 2019, from Fair Labor Association: [https://www.fairlabor.org/sites/default/files/documents/reports/hialpesa\\_final\\_report\\_october\\_2014.pdf](https://www.fairlabor.org/sites/default/files/documents/reports/hialpesa_final_report_october_2014.pdf)

<sup>39</sup> The primary arguments of this complaint were that the use of short-term contracts affected the calculus of the seniority and the closure of the plants to reduce the number of union members.

<sup>40</sup> See Solozarno, *op. cit.*, 838.

<sup>41</sup> Consejo Privado de Competitividad, *Informe de Competitividad 2019*, 2019. Retrieved July 2019, from Peru Compite: <https://www.compite.pe/wp-content/uploads/2019/02/informe-de-competitividad-2019.pdf>

In March 2014, a new hiring guideline under Decree 22342 was issued by the Second Chamber of the Constitutional Court through the Judgment of the File EXP. N.º 02278-2013-PA/TC.<sup>42</sup> It established jurisprudence defining guidelines about when a contract would be subject to the Decree 22342. The sentence set that firms can hire under Decree 22343 if the worker's settlement includes the international purchase order that originated the need to have an additional worker or the production plan to accomplish it. In brief, the contract must express the objective case that requires new hiring. Otherwise, the agreement cannot be considered valid under the NLE law.

A judge [who prefers to remain anonymous] stated that this judgment was relevant for two reasons. First, it was the first time that the judiciary moved forward to protect workers under Decree 22342. The judge stated that there have been many similar cases, but the court decisions were in favor of the firms. Second, before the judgment, the only way that the court would agree to "denaturalize a labor agreement" was if they found evidence that the firm did not sell 40 percent of its production in the international market. However, the judge stated that firms learn quickly, so since then, most of the contracts include the new requirement.

Notwithstanding, the Constitutional Court's judgments have not run away from controversies. For instance, Miguel Canessa [Professor at Pontificia Católica del Perú] states that since 2002<sup>43</sup> The Constitutional Court has been delivering sentences in favor of protecting workers' labor rights. By contrast, others believe that those judgments curtail the firms' flexibility to manage their workforce because any labor dispute can end up in a trial that would define new guidelines or interpretation for the current labor regulations.

Meanwhile, the FLA is one of the international organizations that has been very active in raising awareness about the excessive use of hiring temporary workers. The FLA keeps encouraging brands to work with their supply chain and unions to reduce this practice. To illustrate, in an

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<sup>42</sup> Tribunal Constitucional, *Sentencia del Tribunal Constitucional EXP. N.º 02278-2013-PA/TC - Víctor Luis Acero Gómez*, 2014, Lima, Perú. Retrieved from <https://tc.gob.pe/jurisprudencia/2014/02278-2013-AA.html>

<sup>43</sup> Prof. Canessa refers to the Judgment's Chamber of the Constitutional Court (File EXP. N.º 1124-2001-AA/TC), which established jurisprudence that the dismissal for union activities is not only illegal, but it also demands that the dismissed workers must return to their jobs. For more information see: Tribunal Constitucional, *Sentencia del Tribunal Constitucional EXP. N.º 1124-2001-AA/TC. Sindicato Unitario de Trabajadores de Telefonía del Perú S.A. y FETRA TEL*, 2002. Retrieved January 2020, from <https://www.tc.gob.pe/jurisprudencia/2002/01124-2001-AA.html>

Issue Brief published in 2014 the FLA stated "because the law allows employers in the apparel and textile export sector to re-hire the same workers repeatedly, employers can undermine the original intent of the law, and in so doing, deny their workers the benefits of full-time employment." For this reason, the FLA "encourages such affiliates to express strong preferences for permanent contracts and employment stability, and to explain to their suppliers how repeated temporary contracts violate the FLA Code of Conduct" and meet higher standards than the Peruvian laws.<sup>44</sup>

## 2. The Submission

### *A New Mechanism is Ruling*

The FTA established a clear commitment for each party to supervise and enforce its labor law.<sup>45</sup> Specifically, Peru and the United States committed to (i) "reaffirm their obligations" as an ILO's members; (ii) "Each Party shall adopt and maintain in its statutes and regulations, and practices [...] the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998);" (iii) "does not derogate from or waive the protections of its labor laws to encourage trade with the other Party or to attract investment;" and, (iv) ensure that workers have access to "fair, equitable, and transparent procedures in the enforcement of labor laws."<sup>46</sup> Since the FTA also established a supervisory system (see Box 2), and an explicit sanction<sup>47</sup> if a party does not comply with its commitments,<sup>48</sup> the

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<sup>44</sup> FLA, *Issue Brief: Short-term Contracts in Peru*, 2014c. Retrieved October 2019, from Fair Labor Association: [https://www.fairlabor.org/sites/default/files/documents/reports/october-2014-short-term-contracts-in-peru\\_0.pdf](https://www.fairlabor.org/sites/default/files/documents/reports/october-2014-short-term-contracts-in-peru_0.pdf)

<sup>45</sup> Harrison (2019) highlights that "while there were only three trade agreements with labour provisions in 1995, this increased to 77 by 2016, elevating the overall share of trade agreements with labour provisions from 7.3 per cent in 1995 to 28.8 per cent in 2016[...]. As of 2016, 136 countries had at least one trade agreement that included labour provisions." See Harrison, J. *The Labour Rights Agenda in Free Trade Agreements*. The Journal of World Investment & Trade, 2019, vol. 20, no 5, p. 705-725.

<sup>46</sup> USTR, nd, *op. cit.*

<sup>47</sup> This feature, contrasted with other labor mechanisms like the ones offered by the ILO, are not binding. For example, although Peru has ratified the eight\* ILO's Fundamental Conventions all in force, Peru has faced around 374 Complaints procedures only for Freedom of Association cases\*\* in the ILO since the 1950's. Nevertheless, Mujica claims that the Peruvian government -most of the time- tends to disregard ILO's recommendations.

workers in the textile and agriculture sector expected that the complaint would add enough pressure to abolish Decree 22342.

Box 2: Supervisory System<sup>49</sup>

The FTA has a supervisory system to make partners accountable for their commitments. The Office of Trade and Labor Affairs (hereinafter OTLA) of the U.S. Department of Labor's Bureau of International Labor Affairs takes up complaints -and determines whether to accept it or not- from any person who alleges that any of the parties fail to comply with its obligations under the labor chapter. If the OTLA accepts the submission for revision, the OTLA will conduct an examination that shall include a process that allows the public to submit information -by file or public hearings- about the submission. Once the review is completed, OTLA publishes a report with a summary of the proceedings, findings, and recommendations.<sup>50,51</sup>

\* Fundamental Conventions: 8 of 8, Governance Conventions (Priority): 3 of 4, Technical Conventions: 65 of 178. See ILO, *Ratifications for Peru*, nd. Retrieved November 2019, from NORMLEX - Information System on International Labour Standards: [https://www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:11200:0:NO::P11200\\_COUNTRY\\_ID:102805](https://www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:11200:0:NO::P11200_COUNTRY_ID:102805)

\*\*Peru is member since 1919. Peru has 161 closed cases since the 50's, 14 active cases and 19 follow-ups complaints regarding Freedom of Association. See ILO. *Supervising the application of International Labour Standards for Peru*, 2019. Retrieved November 2019, from NORMLEX - Information System on International Labour Standards: <https://www.ilo.org/dyn/normlex/en/?p=1000:11110::NO::>

<sup>48</sup> Basically, the commitment is to show enough effort to enforce its labor codes.

<sup>49</sup> Powell & Chavarro (2008) describe the new mechanism as following “the Chapter 21 dispute settlement provides for dispute panel procedures which set high standards of openness and transparency through open public hearings, public release of legal submissions by parties, special labor or environment expertise for disputes in these areas, and opportunities for interested third parties to submit views. Even though Chapter 21 emphasizes promoting compliance through consultation and trade-enhancing remedies, it establishes an innovative enforcement mechanism which includes monetary penalties to enforce commercial, labor, and environmental obligations of the trade agreement. See Powell, S. J.; Chavarro, P. A., *op. cit.*

<sup>50</sup> Previously consulted with at “the Office of the United States Trade Representative and the Department of State.

<sup>51</sup> Office of the Secretary of Labor, *Bureau of International Labor Affairs; Notice of Reassignment of Functions of Office of Trade Agreement Implementation to Office of Trade and Labor Affairs; Notice of Procedural Guidelines*, 2006. Retrieved October 2019, from Federal Register: <https://www.federalregister.gov/documents/2006/12/21/E6-21837/bureau-of-international-labor-affairs-notice-of-reassignment-of-functions-of-office-of-trade#p-30>

If the OTLA considers that its counterpart is not complying with its commitments, OTLA can invoke cooperative consultations to determine whether the other party is failing "to effectively enforce its labor law." After those consultations, it is also possible to invoke the Agreement's general dispute settlement mechanism requesting more consultations or meetings with the Free Trade Commission. If the former cannot resolve the dispute, the issue should be referred to the dispute settlement panel.<sup>52</sup> This panel can hold more consultations, panel procedures, or suspend benefits if the matter is not resolved.<sup>53</sup>

Source: Office of the Secretary of Labor, *op. cit.*

There is no clear clue of which organization came up and promoted the idea to file the complaint under the FTA's labor chapter. However, there is an apparent consensus that this initiative was a result of all the training and the advocacy campaign developed during the execution of the projects financed by USAID and USDOL and executed by the Solidarity Center. Among the labor NGOs and unions, there was a genuine interest to explore how this mechanism would help to enhance labor rights compliance in Peru.

By contrast, Mujica disagrees with this idea. He argues that the Peruvian's labor trade unions have used international mechanisms to advocate for their rights in the past.<sup>54</sup> Consequently, he clarifies that SC's training strengthened capabilities that the labor unions were already developing with the support of other local actors such as CEDAL and PLADES. Thus, this initiative cannot be understood as a result of a single event (such as the learning that the unions acquired there) or attributable to a single actor.

Giovanna Larco, PLADES's Executive President, highlights that the local labor action did not have enough consensus to make legislative changes. There was no support in Congress to approve any amendment to the Decree 22342. Consequently, it is not surprising that the mechanism offered by the FTA became a viable alternative to include international

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<sup>52</sup> Office of the Secretary of Labor, *op. cit.*

<sup>53</sup> USTR, nd, *op. cit.*

<sup>54</sup> To illustrate, he mentions: (i) the submission filed in 1994 in the USTR due to the Collective Labor Relations Act (in Spanish Ley de Relaciones Colectivas de Trabajo), (ii) in 2000, joined with the AFL-CIO and ILFR; they requested a revision to Peru as a beneficiary of the Generalized System of Preferences (SGP) and, (iii) their participation during the middle 2000s in the bargaining process that modified some aspect of the Free Trade Agreement between the U.S. and Peru.

pressure that pushed the Peruvian government to improve labor conditions.<sup>55</sup>

Gerardo Olortegui, FNITP's Secretary of Defense, argues that the U.S. and Peru agreed to respect the ILO's Core Conventions. However, even though the NTE law does not mention anything about free association, it allows violations to the convention No. 87 because if a worker becomes a union member, they will never get a new contract.

Vicente Castro, FTTP's National Secretary-General, affirms that the practice of using short term contracts in the textile sector increased after the FTA's implementation.<sup>56</sup> Similarly, Maximiliano Gutierrez, Hialpesa's General Secretary, states that Hialpesa's union decided to participate in the claim because the NTE law harms workers, and the Peruvian system does not offer an effective channel to enforce workers' rights. Instead, new law drafts are oriented to cut benefits.<sup>57</sup>

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<sup>55</sup> Paiement (2018) highlights that “FTAs offer a tempting venue for labor unions and workers' rights groups to draw attention to systematic rights infringements when domestic courts prove incapable or unwilling to protect labor rights.” Moreover, he recommends to keep in mind “the strategic use [in transnational labor law] of the arbitral venue as a potential means for transnational labor enforcement, and the broader goal of achieving social and economic justice for laborers, wherever they work.” See Paiement, P., *Leveraging Trade Agreements for Labor Law Enforcement: Drawing Lessons from the US-Guatemala CAFTA Dispute*, *Georgetown Journal of International Law* 49, no. 2 (2018): 675-692.

<sup>56</sup> The number of short-term contracts under Decree 22342 increased in an annual rate of 10 percent between 1991 and 2011. See EQUIDAD, P., CGTP, CATP, FNITP, CUT, ILRF, FENTEAGRO e Inspectores de Trabajo de la SUNAFIL. *Documento de Actualización referido a la Queja presentada ante la Oficina de Asuntos de Comercio y Trabajo de (OTLA) Bajo capítulos 17 (Trabajo) y 21 (Solución de Controversias) del Acuerdo de Promoción Comercial entre Estados y Perú con respecto a la falta de voluntad del Gobierno de Perú para cumplir con las recomendaciones propuestas por el Departamento de Trabajo (USDOL) para garantizar el respeto de las normas laborales incluidas en el acuerdo de promoción comercial Perú – Estados Unidos*. Junio 2019, Lima. PLADES et al. (2014), state that the short-term contracts raised 16.6 percent between 2011 and 2012. Moreover, during this time, 30 percent of the cases investigated by the National Superintendence of Labor Inspection corresponded to short-term contracts. See PLADES, CEDAL, IESI, P. E., CGTP, CUT, CATP, & CTP, *La Agenda Laboral Pendiente del TLC Perú - Estados Unidos: Cuando la Competitividad se basa en la reducción de los derechos laborales*, 2014. Retrieved septiembre 2019, from IESI PERU: <https://www.iesiperu.org.pe/documentos/publicaciones/TLC%20EEUU%20PERU.pdf>

<sup>57</sup> For instance, (i) Hialpesa's union has members that have worked with short-term contracts over twenty years; (ii) if a worker affiliated to the union or refuses to work overtime they will not get a new contract, (iii) the labor inspectorate did not have enough staff to enforce labor law, (iv) if the firms do not comply, the labor inspection ns are useless, and, (v) judiciary processes take around ten years.

It is relevant to mention that the unions have been able to get some court settlements in the worker's favor. However, workers state that the rule is still there. So along with its pervasive effects that go beyond the workplace, as Castro indicates, there has also been a negative impact on workers' personal life.

Mujica also claims that the textile unions presented their cases during the public and yearly hearing of the Labor Council in October 2014. This council is one of the supervisory bodies created by the FTA, having representatives from both governments, Peru and the U.S. At that moment, different members from the society can raise their voice and express their opinion about the implementation of the FTA. However, after the hearing, there has not been any concrete action in this regard. Thus, the unions decided to explore the new mechanism and file the complaint.

### *How to Make a Case?*

For making the case, the complaint attempted to address four key factors: (i) identify how the Peruvian government fails its commitments under the FTA; (ii) identify the channel that allows the failure to become a pattern; (iii) find well documented examples that illustrate systematic violations and, (iv) offer a sense about how many workers are affected by this failure.

The submission states that the Peruvian government fails to protect the right of freedom of association. Employers from the nontraditional export sectors can dismiss workers who are affiliated to a union using the legal argument that the contract has expired because workers were hired under the Decree 22342.

According to Olortegui, around 80 percent of the textile workers -in the formal sector- have short term contracts under the NTW law.<sup>58</sup> The low rate of unionizations -about 5 percent in the private and formal<sup>59</sup> sector-

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<sup>58</sup> In some large firms the number of employees hired under the Decree 22342 represents around 90 percent of the total labor force of the firm. See ILRF, Peru Equidad, CGTP, CATP, CTP, CUT, FNTP, FTTP, FENTAGRO y Sindicato SUNAFIL, *Presentación Pública a la Oficina de Asuntos de Comercio y Trabajo (OTLA) bajo Capítulos 17 (Trabajo) y 21 (Solución de Controversias) del Acuerdo de Promoción Comercial entre Estados Unidos y Perú con respecto a la falta del Gobierno de Perú de cumplir con las normas laborales incluidas en el acuerdo de promoción comercial Perú-Estados Unidos*, Julio 2015.

<sup>59</sup> "In 2004, nearly 75.2% of the non-agricultural labour force had informal employment, a percentage that fell to 68.6% in 2012." See FORLAC-ILO. *Trends in informal employment in Peru: 2004 – 2012, 2014*. Retrieved January 2020, from ILO:

allows firms to keep low wages in the textile sector because collective bargaining is at the firm's level.<sup>60</sup> Nevertheless, Larco states that most of the time, once a union settles a contract, the firms tend to expand the benefits agreed in the collective bargaining agreement to the rest of non-union workers to discourage that more workers join the union.

Larco highlights that most of the unions are in the spinning sector because they are most likely to have permanent jobs. However, the spinning sector represents a small part of firms in the textile sector. The rest of the firms are in the garment business, which has a younger workforce, a more female prevalence, more short-term contracts, and less unions. This context may explain why Mincetur does not find a significant difference between worker's wages in the textile sector affiliated to unions and their non-union peers.<sup>61</sup> This is an unusual result in the literature that compares different labor outcomes between union and non-union workers. Olortegui claims that under this context, firms can compete in the international markets avoiding non-wages costs that workers with open-ended contracts are entitled under the General Regime.

Although the average number of workers with contracts under Decree 22342 represents a small part of the workforce,<sup>62</sup> between 2.18 and 2.3 percent of the total private and formal workforce in Peru during 2013 and 2017,<sup>63</sup> most of the workers employed under this regime belong to the textile sector.

The Ministry of Labor reports the number of contracts presented under Decree 22342. Table 1 shows that Lima holds about 64 percent of those contracts in Peru. The average number of contracts presented by the textile sector in the capital city was 127,148, representing about 84 percent

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[https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/documents/publication/wcms\\_245891.pdf](https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/documents/publication/wcms_245891.pdf)

<sup>60</sup> Larco states that the unions in the textile sector are mostly minority; this means that they only can bargain with their employers for their affiliates. According to Larco, the largest union in the sector is the Topy Top's union, with 600 members, while the rest are unions of 100 or at most 200 members in firms with more than a thousand employees.

<sup>61</sup> See Mincetur, *Posición del Gobierno del Perú respecto de la comunicación presentada por organizaciones de la Sociedad Civil por un supuesto incumplimiento del Perú en sus compromisos laborales y ambientales, contenidos en el acuerdo comercial entre el Perú y la Unión Europea*, 2018. Retrieved July 2019, from Acuerdos Comerciales: [http://www.acuerdoscomerciales.gob.pe/images/stories/union\\_europea/2018/Posicion-Peru-ComercioyDesarrolloSostenible.pdf](http://www.acuerdoscomerciales.gob.pe/images/stories/union_europea/2018/Posicion-Peru-ComercioyDesarrolloSostenible.pdf)

<sup>62</sup> Between 2013 and 2017, the average number of workers hired monthly under Decree 22342 has been between 68,888 and 76,123 workers. See Mincetur (2018), *op. cit.*

<sup>63</sup> See Mincetur (2018), *op. cit.*

of the total contracts in Lima, and about 54 percent of the total contracts presented in Peru that used the Decree 22342. This evidence suggests that the textile sector is the sector that most relays on the intensive use of short-term contracts under the NTE law.

TABLE 1: Number of Contracts presented by the Manufacturing Industry (Textile Sector) 2002-2014 - Decree-Law No 22342

	2002	2004	2006	2008	2010	2012	2014
Preparation and Spinning Textile Fibers, Textile products	16,988	19,565	25,077	29,124	36,462	31,238	30,547
Manufacture of Fabrics and Articles of knitting and crochet.	14,724	15,972	18,989	22,914	17,772	12,479	7,364
Manufacture of Clothing clothes, except leather clothes	34,373	70,045	99,751	95,714	99,415	96,425	72,368
Other textile classifications			2,065	5,002	8,724	3,878	3,064
Sub Total Textile Sector (1)	66,085	105,582	145,882	152,754	162,373	144,020	113,343
Total Lima (2)	86,581	126,776	171,216	179,504	196,025	164,539	131,921
% (1) / (2)	76%	83%	85%	85%	83%	88%	86%
Total Renewal Lima Textile (3)	46,743	66,173	91,139	127,731	111,764	109,667	89,506
% (3) / (1)	71%	63%	62%	84%	69%	76%	79%
Total Peru (4)	155,174	186,525	246,314	272,227	273,146	254,565	243,866
% (2)/ (4)	56%	68%	70%	66%	72%	65%	54%
% (3)/ (1)	43%	57%	59%	56%	59%	57%	46%

Source: Author's calculations using data from the Statistical Yearbooks, Ministry of Labor and Employment Promotion Peru.

To portray "the systematic failure" of the Peruvian government commitments under the F.T.A., the document describes the behavior of five firms with more labor rights violation records in the textile sector, and that serve American clients. These firms are Topy Top S.A., Hialpesa,

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Inca Tops S.A., Corporación Texpop S.A. and, Fábrica de Tejidos Pisco S.A.C. Vicente Castro and Gerardo Olortegui state that the textile unions spent around a year collecting facts and evidence for more than one hundred cases using the labor documentation form created by the Solidarity Center and PLADES during the projects financed by USAID and USDOL. The selection criterion was that the case exemplifies a spread and systematic violation of a fundamental labor right -in this case, retaliation for union activities using the Decree 22342.

To reinforce the evidence about the relationship between the use of hiring laws (with fewer non wage costs to promote exports) and labor rights violations in nontraditional industries. The submission also included cases from the agroindustry that portray the same behavior, but under Law No. 27360 approved in 2000. The firms included are Camposol, Grupo Palmas y Sociedad Agrícola Virú. By contrast with the textile sector, the average number of workers hired monthly under Law No. 27360 has been growing sharply during the last years — for instance, between 2012 and 2019, from 210,298 to 314,769, representing in 2018 9.5 percent of the total private workforce in Peru.<sup>64</sup>

As Celestina Carraza Ruiz an agroindustry worker affiliated to the GCTP reports, "the Law 27360 curtails our rights, for example, less day of vacations, not severance pay. The firms grow selling their products to other countries while we get worse wages. Also, we suffer retaliation for being union leaders; the firm does not want that we advocate for us; they want us on our knees." Similarly, Juan Antonio Herrera, a worker from Sociedad Agrícola Virú asserts, "in the agroindustry, our work is conditioned to union disaffiliation."

The submission also pointed out that the Peruvian government cannot ensure that workers hired under Decree 22342 and the Law 27360 have access to a "fair, equitable, and transparent procedures in the enforcement of labor laws."<sup>65</sup> The submission attributed this failure to the lack of resources and mechanisms to supervise and enforce labor rights by the National Superintendence of Labor Inspection (SUNAFIL). In addition, the government's passivity to lead legislation changes to address those problems.

To underpin this statement, the signatories claimed that since Law 30222 in 2014, and for the next three years, SUNAFIL would adopt a preventive

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<sup>64</sup> Source Ministerio de Trabajo y Promoción del Empleo, Planilla Electrónica's Database.

<sup>65</sup> USTR, nd, *op. cit.*

approach. As a result, when an inspector identifies a labor infraction, they only could offer orientations to employers about how to improve its labor practices (rather than apply a fine) and then conclude the inspection procedure. In other words, as Máximo Gutierrez argues, "before the law, SUNAFIL applied fines, now SUNAFIL gives them many chances to remedy, but they keep doing the same bad practices."

### *Challenges during the First Steps of the Process*

In Giovanna Larco's view,<sup>66</sup> the most challenging part for shaping the submission was to gather the cases because, for an international claim, the facts must be very well defined, and it is tough that unions give you robust information. For this reason, she highlights the relevance of the use of the form to document labor rights violations and the capacitation in labor rights that unions received since the FTA's implementation through the Solidarity Center and other local labor NGOs.

Similarly, Javier Mujica states that textile workers chose the cases based on what they learned during the capacitation on labor rights and mechanisms for enforcing compliance that he taught for the Solidarity Center's project. "There are a lot of considerations to keep in mind, for example, is a violation of a right protected by the FTA? Does the practice represent a pattern over time? Does it show a Peruvian government's lack of action? Does it affect trade? Not all the cases have enough evidence for all those factors." The submission presented eight emblematic cases, five from the textile sector, and three from the agroindustry chosen out of around hundreds of cases.

Although Larco emphasized that textile unions did most of the work, she also acknowledged that they would not have been able to file this submission on their own because there is a lot of technical assistance behind this process (e.g., case selection, writing the claim, connecting with other actors, etc.) Larco claims that "unions from the textile sector do not have the money to afford it (as unions in the mining do) because wages in the industry are meager."

Another challenge was building national and international support to file the claim; the two textile federations requested to the Coordinadora de

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<sup>66</sup> PLADES was not involved directly in the submission process because they were working on a USDOL's project and Sunafil by then.

Centrales Sindicales del Perú<sup>67</sup> to also sign the submission on their behalf to give the sense of broad support among workers. Moreover, the FITP and the FNTT also needed cross border solidarity,<sup>68</sup> so they had to get in touch with the American unions. As Larco states, "for any international mechanism, you need the support of local actors in that country to enhance your chances of success."<sup>69</sup>

Most of the actors involved in the submission acknowledge the Solidarity Center's role in this process. They mentioned that SC supported unions and local NGOs in the process of selecting the cases and establishing international alliances. For instance, SC counseled the sorting data process to ensure that the information was relevant (technical advice) and connected the unions with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and with the International Labor Rights Forum (ILRF). In fact, the SC have served as a contact point between different actors; its role has allowed unions to have fluid communication during the whole process with the rest of the actors involved. In this regard, Oscar Muro, the Program Officer from the Solidarity Center office in Peru, claims that "our concern is that each trade union confederation can fight for their labor rights. We have supported them through capacitation since the negotiations for the FTA."

### 3. The Submission has been Filed

The submission was filed with OTLA<sup>70</sup> on July 23, 2015 (day 1), by: The International Labor Rights Forum, Perú Equidad, and seven Peruvian

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<sup>67</sup> Integrated by the Confederación General de Trabajadores del Perú (CGTP), Central Autónoma de Trabajadores del Perú (CATP), Confederación De Trabajadores Del Perú (CTP), and Confederación Unitaria de Trabajadores del Perú (CUT).

<sup>68</sup> Paiement, P. (2018) states that "a transnational coalition of worker interests is precisely the kind of opportunity which labor advocates have been seeking to foster" because "it also illustrates how this can serve as a mechanism for uniting labor rights advocacy efforts across borders rather than pitting labor groups against each other." See Paiement, P., *op. cit.*

<sup>69</sup> According to DiCaprio (2004) "there are few, if any, instances of petition submission where the petitioner submitted unilaterally without the consultation and cooperation of labor groups in the defendant country." Moreover, she states that "Both the AFL-CIO and Human Rights Watch only submits a complaint if groups on the ground support the submission." See DiCaprio, A. *Are Labor Provisions Protectionist: Evidence from Nine Labor-Augmented US Trade Arrangements*. Comp. Lab. L. & Pol'y. J., 2004, vol. 26, p. 1.

<sup>70</sup> The Submissions Under Labor Provisions of Free Trade Agreement are from Bahrain, Colombia, Dominican Republic, Guatemala, Honduras, Mexico, and Peru. Most of the "complaints have been brought by trade unions and labour NGOs from the United

workers' organizations (CGTP, CATP, CTP, CUT, FTTP, and FNTP). The submission was accepted for review (within the 60 days established) by the Notice of Procedural Guidelines<sup>71</sup> on September 21, 2015. Moreover, the OTLA sent a fact-finding mission to Peru on December 6-15, 2015, to gather information about the arguments exposed on the submission and, on March 18, 2016 (within the 180 days), the OTLA emitted the Public Report of Review.<sup>72</sup>

In the public report, the OTLA expressed "significant concerns regarding whether the system in place to protect the right to freedom of association of workers employed on unlimited consecutive short-term contracts in the NTE sectors is sufficient to protect the right to freedom of association." Consequently, the OTLA offered four recommendations, summarized as follows: (i) "implement legal instruments to ensure that the use of short-term contracts in the NTE sectors does not restrict workers' associational rights;" (ii) expand SUNAFIL offices in all regions, (iii) increase SUNAFIL' support for its enforcement activities, and (iv) "expand Labor Courts of First Instance and increase the judiciary's budget for labor cases."<sup>73</sup>

After this public report, the official counterparts for both governments held meetings to discuss the concerns stated in the report.<sup>74</sup> The OTLA would monitor actions that attempt to progress in those concerns, setting the next steps in this submission. At the end of 2019, the OTLA emitted two periodic reviews (December 16, 2016, and April 20, 2018) and the submission is still in progress. As of January 2020, the third periodic review has not been published yet.

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States and its trading partners [...] Such complaints have been investigated in seven countries to [2019], resulting in various follow-ups, including government-level action plans. However, action plans are not always enacted in practice [...]" See Harrison, J., *op. cit.*

<sup>71</sup> Office of the Secretary of Labor, *op. cit.*

<sup>72</sup> USDOL. *Public Report of Review of U.S. Submission 2015-01 (Peru)*, 2016a. Retrieved July 2019, from U.S. Department of Labor: [https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/Public\\_Report\\_of\\_Review\\_of\\_US\\_Submission\\_2015-01.pdf](https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/Public_Report_of_Review_of_US_Submission_2015-01.pdf)

<sup>73</sup> USDOL, 2016a, *op. cit.*

<sup>74</sup> Agusti-Panareda et al (2015) state that "most of the complaints have been dealt with at the level of the national contact point or through ministerial consultations. This limited advancement may, in part, be explained by the strong political component inherent in the enforcement procedure [...]" See Agusti-Panareda, J., Franz Christian Ebert, and Desirée LeClercq. "ILO Labor Standards and Trade Agreements: A case for consistency." *Comp. Lab. L. & Pol'y J.* 36 (2015): 347.

*SUNAFIL's Union Subscribe the Submission*

The first USDOL's fact-finding mission (December 6-15, 2015) matched with a call for a strike on December 9th, 2015, by the SUNAFIL's Union with the slogan "The shoemaker's son always goes barefoot."<sup>75</sup> Once the Sindicato Único de Trabajadores de SUNAFIL's representatives heard about the submission (which pointed out the lack of capabilities to supervise and enforce labor rights by SUNAFIL as one of the problems to comply with labor rights) filed against the Peruvian government, they decided to reach out Perú Equidad.<sup>76</sup> They expressed their interest to subscribe to the claim and showed the problems that they face as SUNAFIL's employees.

According to Victor Manuel Gomez Rojas, the former General Secretary of SUNAFIL's Union, SUNAFIL's representatives have reached out to members of the Congress and the ILO in search of solutions that improve labor inspector's work and employment conditions. Gomez states that the Peruvian government, as an employer (in this case, SUNAFIL as one of its agencies) must lead with the example. Conversely, it fails to comply with the requirements that SUNAFIL evaluates during labor inspections.<sup>77</sup> In an interview with USDOL's mission on December 10th, 2015, they exposed their demands and explained how the lack of budget and inspectors undermines their ability to enforce labor codes in Peru.

A consultant, who prefers to remain anonymous, states that the labor inspectors helped to expose the severity of this case. The critical factor was that the labor inspectors linked their demands as a union (because as workers, they are entitled to rights too) with the defense of labor rights for Peruvian workers because they are a key part in the enforcement of labor codes.

Moreover, the consultant believes that the union who led the submission took an intelligent and strategic decision when they agreed to incorporate the SUNAFIL's union, because they reinforced the submission's argument about the lack of ability by the Peruvian government to ensure that

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<sup>75</sup> See the FaceBook announcement (Sindicato Único de Inspectores de Trabajo de la Sunafil, 2015).

<sup>76</sup> Perú Equidad was the responsible for writing the labor rights' legal framework in the submission.

<sup>77</sup> For instance, Gomez claims that "it does not respect our right to collective bargaining" because SUNAFIL does not comply with the agreement.

workers have access to a "fair, equitable, and transparent procedures in the enforcement of labor laws."<sup>78</sup>

#### 4. Government's Reactions

The union sector interpreted and promoted news about the OTLA's decision<sup>79</sup> to "monitor the issues raised by the submission" and "any progress that the Peruvian's government may make with respect"<sup>80</sup> as suggested evidence that Peru was failing to comply with its commitments under the labor chapter in the FTA. For example, some of them claimed in different news outlets that those failures might put the trade agreement at risk.

Sayuri Bayona, Vice Ministry of Trade in Peru, clarified that "the OTLA's report did not find any violation by the Peruvian government concerning the trade agreement. Peru has 19 trade agreements with more than 50 partners (28 with the European Union) and regardless of the public claims, Peru never has faced a dispute resolution for failing to comply with its labor or environment chapters."

Carlos Rabanal, Coordinator of Labor Affairs at the Ministry of Trade, explains that OTLA's mechanism is to determine preliminarily if there is a breach in the partner's commitments. The OTLA's mechanism is not for pushing regulatory changes, as the unions attempted, if there is no evidence of a violation. Bayona highlights that OTLA's recommendations are not binding.<sup>81</sup> Nevertheless, she reaffirms that since Peru has a collaborative dialogue with the United States, Peru shares with the States

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<sup>78</sup> USTR, nd, *op. cit.*

<sup>79</sup> On December 30, 2010, OTLA received a submission from the Peruvian National Union of Tax Administration Workers (SINAUT), Sindicato Nacional de Unidad de Trabajadores de SUNAT. However, on August 30, 2012, the OTLA's public report does not recommend formal consultations between the U.S. government and the Peruvian government under Article 17.7.1 of the PTPA Labor Chapter. See USDOL. *Public Report of Review of Office of Trade and Labor Affairs U.S. Submission 2010-03 (Peru)*, 2012. Retrieved October 2019, from U.S. Department of Labor: <https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/PeruSubmission2012.pdf>

<sup>80</sup> USDOL, 2016a, *op. cit.*

<sup>81</sup> To illustrate, Albertson, P. (2010) claims that "OTLA... may only make nonbinding recommendations to the U.S. Secretary of Labor regarding whether cooperative consultations..., are appropriate; whether a council of the parties' labor ministers ... should be convened in the event that the initial cooperative consultations fail; and whether the formal dispute settlement process should be initiated." See Albertson, P., *op. cit.*

information regarding the improvements in Peruvian policies and practices.

Notwithstanding, some of O'TLA's recommendations such as the need to build more capabilities for SUNAFIL to increase its enforcement's activities, matched with Peruvian government's agenda and priorities. For instance, Larco and the Congresswoman Ursula Letona (a member of the Congress's Labor Commission), agree that Peru's agenda as a country has driven the restructuring of the Peruvian's inspection primarily because Peru wants to be part of the OECD. Thus, Peru will implement the necessary reforms to join the group.<sup>82</sup>

Nonetheless, the recommendations regarding the Decree-Law 22342 faced staunch opposition among local actors. The arguments for supporting the Decree-Law 22342 besides the reiterated one that this law has been in force before the FTA with the U.S. are summarized as follows:

- Bayona states that there are no free trade agreements banning short-term contracts, because short-term contracts allow firms to adjust their hiring to fluctuations in the business cycle of each market. Moreover, she emphasizes that the requirements for hiring under the Decree 22342 are unambiguous and stringent. For example, the firm must sell 40 percent of its production to international markets. The firm also must present the purchase order identifying the additional quantity requested by its client to the Ministry of Labor to justify short-term contracts under this law and get the approval for the hiring.
- Reaño claims that those recommendations against the Decree interfere with Peru's ability to define its rules. As a result, they make vulnerable the Peruvians' right to self-determination.
- On average, the number of workers hired under the nontraditional export law between 2013 and 2017 was 71,070 per month.<sup>83</sup> This number represents about 2.2 percent of the workers employed

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<sup>82</sup> To illustrate, Peru's decision to be the first country to join the OECD Country Programme in December 2014 can be a clear sign of its interest to join the OECD. This program is a "new instrument for supporting dynamic, emerging economies" (that are committed to best policy practices) to identify areas for future reforms. See OECD. *Launch of the OECD Country Programme with Peru Remarks*, 2014. Retrieved November 2019, from OECD: <https://www.oecd.org/about/secretary-general/launch-of-the-oecd-country-programme-with-peru-remarks.htm>

<sup>83</sup> Source Ministerio de Trabajo y Promoción del Empleo, Planilla Electrónica's Database.

under the General Regime (formal sector). Representing a small part of the labor conditions status quo in Peru.

- Peru is investing its efforts in reducing informality (about 75 percent in 2018) as a way to enhance labor rights for more workers.

The Congresswoman Indira Huilca, a member of the Congress's Labor Commission, argues that the submission and the USDOL's recommendations have gone almost unnoticed in the Congress. The Labor Commission focused its attention on more circumstantial issues, thus, the Commission has not discussed the topic in any ordinary session. If that had been the case, it would have forced congress members to have a position about it. By contrast, the Foreign Commission attempted to review it from a perspective about how it has evolved the FTA with the U.S. through a sub commission,<sup>84</sup> but it did not move forward. Conversely, Letona guesses -she was not a Congress member by then- that the submission has not been discussed in Congress because the executive branch of the government is the official counterpart in the FTA.

## 5. Recommendations' Follow-ups

The USDOL's Public Report of Review of Submission 2015-01 expressed its concern regarding "whether the system in place to protect the right to freedom of association of workers employed on unlimited consecutive short-term contracts in the non-traditional export (NTE) sectors is sufficient to protect that right." Furthermore, "the report raised questions regarding labor law enforcement in Peru more generally, and particularly in the NTE sectors."<sup>85</sup> Since then, USDOL has been in touch with Peruvian authorities, unions, and local NGOs to assess any progress made by the Peruvian government on those matters that have been documented in two periodic reviews (Box 3).

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<sup>84</sup> The sub commission is a small group of congressmen that are part of the Foreign Commission.

<sup>85</sup> See USDOL. *First Periodic Review of Progress to Address Issues Identified in the U.S. Department of Labor's Public Report of Review of Submission 2015-01 (Peru)*, 2016b. Retrieved July 2019, from U.S. Department of Labor: <https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/Peru-Review-Statement.pdf>

Box 3: USDOL's visits and reports

- December 6-15, 2015: first USDOL's fact-finding mission.

*Review of Submission 2015-01, March 18, 2016.*

- October 2016: USDOL technical-level delegation.
- November 2016: U.S. Secretary of Labor Thomas E. Perez led a U.S. delegation that met with President Kuczynski and other senior officials.

*First Periodic Review December 16, 2016.*

- June 2017: a joint USDOL-Office of the U.S. Trade Representative (USTR) technical-level delegation.
- August and December 2017: USDOL and USTR held videoconferences.

*Second Periodic Review April 20, 2018.*

- April 2019: a USDOL technical-level delegation.

Source: Author elaboration based on USDOL's reports.

Although USDOL sent a technical level delegation to Peru in April 2019, the USDOL has not published any update about the progress made by the Peruvian government. Some interviewers have interpreted the 'delay' in the publication as a signal of lack of interest from the Trump administration in this matter.<sup>86</sup> However, it is important to remember that Peru's President Kuczynski quit the presidency in March 2018, and since then, his vice president Mario Vizcarra took office.<sup>87</sup>

This is not the first time that USDOL 'does not comply with the deadline' regarding the publication of its Periodic Review, but this 'delay' has been the longest so far. On October 13, 2017, the Director of the International Department from the AFL-CIO sent a public communication to the Deputy Undersecretary for International Affairs at the U.S. Department of Labor. The letter expressed a concern regarding the lack of commitment of the United States to enforce the labor provisions in its free trade agreements because the Periodic Review was not released on

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<sup>86</sup> According to Harrison (2019) 'Trump's nationalist rhetoric during his campaign made clear that "violations of labour rights abroad [would be] a concern only to the extent that they provided unfair competition which harmed workers in the United States." See Harrison, J., *op. cit.*

<sup>87</sup> Moreover, SUNAFIL changed three times the superintendent in charge during 2018 - the last one was appointed in January 2019. Maybe all those changes plus the lack of public pressure requesting the third report or questioning the noncompliance in the 'deadline' have contributed to this 'delay.'

time. The letter also called to resume the consultation process in order to move to the next stage.<sup>88</sup>

However, it is relevant to clarify that the OTLA's procedural guidelines do not explicitly define how often USDOL should publish the periodic reports, as it does with the Public Report of Review after the acceptance. Consequently, an anonymous consultant interprets that the Periodic Reviews are optional for USDOL. Thus, USDOL may release a new one if the report would present further information that may impact any of the parties. The anonymous consultant also states that the absence of a published Periodic Review does not mean a lack of communication or follow up between USDOL and the parties – indeed, some interviewers reported constant interactions with USDOL staff.

### *SUNAFIL's Improvements*

Although the General Law for Labor Inspection (Law 28806) that rules labor inspection as a service and the duties of inspectors was established in 2006, the creation of the SUNAFIL, which is the agency responsible for promoting, supervising, and enforcing labor law compliance in Peru, was created by Law No. 29981 on January 13, 2013. Before SUNAFIL began operations on April 1, 2014, regional governments oversaw labor codes' enforcement in Peru.

According to Juan Carlos Requejo Alemán, superintendent of SUNAFIL, the problem with regional governments overseeing labor codes' enforcement was that regional governments had other priorities. In other words, financial constraints at the local level, different agendas, and the autonomy about how to inspect firms undermined the ability to enforce labor codes through labor inspections, regardless of whether all the regions received the same guidelines from the Ministry of Labor. Consequently, the creation of an agency only focused on labor inspections was a must for Peru.

The major challenge for SUNAFIL was to transit from the decentralized 26 regional governments to a centralized system. Once SUNAFIL established an office in a region, the activities of the inspection would be

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<sup>88</sup> See AFL-CIO. *Carta a Martha Newton Subsecretaria adjunta para Asuntos Internacionales, Oficina de Asuntos Laborales Internacionales U. S. enviada por Cathy Feingold - Directora del Departamento Internacional*, 2017. Retrieved January 2020, from Trabajo Digno Perú: <http://trabajodigno.pe/wp-content/uploads/2017/10/Peru-Letter-to-ILAB-and-USTR-OCT-2017-traducido.pdf>

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shared with the regional governments.<sup>89</sup> By 2019, regional governments still have full competencies in five regions (Table No. 2).

Table 2: Regional Office and Inspectors

	Coverage			Target	
	2017	2018	2019	2020	2021
Number of SUNAFIL regional offices	14	18	21	26	26
Number of Labor Inspectors	464	671	731	924	924

Source: SUNAFIL

Furthermore, having a presence in all the regions was not enough if SUNAFIL did not expand its coverage (Table 2). Thus, SUNAFIL needed to increase its number of inspectors and train them on different topics such as labor rights, new protocols, and other related topics. Along the same lines, SUNAFIL also created a unified term of employment, wage scales, benefits for each of the three levels of the inspector's career paths. For instance, a significant change is that now, inspectors at the instructor level have more competencies based on how complex are the issues that they will inspect rather than the firm's size.

To face all the challenges that the implementation process has required, SUNAFIL has received technical and financial assistance, to build institutional and operational capacity from the ILO<sup>90</sup> and USDOL. In December 2014, USDOL signed a Cooperative Agreement with Capital Humano y Social (CHS) to implement a 2 million USD project called "Building the Capacity of the Peruvian Labor Inspectorate." This project was implemented by CHS and PLADES<sup>91,92</sup> and was scheduled from December 31, 2014 to December 31, 2018.

The USDOL project invested in two information systems to increase the effectiveness and efficiency of the inspections: Sistema Informático de la Inspección de Trabajo (SIIT), and Sistema de Información Articulado Nacional (SIAN).<sup>93</sup> The goal is to develop algorithms that help to identify firms in which workers are likely to be at high risk for labor rights

<sup>89</sup> For example, regional governments would inspect micro-enterprises while SUNAFIL sets general guidelines and oversees smalls, medium, and large firms.

<sup>90</sup> See <https://www.sunafil.gob.pe/organizacion-internacional-del-trabajo-oit.html>

<sup>91</sup> According to Larco, the USDOL project has been a very complex one, because building capabilities takes time.

<sup>92</sup> See <https://www.dol.gov/agencies/ilab/building-capacity-peruvian-labor-inspectorate>

<sup>93</sup> In English Labor Inspection Information System and The National Articulation Information System respectively

violations and therefore develop targeted inspections there. Moreover, the project has supported: training courses for SUNAFIL's staff, the development of three<sup>94</sup> protocols for inspections and, paid for studies, such as the inspector workload distribution.<sup>95,96</sup> On the other hand, O'Brien Associates International's report (2017) observes that worker organizations "know very little about the project." Therefore, they would like to understand "how the project is trying to strengthen SUNAFIL."

Furthermore, Jesus Barrientos, Intendant of Inspection Intelligence, states that another significant change in SUNAFIL has been the shift from a punitive (or reactive) to a preventive approach. Barrientos claims that "most of the failures to obey labor law are due to a lack of knowledge about the regulations. Thus, it is essential to allow employers to remedy and improve practices rather than apply high fines." For this reason, Barrientos highlights the role of capacitation on labor rights and good practices for employers and unions as a critical element for getting long-term improvements in labor codes compliance.

In both Periodic Review of Progress, USDOL acknowledges that the Peruvian government's commitment to taking "some steps that, if fully implemented, would represent progress towards addressing the USDOL report's recommendations" and gives some examples about it, such as the increase in the number of inspectors, the presence of SUNAFIL in more regions, more budget for SUNAFIL, among others.<sup>97</sup>

USDOL's periodic reports also highlight that Peru has not addressed key recommendations, such as:

- "increase the authority of SUNAFIL and the MPTE to convert short-term employees into permanent employees in cases of identified violations of workers' associational rights and while administrative or legal proceedings are still pending."

<sup>94</sup> There is a fourth protocol regarding freedom of association that is still in process.

<sup>95</sup> According to Jesus Barrientos, Intendant of Inspection Intelligence, this is the next challenge once they complete the number of inspectors.

<sup>96</sup> O'Brien and Associates International. *Independent Midterm Evaluation of the Strengthening the Institutional Capacity of the Peruvian Labor Inspection System Project*. 2017. Retrieved October 2019, from DOL.GOV: [https://www.dol.gov/sites/dolgov/files/ILAB/evaluation\\_type/midterm\\_evaluation/Final\\_Evaluation\\_Report\\_Strengthening\\_the\\_Institutional\\_Capacity\\_of\\_the\\_Peruvian\\_Labor\\_Inspection\\_System\\_12\\_09\\_2017\\_without\\_PII\\_0.pdf](https://www.dol.gov/sites/dolgov/files/ILAB/evaluation_type/midterm_evaluation/Final_Evaluation_Report_Strengthening_the_Institutional_Capacity_of_the_Peruvian_Labor_Inspection_System_12_09_2017_without_PII_0.pdf)

<sup>97</sup> However, the Congresswoman Huilca argues that it is not possible to talk about improvements regarding SUNAFIL because SUNAFIL is still an agency in implementation stages. Thus, it does not have the full capacity yet to enforce labor law.

- "issue protocols that SUNAFIL and MTPE labor inspectors can use to verify that short-term contracts in the NTE sectors meet all legal requirements and are not being used to restrict workers' rights."<sup>98</sup>

In the same way, Perú Equidad elaborated a document that discusses which actions from the Peruvian government are moving far from Peru's expected behavior to address effectively the USDOL's recommendations.<sup>99</sup> The document also reflects the differences between the new approach that SUNAFIL is adopting to improve labor rights compliance in Peru and what the unions and other actors from the labor movement believe SUNAFIL should do. For example:<sup>100</sup>

- The fact that SUNAFIL has been reducing fines between 2006 and 2017<sup>101</sup> due to a change in the punitive approach is not welcomed by the unions. They argue that if the penalties are low, firms would not have any incentive to improve their labor practices.<sup>102</sup>
- SUNAFIL's union expects that all the inspectors would have the same competencies.<sup>103</sup> This issue is opposed with SUNAFIL's current approach of keeping a pyramidal structure. Nevertheless, Barrientos states that a non-pyramidal structure would be an

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<sup>98</sup> See USDOL. *Second Periodic Review of Progress to Address Issues Identified in the U.S. Department of Labor's Public Report of Review of Submission 2015-01 (Peru)*. 2018. Retrieved July 2019, from USDOL: <https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/Peru-FTA-Submission-Second-Review-Statement-Final.pdf>

<sup>99</sup> In the case of SUNAFIL, the document mentions the SUNAFIL's tendency to reduce fine and, the Supreme Decree No. 007-2017-RT, which establishes that SUNAFIL cannot inspect during the same year, the same issue in the same firm

<sup>100</sup> See Equidad, et. al., *op. cit.*

<sup>101</sup> Examples of modification to the rules of procedures of the General Law of Labor Inspection that implied fine reductions: (i) Supreme Decree No. 019-2006-TR, reduced 50 percent of the fines for micro and small firms, (ii) Supreme Decree No. 012-2013-TR, created a table of fines according the size of the firms, (iii) Law No. 30222 that modified the Law 29873 (Occupational Health and Safety) reducing 35 percent of the fines for all the infractions except for freedom of association, child labor, forced labor or other that caused dead or incapacity, (iv) Supreme Decree No. 015-2017-TR increased 10 percent the fines established by the Law 30222 and established an upper limit fine for micro and small firms for each sanction proceeding.

<sup>102</sup> If the cost of not improving practices is so small, firms can consider it as a part of the cost of doing business and keep the same behavior. As a result, firms will not change their behavior if it is cheaper to not comply with the law than comply with it.

<sup>103</sup> See Equidad, et. al., *op. cit.*

unnecessary expense because SUNAFIL expects to conduct target inspections based on their information systems.

In other words, the differences regarding how SUNAFIL should develop strategies to enforce labor codes in Peru have deepened by the lack of knowledge of what was SUNAFIL pursuing through the cooperative agreements with USDOL and the negative perception that workers had regarding SUNAFIL performance. For example, O'Brien Associates International (2017)'s report also offers a clue on how workers perceive SUNAFIL: "SUNAFIL is slow to respond to inspection requests and that some inspectors are biased towards employers." "SUNAFIL has a shortage of inspectors due to an inadequate budget."

Notwithstanding, Larco argues that the institutional reform in SUNAFIL has been more successful. Still, the political part of developing protocols for inspections such as contracts under Decree 22342 has not gotten any result. Larco states that "there is no political will, and nobody can force Peru to reach an agreement on it."

### *Short-Term Contracts in the Non-Traditional Export-Sector*

The periodic reports state the Peruvian government had not addressed recommendations regarding:

- the implementation of "a legal instrument that limits the consecutive use of short-term employment contracts in the NTE sectors" and,
- enhancements of SUNAFIL's authority "to convert short-term employees into permanent employees in cases of identified violations of workers' associational rights."<sup>104</sup>

Regardless, there have been other attempts to modify or derogate the labor regime ruled by the Decree-Law 22342; any of them have been successful. For example, the draft-law 01635/2016-CR proposed by the parliamentary faction Frente Amplio por Justicia, Vida and Libertad. The day scheduled (May 23, 2017) to discuss this project matched a 24 hour strike by the textile workers to support this Draft-law.<sup>105</sup> Then, on the new

<sup>104</sup> USDOL, 2018, *op. cit.*

<sup>105</sup> See Trabajo Digno, *Claves para entender el debate sobre el régimen laboral de las Exportaciones No Tradicionales CUANDO EL OBJETIVO ES IMPEDIR LA SINDICALIZACIÓN*, 2017. Retrieved September 2019, from Trabajo Digno.Pe: <http://trabajodigno.pe/claves-para-entender-el-debate-sobre-el-regimen-laboral-de-las-exportaciones-no-tradicionales-cuando-el-objetivo-es-impedir-la-sindicalizacion/#more-1379>

date for the debate, according to Huilca, "there was no quorum for it."<sup>106</sup> On November 20, 2018 was another unsuccessful attempt to debate the Draft-law.<sup>107</sup>

Similarly, Perú Equidad states that the Peruvian government has not made any change to its laws. Instead the government is adopting additional codes promoting short-term contracts. For instance, in October 2016, Congress approved the Law No. 205062 that allows extraordinary faculties to the Executive branch to promulgate norms with a range of laws to promote economic and formalization. Through this law, there is not mandatory to register short-term contracts any more with the Autoridad Administrativa de Trabajo (ATT)<sup>108</sup>

By contrast, Congresswoman Ursula Letona states that there is evidence that laws for promoting nontraditional exports have been effective, because those sectors have growth (see Figure 2). To illustrate, the Law 27360 has been successful in promoting the growth in the agroindustry sector, offering formal employment as well as keeping competitiveness in international markets. For instance, the overall number of workers under this system has risen from 210,298 in 2012 to 295,048 in July 2018.<sup>109</sup> Letona also emphasizes that "the raise in the remunerations is also associated with decreasing levels of poverty in areas with predominant presence of firms that hire with this regime."

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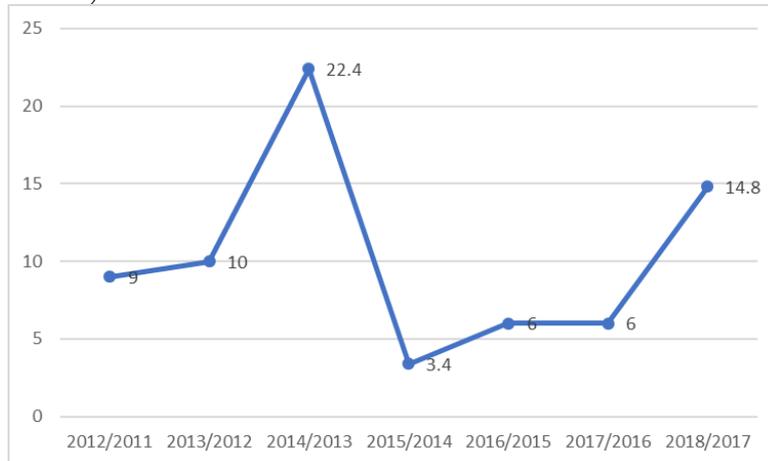
<sup>106</sup> See Huilca, I. *Urge derogar régimen laboral de exportación no tradicional*. 2017. Retrieved September 2019, from Indira Huilca: <http://www.indirahuilca.pe/urge-derogar-regimen-laboral-de-exportacion-no-tradicional/>

<sup>107</sup> See Congreso de Perú. *Agenda Sexta Sesión Ordinaria - Comisión de Trabajo y Seguridad Social - Período Anual de Sesiones 2018-2019*. 2018. Retrieved October 2019, from Congreso de la Republica: [http://www2.congreso.gob.pe/Sicr/ApoyComisiones/comision2011.nsf/f28b2e5ecd1427cc052578e3006ef917/66c5d675759306750525833c005cca25/\\$FILE/AGENDA06201118.pdf](http://www2.congreso.gob.pe/Sicr/ApoyComisiones/comision2011.nsf/f28b2e5ecd1427cc052578e3006ef917/66c5d675759306750525833c005cca25/$FILE/AGENDA06201118.pdf)

<sup>108</sup> See Equidad, et. al., *op. cit.*

<sup>109</sup> See Mincetur. *Posición del Gobierno del Perú respecto de la comunicación presentada por organizaciones de la Sociedad Civil por un supuesto incumplimiento del Perú en sus compromisos laborales y ambientales, contenidos en el acuerdo comercial entre el Perú y la Unión Europea*. 2018. Retrieved July 2019, from Acuerdos Comerciales : [http://www.acuerdoscomerciales.gob.pe/images/stories/union\\_europea/2018/Posicion-Peru-ComercioyDesarrolloSostenible.pdf](http://www.acuerdoscomerciales.gob.pe/images/stories/union_europea/2018/Posicion-Peru-ComercioyDesarrolloSostenible.pdf)

Figure 2: Percentage Change of Peruvian Agriculture Sector's Total Export (US\$ Millions)



Source: Monthly Report (December) on Foreign Trade (2011- 2018) – Mincetur.

Therefore, in July 2019, Congresswoman Letona had a draft law to extend the rule and expand this regime to other sectors such as fishing and forestry. In spite of the dissolution of the Peruvian Congress in September 2019, the Law 27360 was extended up to December 31, 2031 by the Emergency Decree N° 043-2019 on December 31, 2019.<sup>110</sup>

## 6. Expectations versus Achievements

The textile union's motivation for filing the submission was to improve their labor conditions and, therefore, their standards of living. Since the unions from the textile sector have portrayed how Decree 22342 promotes precarious jobs in multiple forums, they have focused their efforts to change it. The lack of political support to change the Decree in Congress has repeatedly closed any internal possibility to make legislative changes that improve their situation. For this reason, the unions have used all the available mechanisms (both national and international) to diversify their actions and push for regulatory and structural reforms, more enforcement of labor law, and more better practices in their

<sup>110</sup> See El Peruano. *Decreto de Urgencia N° 043-2019 Modifica la Ley N° 27360, para promover y mejorar las condiciones para el desarrollo de la actividad agraria*. 2019. Retrieved January 2020, from Diario Oficial del Bicentenario - El Peruano: <https://busquedas.elperuano.pe/normaslegales/modifica-la-ley-n-27360-para-promover-y-mejorar-las-condic-decreto-de-urgencia-n-043-2019-1841328-1/>

workplace. Celestina Carraza Ruiz, a worker from the Agro Industry illustrates this argument:

"We want to expose business' practices to the international community. I am very confident that we would enforce our rights compliance through international forums because the Peruvian laws are only pro-business. Our claims have not been heard in our country. We expect that they sit down with us to dialogue."

The FTA's mechanism was appealing because, on the one hand, "it has been well documented by national and international organizations that the Peruvian Government is not enforcing its own labor laws in the export sector."<sup>111</sup> On the other, since the FTA has clear commitments, arbitrage procedures, and sanctions; there were expectations that this mechanism would be a more effective way to push for regulatory changes.<sup>112</sup>

The Labor Advisory Committee on Trade Negotiation and Trade Policy (2015) considers that "Peru is currently in violation of the U.S.-Peru FTA" because "since the U.S.-Peru Free Trade Agreement came into force, the Peruvian government has reduced protections for workers and weakened mechanisms to enforce labor legislation." The OTLA only has expressed its concern about "whether the system in place to protect the right to freedom of association of workers employed on unlimited consecutive short-term contracts in the non-traditional export (NTE) sectors is sufficient to protect that right."<sup>113</sup>

Due to the commitment between the U.S. and Peru is to show enough effort to enforce their labor codes, the OTLA has not found any violation that requires to call a dispute resolution with Peru for failing to comply with the labor chapter so far. Consequently, besides the recommendations, constant communication with Peruvian stakeholders, technical and financial support, there is not too much space for actions in the coming future. Larco describes the constraints to achieve a change as the following:

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<sup>111</sup> See Labor Advisory Committee. *Labor Advisory Committee on Trade Negotiation and Trade Policy*. 2015. Retrieved December 2019, from USTR.GOV: <https://ustr.gov/sites/default/files/Labor-Advisory-Committee-for-Trade-Negotiations-and-Trade-Policy.pdf>

<sup>112</sup> From the Congress woman Huilca points of view, it is interesting that besides the worker's opposition to the FTA, they have decided to use its mechanism for getting a solution to their problems.

<sup>113</sup> See USDOL. *First Periodic Review of Progress to Address Issues Identified in the U.S. Department of Labor's Public Report of Review of Submission 2015-01 (Peru)*. 2016b. Retrieved July 2019, from U.S. Department of Labor: <https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/Peru-Review-Statement.pdf>

“Little things have changed since the submission because USDOL can ask for explanations and offer recommendations, resources, and support, but they cannot do more. SUNAFIL cannot change legislation, either. Regulatory changes are done in the Congress, and the political forces in Peru make it impossible.”

Mujica acknowledges the presence of SUNAFIL in the regions as an improvement, but he claims that most of the firms<sup>114</sup> used as an example in the submission have not improved their labor relation practices yet. He argues that the legal framework and the enforcement mechanisms are not helping to push for improvements. Since the workers have not gotten a better off situation, it is not surprising to find different evaluations among workers regarding their situation after four years of filing the submission. For instance,

“The submission has offered recommendations, but there is not a firm position to force changes. Thus, the claim has not helped with anything to improve our labor conditions. For instance, regardless of the MTPE rejected Hialpesa's request to dismiss 195 workers due to financial constraints,<sup>115</sup> Hialpesa laid off 195 employees in June 2019 and 95 of those employees were union members.” [...] “from 145 union members, only 45 of them are working now.” [...] “Hialpesa does not want the union because we have filed some lawsuits, and we have won them, so Hialpesa shall pay those benefits to its workers.”

Máximo Gutierrez, Hialpesa

“We wanted to raise our voice in every forum because we feel that the law is not for the weakest. Even though we have gotten some judgments in our favor, that we celebrate<sup>116</sup> The suffering is still there. You had a terrible time, the suffering of losing your job, the suffering due to the financial hardship's consequences that you faced with your family, all that grief remains with you.”

<sup>114</sup> The only exception is Camposol. In March 2014, Camposol started a program called "Modelo de Diálogo Social Camposol – Afianzando el compromiso" [in English: Model for a social dialogue Camposol - strengthen the commitment] to improve their labor relations. Since then, Camposol has settled two collective bargaining contracts (for three years) and received some awards from the Ministry of Labor for its ethical practices and its respect to union activities.

<sup>115</sup> However, Hialpesa has been opening operations in Central America.

<sup>116</sup> For more information regarding specific cases, See Equidad, et. al., *op. cit.*

Jose Lopez Mota, Incatop

"We believe that Chapter 17 has not been fulfilled because union activities are considered as a crime."

Juan Antonio Herrera, Agro Industry

The main challenge to achieve consensus in Congress is the polarization of perspective regarding the benefits and the pervasive effects of the short-term contracts in the export sector. In addition, there is an unbalance of economic and political power among their supporters. To illustrate, Letona summaries part of the debate from her perspective:

"The problem is more regarding the rules and the unclear application of them through the Court. The business sector uses short-term contracts because the system is very rigid, and the Court can order to hire them again, so they cannot fire workers, regardless if they are bad ones. Furthermore, in the same way that some groups are saying that those laws create precarious jobs, we have other groups -such as SNI- supporting them because those laws allow them to offer formal jobs and keep competitiveness in international markets as the evidence shows."

Even though the Obama Administration worked on labor issues in the USTR and DOL in partners like Guatemala, Colombia, Jordan, Bahrain, Bangladesh, Swaziland, Haiti and Burma,<sup>117</sup> some members of the American Congress qualify the failures on enforcement labor rights on free trade agreements. as "broken promises"<sup>118</sup> For example, the AFL-CIO reminds us that the only case that has proceeded to dispute resolution, after nine years of filling the case and on more than 24 years of FTAs, is Guatemala.<sup>119,120</sup> "No U.S. FTA partner has come into full

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<sup>117</sup> See USTR, DOL. *Standing Up for Workers: Promoting Labor Rights through Trade*. United States: Executive Office of the President of the United States, 2015.

<sup>118</sup> See Staff of Sen. Elizabeth Warren. *Broken Promises. Decades of Failure to Enforce Labor Standards in Free Trade Agreements*. (n.d.). Retrieved December 2019, from Warren Senate: <https://www.warren.senate.gov/files/documents/BrokenPromises.pdf>

<sup>119</sup> "the Obama Administration became the first in history to bring a labor case under a free trade agreement—not just under a U.S. trade agreement, but any trade agreement ever negotiated." See USTR, DOL. *Standing Up for Workers: Promoting Labor Rights through Trade*. United States: Executive Office of the President of the United States, 2015.

compliance as a result of post-FTA monitoring or enforcement of labor provisions.”<sup>121</sup>

Nevertheless, Bolle (2016) states that although “all labor provisions in trade agreements are technically enforceable.” “The USTR is a small operation. Entering into the dispute resolution process is a lengthy, involved, expensive process in terms of both personnel and resources.” Consequently, even “the USTR must decide which cases it will pursue based on priorities.”<sup>122</sup> For this reason, Larco believes that “mechanisms enforced through governments are not the most effective channel to get a solution in the short-term. However, they help to keep the topic on the public agenda and work as a reminder that we still have a pending issue. The OITLA's submission behaves like a reminder, and the reminder has a value too.”<sup>123</sup>

Notwithstanding how the submission will evolve is not defined in a vacuum. The willingness of the Peruvian government to improve practices and the discretion of the American government<sup>124</sup> to enforce the labor chapter depends on the political and economic context of each country. Those forces influence how actors behave and will shape the outcomes of this submission.

## 7. Does this Manner Affect Trade between the Parties?

There has not been any legislative change to create mechanisms that would protect the right of freedom of association for workers hired under

<sup>120</sup> Harrison (2019) emphasizes that Guatemala is the only one “out of almost 50 complaints made so far [2019] under US FTAs (the vast majority of which relate to NAFTA).” See Harrison, *op. cit.*

<sup>121</sup> See AFL-CIO. *U.S. Labor Enforcement Process*, 2018. Retrieved December 2019, from AFL-CIO: <https://aflcio.org/sites/default/files/2019-02/History%20of%20Labor%20Enforcement%20Chart%20Oct2018.pdf>

<sup>122</sup> See Bolle, M. J. *Overview of Labor Enforcement Issues in Free Trade Agreements*. 2016. Retrieved December 2019, from Congressional Research Service: <https://fas.org/sgp/crs/misc/RS22823.pdf>

<sup>123</sup> From Larco's view, the most effective channels are the mechanisms that involve actors in the supply chain, such as the brand and consumers because they work closely with the firms and workers.

<sup>124</sup> Albertson, P. (2010) claims “As Human Rights Watch notes, the FTAs leave much discretion for the U.S. government regarding when to initiate the steps outlined in the FTA labor chapters, and the criteria for such a decision are subjective [...] Such broad discretion is rooted, in part, in the language of U.S. free trade accords, which gives significant freedom to decide whether to invoke labor rights complaint and dispute settlement systems [...]” See Albertson, P., *op. cit.*

Decree 22342 and Law 27360. The submission's signatories expect that the OTLA invokes the General Dispute Settlement Mechanism in this process and, eventually, the Dispute Settlement Panel if the former cannot resolve the dispute.

Guatemala's submission is the only case that has ended up in a Dispute Settlement Panel. Consequently, it is a unique reference of how the panel members would interpret and evaluate issues such as: "not fail to effectively enforce," "sustained or recurring course of action or inaction" and, "in a manner affecting trade between the parties." Regardless the fact that "the approach of the Panel has been viewed by academic commentators as creating significant difficulties in terms of bringing successful cases in the future."<sup>125</sup>

Nevertheless, the parties must also consider that the Panel in Guatemala did not create jurisprudence. Thus, an eventual new panel does not need to follow their criteria, they can develop their own guidelines to settle the dispute instead.<sup>126</sup> Moreover, the parties should also keep in mind that the labor chapter in Peru is broader than Guatemala's labor chapter because it includes more standards subject to arbitration.

Regardless of the differences, and the eventual change in the panel's criteria, the Peruvian submission should be evaluated to the light of the criteria used by the settlement panel's members in the case of Guatemala to assess whether there is a breach in the free trade agreement's commitments under the labor chapter.

In Guatemala's case, the Panel acknowledged that "a failure to enforce labor laws can relieve an employer of unionization costs." The panel also raised the question of "whether such effects were of sufficient scale and duration to confer a competitive advantage." For example, the panel requested at least approximated evidence of (i) the significance of the amounts in cost-savings (for unionization costs, compensation, and sanction cost) to the overall labor costs of each firm and, (ii) the impact of the dismissal (or other retaliations) on the ability of the other workers to

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<sup>125</sup> See Harrison, J., *op. cit*

<sup>126</sup> Actually, Agusti-Panareda et al (2015) state that the inclusion "of the [ILO] Declaration's principles [also] brings a degree of uncertainty" due to "the lack of comprehensive guidance on the application of those principles." As a result, dispute settlement bodies under trade agreements "could attempt to develop the meaning of the undefined concepts[...]. At a trade partner level, this variance may lead to uncertainty among parties of the respective trade agreements concerning their respective obligations, particularly if different meanings crop up over time under different trade agreements for the same parties." See Agusti-Panareda, Jordi, Franz Christian Ebert, and Desirée LeClercq, *op. cit*.

organize and bargain collectively. Consequently, the complainant should have shown that the effects have been significant and long enough that the firms could enjoy a competitive advantage during the disputed period.<sup>127</sup>

Even though the Panel stated that the complainant does not need "proof of cost or other effects with any particular degree of precision," the Panel required to "determine that a competitive advantage has accrued." This also means that the complainant needs to show that "there is an effect on conditions of competition." This requirement is a key issue because the Panel clearly stated that it is the complainant's responsibility to "demonstrate that labor cost effects reasonably expected in light of the record evidence are sufficient to confer some competitive advantage [change condition of competition]."<sup>128</sup>

The Panel also stated that they do not require "evidence drawn from employer records" and that the "determination [of the competitive advantage] does not depend upon the weight or significance of that employer within its particular economic sector."<sup>129</sup> Since the panel does not conduct an independent investigation (as an anti-dumping commission<sup>130</sup> does) there are no procedural guidelines defined about how to gather information or an incentive for the firms to collaborate with the process. Consequently, this clarification is relevant for two reasons:

1. The complainants have broad options to select the best information available to approximate their evidence.
2. Since the advantage does not depend on the importance of a specific employer in the industry, it can be inferred that the share of the American market that has the firm or the country is not relevant either to determine whether there is an advantage or not. This is important because it isolates issues like market penetration and focuses on the fact that there is a trade between the parties.<sup>131</sup>

<sup>127</sup> See International Trade Administration. *Dominican Republic - Central America - United States Free Trade Agreement. Arbitral Panel Established Pursuant to Chapter Twenty. In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR. Final Report of the.* 2017. Retrieved January 2020, from Trade.gov: [https://legacy.trade.gov/industry/tas/Guatemala%20%20%E2%80%93%20Obligations%20Under%20Article%2016-2-1\(a\)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf](https://legacy.trade.gov/industry/tas/Guatemala%20%20%E2%80%93%20Obligations%20Under%20Article%2016-2-1(a)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf)

<sup>128</sup> See International Trade Administration, *op. cit.*

<sup>129</sup> See International Trade Administration, *op. cit.*

<sup>130</sup> See the Anti-dumping Agreement that implements the Article VI of GATT 1994.

<sup>131</sup> This point is relevant because the exports from the Peruvian textile sector to the United States decreased by 12 percent during 2012, and since then, they have had a slow

Although the Peruvian submission cast doubts on whether the system in place is enough to protect the right of freedom of association of workers hired under Decree 22342 and Law 27360, the submission does not offer clear evidence whether this situation is conferring a competitive advantage for the firms involved.

By contrast, the Peruvian government stated that between 2012 and 2017, the remunerations in the textile sector showed a positive trend, and there were no significant differences between remunerations from unions and non-union members.<sup>132</sup> The report does not offer further information about this statistical analysis. The argument suggests that there is not a competitive advantage generated by fewer labor costs due to non-union workers in the textile sector.

## 8. Final Remarks

The process of filing this submission highlights two critical considerations: the technical assistance and the role of international aid. The projects funded by USAID and USDOL channeled resources into building up workers' capabilities to enforce their labor rights. Both projects offered unions the opportunity not only to learn about their labor rights, but also how to document cases and identify mechanisms to enforce labor rights compliance. During the training, unions also accessed international networks, which offered the possibility of building cross border solidarity and obtaining additional technical assistance. The relevance of the trainings can be summarized in the words of one consultant [who prefers to remain anonymous]:

"A worker cannot fight for his rights if he does not know his rights or where and how to claim for them. And if he does, he cannot do anything if he does not have robust evidence to prove that his rights have been violated."

Unfortunately, funds destined to empower workers through capacitation are scarce in developing countries (there are other priorities like food, water, or immunizations). For this reason, international aid oriented to promote labor rights plays a crucial role in the promotion of growth with

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recovery. By contrast, the agriculture sector has been increasing its exports to the States during the last ten years (See Annex 2).

<sup>132</sup> See Mincetur, (2018), *op. cit.*

inclusion. Cooperation mechanisms in free trade agreements are a valuable asset to improve labor rights globally.

International aid also raised awareness about how much unions rely on external resources to fund their activities. To illustrate, the process of how to make the case required high skills of technical assistance in multiple disciplines. Not all the unions can afford technical support, which opens the question about who has the last word regarding the strategies and actions that the unions would develop in the next stages of this submission. Could it be, perhaps, the unions' agenda, or is it the NGOs that supported the technical process?

Moreover, we must acknowledge the role of the advocacy network is not only to add pressure, channel resources, spread the message, and raise awareness. Cross border solidarity plays an essential role, especially in the U.S. political dynamic. Different American sectors have expressed their discomfort regarding the lack of the United States' commitment to enforcing labor chapters in its trade agreements. The Peruvian unions need their support to keep this submission on America's agenda, so it is necessary to maintain constant communication with their international allies.

Finally, although the submission is in a "stand by" stage, the political context can change at any time, and the signatories should be prepared in the case that this submission moves forward. The unions (and the NGOs that endorsed the submission) still have to figure out how to offer clear evidence about whether the violation of freedom of association for workers hired under Decree 22342 and Law 27360 is conferring a competitive advantage for the firms involved.

**Annex 1**

**Box A-1: FLA Workplace Code of Conduct and Compliance Benchmarks**

ER.9 Recruitment and Hiring/Invalid Use of Contract, Contingent or Temporary Workers Employers shall not:

ER.9.1 use contract/contingent/temporary workers on a regular basis for the long-term or multiple short-terms;

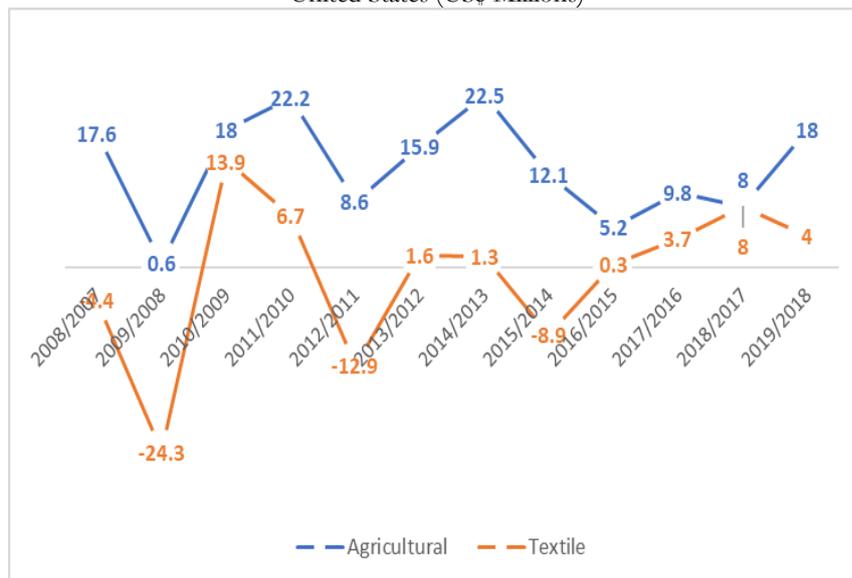
ER.9.2 hire contract/contingent/temporary workers as a means to support normal business needs on a continuous basis or as regular employment practice; or

ER.9.3 make excessive use of fixed-term contracts or schemes where there is no real intent to impart skills or provide regular employment.

Source: FLA. *FLA Workplace Code of Conduct and Compliance Benchmarks*. 2011. Retrieved October 2019, from the Fair Labor Association: [https://www.fairlabor.org/sites/default/files/fla\\_complete\\_code\\_and\\_benchmarks.pdf](https://www.fairlabor.org/sites/default/files/fla_complete_code_and_benchmarks.pdf)

**Annex 2**

Figure A-2: Percentage Change of Peruvian Agriculture and Textile Sector's Exports to United States (US\$ Millions)



Source: Monthly Report (December) on Foreign Trade (2008- 2019) – Mincetur.

# ADAPT International Network



**ADAPT** is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Centre for International and Comparative Studies on Law, Economics, Environment and Work, (DEAL) the Marco Biagi Department of Economics, University of Modena and Reggio Emilia, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at [www.adapt.it](http://www.adapt.it).

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