

UNITED STATES-PERU TRADE PROMOTION AGREEMENT

PUBLIC REPORT OF REVIEW OF
U.S. SUBMISSION 2015-01 (PERU)



OFFICE OF TRADE AND LABOR AFFAIRS
BUREAU OF INTERNATIONAL LABOR AFFAIRS
U.S. DEPARTMENT OF LABOR

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PUBLIC REPORT OF REVIEW OF U. S. SUBMISSION 2015-01 (PERU)

Executive Summary

Purpose of the Report

This report responds to U.S. Submission 2015-01 (Peru), filed with the Office of Trade and Labor Affairs (OTLA) of the U.S. Department of Labor's Bureau of International Labor Affairs on July 23, 2015, by the International Labor Rights Forum, Perú Equidad, and seven Peruvian workers' organizations pursuant to Article 17.5 of the United States-Peru Trade Promotion Agreement (PTPA). The submission alleges violations of the Labor Chapter of the PTPA, which entered into force on February 1, 2009. On September 21, 2015, the OTLA accepted the submission for review, after having considered the factors articulated in OTLA's Procedural Guidelines. Under the Procedural Guidelines, the OTLA shall issue a public report within 180 days of the acceptance of a submission for review, unless circumstances as determined by the OTLA require an extension of time.

The OTLA conducted its review to gather information about and publicly report on the issues raised by the submission. During the review period, the OTLA consulted with the Office of the U.S. Trade Representative (USTR) and the U.S. Department of State (State Department).

Summary of U.S. Submission 2015-01 (Peru)

U.S. Submission 2015-01 (Peru) alleges that, by permitting the unlimited consecutive renewal of short-term contracts under the Decree Law 22342, the law that governs contracts in the non-traditional export (NTE) sectors, the Government of Peru has failed to meet its PTPA commitment to adopt and maintain in its statutes and regulations, and practices thereunder, the right of freedom of association and the effective recognition of the right to collective bargaining. The submission also cites specific instances to support its allegation that the Government of Peru, through its action or inaction, has failed to uphold its PTPA commitment to effectively enforce its labor laws in the NTE and agricultural sectors with respect to freedom of association, the effective recognition of the right to collective bargaining, and acceptable conditions of work.

Findings

Freedom of Association in Law and Practice

The law governing employment contracts in the NTE sectors, Decree Law 22342, allows employers to employ workers indefinitely on consecutive short-term contracts. The law for short-term contracts in sectors other than NTEs limits the use of short-term contracts to five years. Decree Law 22342 differs from this law in that it contains no limit on the consecutive use of short-term contracts for NTE workers.

Workers reported to OTLA that, in many instances, workers employed under Decree Law 22342 who attempt to exercise their right to freely associate do not have their contracts renewed.

Regardless of the contractual vehicle by which a worker is employed, Peruvian law establishes that employers must refrain from any acts likely to constrain, restrict or impair, in any way, the right of workers to unionize; and intervening in any way in the establishment, administration, or maintenance of trade union organizations. Nevertheless, where workers challenge the legality of their contracts' non-renewal as an act of anti-union discrimination, the lengthy administrative and judicial processes required to do so often mean that the workers do not have access to remedies for a number of years. In addition, only the courts can enforce corresponding remedies. The rate of unionization in the NTE sectors is less than half the rate for workers employed on an indefinite basis. In view of the unlimited use of short-term contracts, it is not surprising that workers employed under Decree Law 22342 might find it more difficult to exercise their freedom of association without fear of retaliation by their employer.

In addition, while Decree Law 22342 establishes requirements that an employer must satisfy to legally employ workers on short-term contracts, the administrative labor authority lacks any protocol or mechanism for verifying information contained in contracts filed under Decree Law 22342. Instead, these contracts are automatically approved without affirmative action by the labor authority. As such, the existing system allows employers to use short-term contracts for NTE workers under Decree Law 22342 without the administrative labor authority having confirmed of the legality of those contracts. Further, where workers challenge the use of short-term contracts as contrary to Decree Law 22342, they must undergo the lengthy process described above before any remedies can be enforced.

Based on the evidence gathered as part of the review, the OTLA has 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.

Enforcement of Laws Relating to Freedom of Association and Occupational Safety and Health

The GOP has taken a number of positive steps intended to improve its enforcement of labor laws since the PTPA was signed. These steps include: enacting legal instruments that clarify that it is illegal for an employer to use short-term contracts to restrict workers' freedom of association and that impose the highest fine rate available on employers who violate this law; passing the New Procedural Labor Law to expedite judicial processes with respect to labor cases; creating the *Superintendencia Nacional de Fiscalización Laboral* (SUNAFIL), a federal labor inspection superintendency, to centralize the labor inspection process and increase the federal government's labor inspection and enforcement capacity; cooperating with the U.S. Department of Labor project to develop a labor inspection protocol to help inspectors better identify cases in which short-term contracts are being used to limit workers' freedom of association in the NTE sectors; and planning to implement a Labor Inspection Court to expedite the administrative sanction process.

Nonetheless, the OTLA's review raises questions about labor law enforcement. Specifically, the OTLA has questions with respect to the DRTPEs' enforcement of the requirements of Decree Law 22342. The OTLA also has questions more generally regarding the GOP's enforcement of labor laws, in particular in the NTE and agricultural sectors, related to low inspectorate staffing

levels; the number of SUNAFIL offices; the length of time for resolution of cases through the administrative and judicial processes; and the inability of the administrative labor authority to compel employers to comply with reinstatement and other remediation orders.

Recommendations and Next Steps

The OTLA will continue to monitor the issues raised by the submission, including any progress that the GOP may make with respect to addressing the questions and concerns identified in this report. The OTLA offers the following recommendations to the GOP to help guide subsequent engagement between the U.S. government and the GOP aimed at addressing the questions and concerns identified during the review:

- Adopt and implement legal instruments and other measures to ensure that the use of short-term contracts in the NTE sectors does not restrict workers' associational rights, which could include:
 - placing a limit on the consecutive use of short-term employment contracts in the NTE sectors, similar to the five-year limit on such contracts contained in Article 74 of Law 728;
 - authorizing the administrative labor authority to: (1) compel employers to renew workers' contracts or convert workers employed on short-term contracts into permanent employees in cases of recurrent employer failure to comply with the requirements of Decree Law 22342 or when contract non-renewal is found to be due to anti-union discrimination, and; (2) not permitting stay of those actions during any subsequent administrative or legal proceedings;
 - requiring the labor authority to verify and approve proactively, based on an established protocol, that contracts under Decree Law 22342 meet the legal requirements and establishing a time period for verification and approval that is appropriate for very short-term contracts;
- Establish SUNAFIL offices in all regions of Peru as expeditiously as possible;
- Increase support for SUNAFIL's enforcement activities, including labor inspections and administrative sanction processes, in a manner that allows for more effective and expeditious enforcement of Peru's labor laws in all regions of Peru;
- Expand Labor Courts of First Instance and increase the judiciary's budget for labor cases generally, including under the New Procedural Labor Law, in a manner that allows for more effective and expeditious adjudication and resolution of labor cases.

The U.S. government will offer to meet with the GOP as soon as possible to discuss the questions and concerns identified in this review and the above recommendations, or similar measures, to address those questions and concerns. The OTLA, in consultation with USTR and the State Department, will use progress towards implementing these recommendations, or similar

measures, for determining appropriate next steps in engagement with the GOP, and will assess any such progress by the GOP within nine months and thereafter, as appropriate.

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I. Introduction

The United States-Peru Trade Promotion Agreement (PTPA) entered into force on February 1, 2009.¹ Chapter 17 (the Labor Chapter) of the PTPA states that each Party shall designate an office within its labor ministry or equivalent entity to serve as a contact point with the other Parties and with the public.² For the United States, the U.S. Department of Labor's Office of Trade and Labor Affairs (OTLA) was designated as this contact point in a Federal Register notice published on December 21, 2006.³

Under the PTPA Labor Chapter, each Party's contact point provides for the submission, receipt, and consideration of communications from persons of a Party on matters related to the Chapter and reviews such communications in accordance with domestic procedures.⁴ The same Federal Register notice that designated the OTLA as contact point also set out the Procedural Guidelines that the OTLA follows for the receipt and review of public submissions.⁵

Article 17.2.1 of the PTPA states that “[e]ach party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998): (a) freedom of association.”⁶ Article 17.3.1(a) of the PTPA states that “[a] Party shall not fail to effectively enforce its labor laws, including those it adopts or maintains in accordance with Article 17.2.1, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties, after the date of entry into force of this Agreement.”⁷ Article 17.8 defines labor laws as “a Party's statutes and regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights: (a) freedom of association; . . . and (f) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.”⁸

On July 23, 2015, the OTLA received a public submission under the PTPA Labor Chapter from the International Labor Rights Forum, Perú Equidad, and seven Peruvian workers' organizations.⁹ U.S. Submission # 2015-01 (Peru) alleges that, by permitting the unlimited consecutive renewal of short-term contracts under the law that governs employment contracts in the non-traditional export (NTE) sectors, the Government of Peru has failed to meet its PTPA commitment to adopt and maintain in its statutes and regulations, and practices thereunder, the right of freedom of association and the effective recognition of the right to collective

¹ Office of the United States Trade Representative, Peru Trade Promotion Agreement, available at <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa>.

² The United States-Peru Trade Promotion Agreement [hereinafter PTPA], Article 17.5.5.

³ 71 Fed. Reg. 76691 (Dec. 21, 2006), available at <http://www.dol.gov/ilab/programs/otla/2006021837.pdf>.

⁴ PTPA, Articles 17.5.5(c) and 17.5.6.

⁵ 71 Fed. Reg. 76691 (Dec. 21, 2006).

⁶ PTPA, Article 17.2.1.

⁷ *Ibid.*, Article 17.3.1(a).

⁸ *Ibid.*, Article 17.8.

⁹ International Labor Rights Forum, Perú Equidad, and Seven Peruvian Workers' Organizations, *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*, July 23, 2015, available at http://www.dol.gov/ilab/media/pdf/Comunicación%20pública_23%20julio%202015.pdf [hereinafter U.S. Submission 2015-01 (Peru)].

bargaining.¹⁰ The submission also cites specific instances to support its allegation that the Government of Peru, through its action or inaction, has failed to uphold its PTPA commitment to effectively enforce its labor laws in the NTE and agricultural sectors with respect to freedom of association, the effective recognition of the right to collective bargaining, and acceptable conditions of work.¹¹

On September 21, 2015, the OTLA accepted for review U.S. Submission 2015-01 (Peru) after having considered the factors articulated in the Procedural Guidelines.¹² Under the Procedural Guidelines, the OTLA shall issue a public report within 180 days of the acceptance of a submission for review, unless circumstances as determined by the OTLA require an extension of time.¹³

The OTLA conducted its review from September 2015 to March 2016 to gather information about and publicly report on the issues raised by the submission. Throughout the review process, the OTLA consulted with the Office of the U.S. Trade Representative (USTR) and the U.S. Department of State (State Department). The OTLA carefully reviewed all information provided by the submitters, the GOP, and others with direct knowledge of the relevant issues.¹⁴ The OTLA, along with representatives of USTR and the State Department, also undertook a fact-finding mission in Peru in December 6-15, 2015, to gather additional information on the issues raised by the submission, including through meetings with the GOP, the submitters, workers' organizations, employers, and other relevant stakeholders.

II. Labor Law and Practice

A. The GOP's Administrative and Judicial processes

Peru enforces its labor laws through three processes: the labor inspection process; the administrative sanction process; and, if an appeal of an administrative order is filed, the judicial process.

Labor Inspections

Three governmental entities have labor inspection duties in Peru: the national Ministry of Labor and Promotion of Employment (*Ministerio del Trabajo y Promoción del Empleo*, MTPE); the national labor inspection superintendency (*Superintendencia Nacional de Fiscalización Laboral*, SUNAFIL), created in 2013 to centralize the labor inspection process and increase the MTPE's

¹⁰ Ibid.

¹¹ Ibid.

¹² The decision to accept the submission was published in a Federal Register notice on September 25, 2015. 80 Fed. Reg. 57877 (Sept. 25, 2015), available at <https://federalregister.gov/a/2015-24414>.

¹³ 71 Fed. Reg. 76691 (Dec. 21, 2006).

¹⁴ This information includes the 76-page document received by the OTLA on March 8, 2016, from the Ministry of Labor and Promotion of Employment, entitled, "Position of the Government of Peru on the Public Submission of July 23, 2015 to the Office of Trade and Labor Affairs (OTLA) Under Article 17.5 of Chapter 17 (Labor) of the Trade Promotion Agreement Between Peru and the United States."

inspection and enforcement capacity;¹⁵ and the Regional Ministries of Labor and Promotion of Employment Office (*Direcciones Regionales de Trabajo y Promoción del Empleo*, DRTPEs) in each of Peru's 26 regions.¹⁶ The MTPE issues regulations and designates priority issues and sectors for the national labor inspection system.¹⁷ SUNAFIL labor inspectors are authorized to conduct work site inspections of employers that have more than 10 registered employees, and if an inspector identifies a violation, the administrative sanction office of SUNAFIL assesses a fine.¹⁸ Created in 2013, SUNAFIL began operating in 2014,¹⁹ and currently is operational in nine of Peru's 26 regions.²⁰ Where SUNAFIL offices are not yet present, the DRTPEs retain authority to inspect all companies.²¹ In the regions where SUNAFIL is operating, DRTPE labor inspectors are authorized to conduct inspections only of employers that have 10 registered employees or fewer.²² Each DRTPE also receives and approves employment contracts filed by employers of any size that are located in its region.²³

Pursuant to the General Labor Inspection Law and its regulations, labor inspections in Peru may be initiated (1) in response to a complaint; (2) proactively by labor authorities; or (3) at the request of a governmental entity, including a court.²⁴ In July 2014, the GOP enacted a law that instructs labor inspectors to focus on preventing and remediating identified labor violations for a period of three years,²⁵ while noting that this focus does not come at the detriment of other inspection functions.²⁶

¹⁵ Government of Peru, Law 29981, *Ley Que Crea la Superintendencia Nacional de Fiscalización Laboral (SUNAFIL), Modifica la Ley 28806, Ley General de Inspección de Trabajo, y la Ley 27867, Ley Orgánica de Gobiernos Regionales* (2013), available at <http://www.sunafil.gob.pe/portal/images/docs/normatividad/LEY-29981-Creacion-SUNAFIL.pdf>.

¹⁶ Government of Peru, *Position of the Government of Peru with Respect to the Questions Submitted by the Government of the United States on the Submission Presented by ILRF, Peru Equidad, and Seven Peruvian Workers' Organizations Related to the Labor Chapter of the U.S.-Peru TPA*, December 4, 2015, p. 4 [hereinafter Government of Peru, December 2015 response]. Law 29981.

¹⁷ Government of Peru, December 2015 response.

¹⁸ Law 29981, Article 3.

¹⁹ Government of Peru, Ministerial Resolution 037-2014-TR, *Aprueban transferencia de competencias del Ministerio de Trabajo y Promoción del Empleo a la Superintendencia Nacional de Fiscalización Laboral* (2014), Article 2, available at <http://www.trabajo.gob.pe/normaCompletaSNIL.php?id=3341>.

²⁰ SUNAFIL is currently operational in: Ancash, Cajamarca, Huánuco, Ica, La Libertad, Lima Metropolitana, Loreto, Moquegua, and Tumbes. Government of Peru, December 2015 response, p.6.

²¹ Meeting between the OTLA and SUNAFIL, Trujillo, December 11, 2015.

²² Law 29981, Article 3. Government of Peru, Supreme Decree 015-2013-TR, *Decreto Supremo que precisa el ejercicio de la función inspectiva de trabajo a cargo de los Gobiernos Regionales* (2013), Article 2, available at <http://www.sunafil.gob.pe/portal/images/docs/normatividad/compentencias-inspectivas-GR-SUNAFIL.pdf>.

²³ Government of Peru, December 2015 response, p. 4.

²⁴ Government of Peru, Law 28806, *Ley General de Inspección de Trabajo* (2006), Article 12, available at <http://www.sunafil.gob.pe/portal/images/docs/normatividad/LEY-28806-Ley General Inspeccion Trabajo.pdf>. Government of Peru, Supreme Decree 019-2006-TR, *Aprueban Reglamento de la Ley General de Inspección del Trabajo* (2006), Article 8, available at <http://www.sunafil.gob.pe/portal/images/docs/normatividad/DS-019-2006-TR-Aprobacion Reglamento Ley Inspeccion Trabajo.pdf>.

²⁵ Government of Peru, Law 30222, *Ley que Modifica la Ley 29783, Ley de Seguridad y Salud en el Trabajo*, 2014, available at <http://www.leyes.congreso.gob.pe/Documentos/Leyes/30222.pdf>.

²⁶ Government of Peru, Supreme Decree 010-2014-TR, *Aprueban Normas Complementarias para la Adecuada Aplicación de la Única Disposición Complementaria Transitoria de la Ley No. 30222, Ley Que Modifica la Ley de Seguridad y Salud en el Trabajo*, 2014, Article 2.3, available at <http://www.trabajo.gob.pe/normaCompletaSNIL.php?id=3703>.

The inspection process begins with the issuance of the inspection order by the labor inspectorate, which is either SUNAFIL or the DRTPE.²⁷ The law does not set a timeframe for how soon the inspection order must be issued after a complaint is received, but labor inspectors report that, in practice, an order generally is issued within 10 business days.²⁸ The inspection order will establish the amount of time that the inspector has to complete the inspection,²⁹ but the law establishes that the inspector has a maximum of 30 business days from the time the inspector begins the inspection to do so.³⁰ The inspector can receive an extension to complete the inspection, but the employer being inspected must be notified of any extension at least five days before the expiration of the timeframe established in the inspection order.³¹ The inspection of the employer includes three parts: the inspection visit, during which an inspector visits the worksite, without providing previous notice, and speaks with relevant workers and the employer;³² the appearance (*comparencia*), in which the employer comes to the labor inspectorate office to answer questions and deliver any requested documentation;³³ and the verification of facts (*comprobación de datos*), in which the inspector reviews the payroll records, contracts, public records, and other relevant information requested from the employer or shared by other GOP agencies.³⁴

If the inspector identifies a labor violation in the course of the inspection, the inspector issues a notice of violation (*medida de requerimiento*) to notify the employer of the violations that must be remediated, if remediation is possible, and establish a time period for remediation.³⁵ If the employer remediates all violations before the conclusion of the time period established by the inspector, no fine is assessed and the inspector issues a report closing the matter.³⁶ However, if a violation is not remediated within the established timeframe, the inspector will issue a violation report (*acta de infracción*) that, as appropriate: can order remediation, including reinstatement or conversion to permanent employment; assesses a fine; and transfers the case to the administrative sanction process.³⁷ The law establishes the fine amount based on the severity of the violation, the total number of workers employed by the employer found to be in violation, and the number of workers affected,³⁸ though the fine amount is automatically reduced if the employer remediates all violations identified soon after the inspector issues the violation report.³⁹

²⁷ Supreme Decree 019-2006-TR, Article 9.

²⁸ Meeting between the OTLA and SUNAFIL, Trujillo, December 11, 2015.

²⁹ Supreme Decree 019-2006-TR, Article 13.3.

³⁰ Ibid. Law 28806, Article 13.

³¹ Supreme Decree 019-2006-TR, Article 13.4.

³² Ibid., Article 12.1(a).

³³ Ibid., Article 12.1(b).

³⁴ Ibid., Article 12.1(c). Meeting between the OTLA and SUNAFIL inspectors, Lima, December 10, 2015.

³⁵ Law 28806, Article 14. Supreme Decree 019-2006-TR, Article 20.

³⁶ Supreme Decree 010-2014-TR, Article 3.2.

³⁷ Ibid., Article 3.3. Law 28806, Article 16. Supreme Decree 019-2006-TR, Article 17. Government of Peru, December 2015 response, p. 8.

³⁸ Government of Peru, Supreme Decree 012-2013-TR, *Decreto Supremo que Modifica el Reglamento de la Ley General de Inspección de Trabajo*, 2013, Article 48, available at http://www.sunafil.gob.pe/portal/images/docs/normatividad/DS-012-2013-TR-Modificatoria_Reglamento_Ley_Inspeccion_Trabajo.pdf.

³⁹ If all violations are remediated before the statute of limitations tolls for filing an appeal of the notice assessing the fine(s), the imposed fine amount is reduced to 20% of the amount designated by law. Supreme Decree 010-2014-TR, Article 4.2.2(a). If all violations are remediated within 10 days of a decision denying the employer's appeal of the notice assessing the fine(s), the imposed fine amount is reduced to 25% of the amount designated by law. Ibid.,

While inspectors can recommend that a fine be assessed, an employer can only be compelled to pay the fine at the conclusion of the administrative sanction process.⁴⁰

In cases in which the inspector finds the employer to have used an unlawful short-term contract, the inspector can also order the employer to convert the affected workers to permanent employee status (a process called *desnaturalización*).⁴¹ If the employer refuses to convert the workers to permanent employees, the inspector must recommend the assessment of an additional fine as part of the administrative sanction process.⁴² While labor inspectors are permitted to recommend fines, order reinstatement of fired workers, and order that workers employed on short-term contracts be converted to permanent employment, fines are not enforceable until the matter reaches a final resolution of the administrative sanctions process and, if appealed by violating employers, until conclusion of the judicial processes and only the courts can compel employers to remediate labor violations. All determinations by the administrative labor authorities and judicial authorities are stayed until a final decision is reached in the case at issue.⁴³ Only courts can enforce remediation measures such as the reinstatement of workers and the conversion of short-term workers to permanent employees.⁴⁴ A legal expert reports that there is no mechanism for the administrative labor authorities to enforce violation reports issued by labor inspectors that order remediation.⁴⁵

Although workers and labor organizations reported to the OTLA that they generally are pleased with SUNAFIL's labor inspections and that SUNAFIL's creation has overall been a positive development for labor law enforcement, they have concerns regarding the relatively low number of SUNAFIL inspectors and their limited geographic reach.⁴⁶ According to information provided by the GOP, SUNAFIL currently employs 394 labor inspectors, while the DRTPEs have 88 total labor inspectors.⁴⁷ Of the 394 SUNAFIL inspectors, 20 are supervisory inspectors,

Article 4.2.2(b). If the violation is not remediated by within 10 days of a decision denying the employer's appeal of the notice assessing the fines, or is never remediated, a fine of 35% of the amount designated by law is imposed. Ibid., Article 4.2.1. Note, however, that Law 30222 exempts from these fine reductions "very serious offenses that also involve serious violations" of the right to freedom of association and employment discrimination, among others. Law 30222, *Disposición complementaria transitoria*. Workers told the OTLA that they were unaware whether fines assessed by inspectors were ultimately paid after lengthy legal processes because are not a party to these administrative or judicial processes, and that, in general, they believed that fine amounts imposed on employers were insufficient to deter recidivist action. Meeting between the OTLA and worker representatives, Lima and Trujillo, December 7-8, 10, and 12, 2015.

⁴⁰ See Administrative Sanction Process, below at pp. 6-7.

⁴¹ Government of Peru, Supreme Decree 019-2007-TR, *Modifican el Reglamento de la Ley General de Inspección de Trabajo*, 2007, Article 20.3, available at http://www.sunafil.gob.pe/portal/images/docs/normatividad/DS-019-2007-TR-Modificatoria_Reglamento_Ley_Inspeccion_Trabajo.pdf.

⁴² Meeting between the OTLA and SUNAFIL, Trujillo, December 11, 2015. Supreme Decree 019-2006-TR, Article 46.7.

⁴³ Government of Peru, December 2015 response, pp. 9-10. Meeting between the Government of Peru and the Government of the United States, Lima, December 7, 2015. Meeting between the OTLA and SUNAFIL inspectors, Lima, December 10, 2015.

⁴⁴ Meeting between the OTLA and SUNAFIL, Trujillo, December 11, 2015. Call between the OTLA and Peruvian labor law expert, February 17, 2016. Meeting between the OTLA and SUNAFIL inspectors, Lima, December 10, 2015.

⁴⁵ Call between the OTLA and Peruvian labor law expert, February 17, 2016.

⁴⁶ Meeting between the OTLA, the submitters, and worker representatives, Lima, December 7, 2015.

⁴⁷ Meeting between the Government of Peru and the Government of the United States, Lima, December 7, 2015.

107 are full labor inspectors, and 267 are auxiliary inspectors.⁴⁸ Full labor inspectors and supervisory inspectors are authorized to conduct all labor inspections,⁴⁹ but supervisory inspectors normally focus instead on supervisory or administrative tasks.⁵⁰ Auxiliary inspectors, who are more junior inspectors, must have full inspectors supervise their inspection processes and review their inspection acts.⁵¹ Of the 107 full inspectors employed by SUNAFIL, 98 of these are located in Lima, with the other nine spread among the other eight regions in which SUNAFIL currently has regional offices.⁵² Thus, in the eight regions outside of Lima in which SUNAFIL offices are located, there are a total of nine full labor inspectors authorized to inspect enterprises with more than 10 employees. The GOP reports that permanent labor inspectors are generally sent once a month from Lima to the other eight regions where SUNAFIL is operating to conduct multiple inspections in support of the one or two locally-assigned full inspectors.⁵³

Administrative Sanction Process

The administrative sanction process, which focuses on the confirmation, reduction, or rejection of the inspector's fine recommendation,⁵⁴ is undertaken by the same relevant administrative labor authority – either SUNAFIL or the DRTPE – that conducts the underlying labor inspection at issue. Once a violation report is issued, an employer has 15 business days to submit a response.⁵⁵ The relevant labor authority then has an additional 15 business days to issue a first instance resolution (*resolución de primera instancia*) that confirms, reduces, or overturns the fine recommendation.⁵⁶ Once the resolution of first instance is issued, the employer has three business days to appeal the resolution to the head of the relevant labor authority.⁵⁷ If the resolution of first instance is appealed, its finding is stayed and the labor authority has 30 business days to issue a second instance resolution (*resolución de segunda instancia*).⁵⁸

If the resolution of second instance confirms the fine, the case is transferred to the collection enforcement office (*cobranza coactiva*).⁵⁹ The collection enforcement office is located in each

⁴⁸ Ibid. SUNAFIL labor inspectors also told the OTLA that 185 of the 267 SUNAFIL auxiliary inspectors have completed the two years that they are required to serve in an auxiliary position and are now eligible to take the examination to be full labor inspectors. However, the inspectors told the OTLA that SUNAFIL has not offered the examination due to budget constraints. Meeting between the OTLA and SUNAFIL inspectors, Lima, December 10, 2015.

⁴⁹ Law 28806, Article 6.

⁵⁰ Meeting between the Government of Peru and the Government of the United States, Lima, December 7, 2015.

⁵¹ Law 28806, Article 6. Supreme Decree 019-2007-TR, Article 4. However, for employers with more than 10 employees, auxiliary inspectors can complete two of the three parts of the inspection process as long as the full inspector supervises and reviews all measures taken by the auxiliary inspector. Full inspectors must always personally complete at least one of the three inspection phases for all companies with more than 10 workers. Meeting between the OTLA and SUNAFIL, Trujillo, December 11, 2015.

⁵² Meeting between the OTLA and SUNAFIL inspectors, Lima, December 10, 2015.

⁵³ Meeting between the OTLA and SUNAFIL, Trujillo, December 11, 2015.

⁵⁴ Law 28806, Articles 46 and 48.

⁵⁵ Ibid., Article 45(c).

⁵⁶ Ibid., Article 45(e).

⁵⁷ Ibid., Article 49.

⁵⁸ Supreme Decree 019-2006-TR, Article 55. Government of Peru, December 2015 response, p. 9.

⁵⁹ Meeting between the OTLA and SUNAFIL inspectors, Lima, December 10, 2015. Meeting between the OTLA and SUNAFIL, Trujillo, December 11, 2015. Government of Peru, Law 26979, *Ley de Procedimiento de Ejecución Coactiva*, 1998, Article 17.1, available at

region for the DRTPEs and in Lima for SUNAFIL.⁶⁰ The collection enforcement office notifies the employer that payment of the fine is due, and if the employer does not pay the fine, the collection enforcement office can embargo employer assets, including bank accounts.⁶¹ An employer has the right to appeal a resolution of second instance to the relevant court, and this appeal stays any administrative resolution to pay a fine.⁶² The administrative process cannot compel remediation of the underlying violation.⁶³

The 2013 law that created SUNAFIL also created the Labor Inspection Court (*Tribunal de Fiscalización Laboral*).⁶⁴ This administrative court, which is not yet operational, will create an additional administrative step for cases that are appealed after the resolution of second instance and prior to any judicial process.⁶⁵ According to the GOP, this court will be established soon and will help to increase the efficiency of the administrative sanction process by issuing resolutions of third instance that are binding on all subsequent similar cases and thus, over time, will establish jurisprudence that expedites the sanctions process by limiting the scope of review for resolutions of first and second instance.⁶⁶

Judicial Process

The New Procedural Labor Law enacted in 2010 establishes a hierarchy of courts to adjudicate labor cases, consisting of the Peace Courts (*Juzgados de Paz Letrados Laborales*) that hear only small claims labor cases, the Labor Courts of First Instance (*Juzgados Especializados de Trabajo*), the Labor Branches of the Superior Courts (*Salas Laborales de las Cortes Superiores*), and the Constitutional and Social Rights Branch of the Supreme Court (*Sala de Derecho Constitucional y Social de la Corte Suprema*).⁶⁷ The Labor Courts of First Instance have jurisdiction over most cases involving alleged labor law violations, challenges to conciliation

http://www.derecho.usmp.edu.pe/centro_derecho_municipal/legislacion/08-Ley26979-Ley_Procedimientos_Ejecucion_Coactiva.pdf.

⁶⁰ Meeting between the OTLA and SUNAFIL, Trujillo, December 11, 2015. Government of Peru, Law 27444, *Ley de Procedimiento Administrativo General*, 2001, Article 231, available at

<http://recursosvirtualesperu.com/nsutusm/normas/LEY27444%20procedimiento%20administrativo%20general.pdf>.

⁶¹ Meeting between the OTLA and SUNAFIL inspectors, Lima, December 10, 2015. Law 26979, Article 33.

⁶² Government of Peru, December 2015 response, pp. 9-10. Meeting between the Government of Peru and the Government of the United States, Lima, December 7, 2015. Meeting between the OTLA and SUNAFIL inspectors, Lima, December 10, 2015. In addition, a Peruvian legal expert reports that the administrative labor authority does not have the authority to bring these orders to court for enforcement; only employers challenging inspectors' orders have a right to appeal to the judicial system. Rather than appeal the original case and risk being compelled to remediate the underlying violation by a court, employers can simply pay a fine at the administrative level and the case is closed; the employer need not remediate the underlying violation. Call between the OTLA and Peruvian labor law expert, February 17, 2016. To seek redress, the worker would have to bring a separate claim to the courts.

⁶³ Meeting between the OTLA and SUNAFIL, Trujillo, December 11, 2015. Call between the OTLA and Peruvian labor law expert, February 17, 2016. Meeting between the OTLA and SUNAFIL inspectors, Lima, December 10, 2015.

⁶⁴ Law 29981, Article 15.

⁶⁵ *Ibid.* Meeting between the Government of Peru and the Government of the United States, Lima, December 7, 2015.

⁶⁶ Meeting between the Government of Peru and the Government of the United States, Lima, December 7, 2015. Law 29981, Article 15.

⁶⁷ Government of Peru, Law 29497, *Nueva Ley Procesal del Trabajo*, 2010, available at http://www.trabajo.gob.pe/LEYPROCESALTRABAJO/pdf/ley_29497_trabajo.pdf.

proceedings and enforcement of administrative resolutions, and appeals of labor judgments from the Peace Courts.⁶⁸ The Labor Branches of the Superior Courts have jurisdiction over appeals of decisions of the Labor Courts of First Instance and also over cases regarding arbitration decisions arising from collective bargaining negotiations.⁶⁹ The Constitutional and Social Rights Branch of the Supreme Court is the court of final appeal on labor law matters.⁷⁰ Courts can confirm, alter, or overturn fines assessed by the administrative labor authority and can also order and compel remediation, including reinstatement of workers and conversion of workers employed on short-term contracts to permanent employees.⁷¹ While the New Procedural Labor Law has expedited the legal process in labor cases to some extent by creating an abbreviated judicial process,⁷² stakeholders report that it can still take two to three years for a case to reach a final judicial decision.⁷³

In the course of pending administrative or judicial processes, workers can also file a request with the relevant court for a precautionary measure (*medida cautelar*) that orders their temporary reinstatement.⁷⁴ Nothing in the New Procedural Labor Law appears to give the judge authority to convert workers employed on short-term contracts into permanent employees pending the final resolution of a matter. As such, while a judge could issue a precautionary measure ordering that a worker be re-employed on a new short-term contract, it appears that the employer could still choose not to renew this new contract upon its conclusion.⁷⁵ Therefore, workers employed on sixty-day contracts, for example, would have to petition the court for a new precautionary measure every sixty days if each contract was not renewed.

B. Law and Practice Related to the Non-Traditional Export Sectors

Peruvian law establishes that short-term contracts may only be used in specific circumstances. In the NTE sectors, the use of short-term contracts is governed by Decree Law 22342, the Law Promoting Non-Traditional Exports.⁷⁶ Decree Law 22342 provides tax benefits and regulates employment relationships for the NTE sectors, which includes exports such as textiles and apparel, certain agricultural products, fishery products, jewelry, wood and paper, and non-metallic minerals.⁷⁷ In the first five years after the PTPA entered into force, revenue from the

⁶⁸ Ibid., Articles 2 and 4(3). Workers may also file cases alleging labor violations directly in the Labor Courts of First Instance, or in the Constitutional Courts if they are alleging a violation of a constitutional right, rather than initiating a complaint through the administrative process. This appears to be an alternative means of seeking relief for labor violations.

⁶⁹ Ibid., Articles 3 and 4(2).

⁷⁰ Ibid., Article 4(1).

⁷¹ Meeting between the OTLA and SUNAFIL, Trujillo, December 11, 2015. Call between the OTLA and Peruvian labor law expert, February 17, 2016. Meeting between the OTLA and SUNAFIL inspectors, Lima, December 10, 2015.

⁷² Law 29497, Articles 48-49.

⁷³ Meeting between the OTLA and representative of the judiciary (*poder judicial*), Lima, December 10, 2015.

Meeting between the OTLA, the submitters, and worker representatives, Lima, December 7, 2015.

⁷⁴ Law 29497, Articles 54-56.

⁷⁵ Call between the OTLA and Peruvian labor law expert, February 17, 2016.

⁷⁶ Government of Peru, Decree Law 22342, *Ley de Promoción de Exportaciones no Tradicionales* (1978), available at <http://www2.produce.gob.pe/dispositivos/publicaciones/2001/dl22342.pdf>.

⁷⁷ Ibid. Peruvian Law does not define which specific exports are considered to be “non-traditional.” However, “traditional exports” are defined by Supreme Decree 076-92-EF (1992) and include iron, gold, silver, lead, zinc,

export of NTEs from Peru to the United States increased by 80 percent, while total export revenue from Peru to the United States increased by 26 percent.⁷⁸ This increase in NTEs has also resulted in an increased demand for workers in the NTE sectors.⁷⁹

Decree Law 22342 contains requirements that employers must fulfill in order to take advantage of the law's tax benefits and contracting mechanisms. These requirements include that: the employment contracts for all workers who will be employed under Decree Law 22342 must be submitted in writing to the DRTPE for approval;⁸⁰ each employment contract must specify the work to be performed and list a specific export contract or purchase order that gives rise to the particular export task;⁸¹ and at least 40 percent of the employer's annual earnings must be derived from exports.⁸²

Unlike legal provisions governing the use of short-term contracts in all other sectors, which permit the use of consecutive short-term contracts for up to five years,⁸³ Decree Law 22342 does not put a limit on the consecutive use of short-term employment contracts. Instead, Decree Law 22342 states that, pursuant to the system established by Decree Law 18138, qualifying employers may hire workers on short-term contracts in the number required to work in production operations for export,⁸⁴ and that such contracts may be renewed as many times as is

copper, crude oil and derivatives, cotton, sugar, coffee, fishmeal and fish oil. All export products that are not listed by Supreme Decree 076-92-EF are considered to be "non-traditional" and are covered by the NTE law.

⁷⁸ Gestión, *Seis años del TLC con EE.UU.: exportaciones crecieron 26%*, February 8, 2015, available at <http://gestion.pe/economia/seis-anos-tlc-eeuu-exportaciones-crecieron-26-2122816>.

⁷⁹ The GOP reported to the OTLA that, in 2015, a monthly average of 70,918 workers were employed on contracts registered under Decree Law 22342. Government of Peru, December 2015 response, p. 4.

⁸⁰ Decree Law 22342, Article 32(d).

⁸¹ Ibid., Article 32(c).

⁸² Ibid., Article 7. The Spanish text of Article 7 reads: "*Considerase empresa industrial de exportación no tradicional, para los efectos del presente capítulo, a la que exporte directamente o por intermedio de terceros, el 40% valor de su producción anual efectivamente vendida.*" Meeting between the OTLA and SUNAFIL inspectors, Lima, December 10, 2015.

⁸³ Law 728, the Law of Productivity and Labor Competitiveness, establishes the general legal parameters relating to employment contracts for all sectors except for NTEs. Law 728 provides that while employment contracts are presumed to be for an indefinite duration, short-term or fixed-term contracts may be used in nine specific circumstances. These circumstances include: contracts based on market necessities; contracts based on occasional work; contracts to substitute temporarily for another worker; contracts for specific acts or services; contracts for intermittent work; and seasonal contracts. While employers may use any combination of these contracts consecutively for the same worker, the total cumulative duration of consecutive contracts for that worker permitted under Law 728 may not exceed five years. Pursuant to Law 728, if a worker is employed on consecutive short-term contracts for more than five years, that worker automatically becomes a permanent employee of the employer. However, Law 728 also specifically notes that the employment contracts of workers employed under Decree Law 22342 are regulated by that law, not Law 728. Nevertheless, the norms established in Law 728 with respect to the approval of employment contracts still apply to workers employed under Decree Law 22342. Government of Peru, Law 728, *Ley de Productividad y Competitividad Laboral, Decreto Supremo No. 003-97-TR* (1997), available at http://www.mintra.gob.pe/contenidos/archivos/prodlab/legislacion/DS_003_1997.pdf.

⁸⁴ Decree Law 22342, Article 32. The Spanish text of Article 32 reads: "*Las empresas a que se refiere el artículo 7 del presente Decreto Ley, podrán contratar personal eventual, en el número que requieran, dentro del régimen establecido por Decreto Ley 18138, para atender operaciones de producción para exportación en las condiciones que se señalan a continuación...*"

necessary.⁸⁵ Decree Law 18138 establishes that for workplaces where the work is permanent or continuous, workers may only be employed on short-term contracts in cases when it is required by unforeseen circumstances or by the temporary nature of the act or service to be undertaken.⁸⁶

The law provides a 60-day period for contracts filed under Decree Law 22342 to be approved by the DRTPE; however, it also provides that the contracts are considered approved once the 60-day period has ended, unless the DRTPE determines otherwise, even without the DRTPE having to take any affirmative approval action.⁸⁷ According to Peruvian law and information provided by labor inspectors, the administrative labor authority is not required to and, in practice, does not affirmatively verify a contract's conformity with the requirements under Decree Law 22342 before it is approved and enters into force.⁸⁸ No protocol exists, for example, for the DRTPE to verify prior to contract approval whether the information submitted by employers in contracts filed under Decree Law 22342 is accurate, and although inspectors told the OTLA that information-sharing agreements exist between the labor authorities and other federal agencies, the DRTPE does not request this information before a contract is approved.⁸⁹ The duration of contracts under Decree Law 22342 can often be as short as 30-60 days,⁹⁰ however, in which case all services performed under these contracts could be completed before the time period has run for the contract to be approved.⁹¹

Labor inspectors further explained to the OTLA that a contract's conformity with legal requirements is only examined if a complaint is subsequently filed with the regional or federal

⁸⁵ Ibid., Article 32(b). The Spanish text of Article 32(b) reads: "*Los contratos se celebrarán para obra determinada en términos de la totalidad del programa y/o de sus labores parciales integrantes y podrán realizarse entre las partes cuantas veces sea necesario, observándose lo dispuesto en el presente artículo.*"

⁸⁶ Government of Peru, Decree Law 18138, *Se Dictan Normas para el Contrato Individual de Trabajo a Plazo Fijo* (1970), Article 1, available at <http://docs.peru.justia.com/federales/decretos-leyes/18138-feb-6-1970.pdf>. The Spanish text of Article 1 reads: "*En los Centros de Trabajo donde se realicen labores que por su naturaleza sean permanentes o continuas, los contratos individuales a plazo fijo o para una obra determinada, sólo podrán celebrarse en los casos en que así lo exija la naturaleza accidental o temporal al servicio que se va a prestar o de la obra que se ha a ejecutar.*" The Regulations to Decree Law 18138 define seven circumstances that meet this definition, many of which match circumstances included in Law 728, including: contracts based on market necessities; contracts based on occasional work; contracts to substitute for another worker; contracts for specific acts or services; and contracts for intermittent work. Government of Peru, Supreme Decree 077-90-TR, *Aprueban el Reglamento del Decreto Ley 18138*, 1990, Articles 2-11, available at http://www.trabajo.gob.pe/archivos/file/SNIL/normas/1990-12-21_077-90-TR_284.pdf.

⁸⁷ Decree Law 22342, Article 32(d). Labor inspectors reported to the OTLA that, in practice, all contracts are automatically considered to be approved once they are filed. Meeting between the OTLA and SUNAFIL inspectors, Lima, December 10, 2015.

⁸⁸ Decree Law 22342, Article 32(d). Meeting between the OTLA and SUNAFIL inspectors, Lima, December 10, 2015.

⁸⁹ Meeting between the OTLA and SUNAFIL inspectors, Lima, December 10, 2015. Inspectors told the OTLA that information-sharing agreements exist between the labor authorities, the National Tax and Customs Superintendency (SUNAT), and the National Public Registry Superintendency (SUNARP).

⁹⁰ Employment contracts provided to the OTLA, which were filed with the DRTPE pursuant to Decree Law 22342, covering the following periods: March 1-31, 2010; September 1-30, 2010; June 1-30, 2011; November 1-30, 2011; June 1-30, 2012; August 1-31, 2012; February 1-28, 2013; March 1-April 30, 2014; April 1-May 31, 2015.

⁹¹ The time period for approval can be further shortened because Peruvian law that does not require employment contracts, including those relating to Decree Law 22342, to be filed with the DRTPE until 15 calendar days after the parties' agreement. Law 728, Article 73.

labor inspectorate,⁹² placing the burden on a worker to file an inspection request to challenge the veracity of information contained in the contract, rather than on the employer to affirmatively establish the contract's legality at the time of filing. Both according to Peruvian law and labor inspectors, after a contract under Decree Law 22342 enters into force, labor inspectors are the primary mechanism for determining the veracity of information filed in an employment contract.⁹³

Workers reported to the OTLA that, while they are employed on consecutive short-term contracts that are filed with the DRTPE, the purchase orders listed on their contracts remain the same across contracts over several years.⁹⁴ Moreover, employers told the OTLA that as long as at least 40 percent of direct employers' annual earnings are derived from exports, they employ their entire workforce on unlimited short-term contracts under Decree Law 22342, even if some of those workers do not produce goods for export.⁹⁵ These employers told the OTLA that because Decree Law 22342 does not explicitly prohibit this practice, they believe that it is legally permissible.⁹⁶

Because workers employed in the NTE sectors under Decree Law 22342 are exempt from the five-year limit on the consecutive use of short-term contracts in other sectors, they may be employed on unlimited, consecutive short-term contracts for the entire duration of their employment. This provides employers with a regular opportunity to not renew contracts without the need to justify the non-renewal and without triggering the legal requirements that a more formal dismissal would draw.⁹⁷

Peruvian law establishes that the government and employers must refrain from: "any acts likely to constrain, restrict or impair, in any way, the right of workers to unionize; and intervening in any way in the establishment, administration, or maintenance of trade union organizations."⁹⁸ In 2007, the GOP enacted legal instruments that clarify that using any form of short-term contracts to affect, damage, or limit workers' freedom of association or right to bargain collectively is

⁹² Meeting between the OTLA and SUNAFIL inspectors, Lima, December 10, 2015.

⁹³ Ibid. Law 728, Article 73.

⁹⁴ Meeting between the OTLA and worker representatives, Lima, December 8, 2015. One worker provided the OTLA with short-term employment contracts spanning five years that were filed with the DRTPE pursuant to Decree Law 22342. Each contract listed nearly the same buyers on the purchase order, but had updated dates.

⁹⁵ Meeting between the OTLA and employers, Lima, December 9, 2015.

⁹⁶ Ibid.

⁹⁷ Law 728, Articles 16-33. Meeting between the OTLA and worker representatives, Lima and Trujillo, December 7-8, 10, and 12, 2015. For example, for workers employed under indefinite employment contracts, an employer may only fire the worker for specific reasons identified by Peruvian law. Law 728, Article 16. At the time of the dismissal, the employer must notify the worker in writing and indicate the reason for the dismissal. Ibid., Article 32.

⁹⁸ Government of Peru, Supreme Decree 010-2003-TR, *Aprueban Texto Unico Ordenado de la Ley de Relaciones Colectivas de Trabajo*, 2003, Article 4, available at

<http://www.mintra.gob.pe/contenidos/archivos/prodlab/TUO%20Relaciones%20Colectivas%20de%20Trabajo%20TUO%20DL.25593%20DS.%20010-2003-TR%2005-10-03.pdf>. The Spanish text of Article 4 reads: "El Estado, los empleadores y los representantes de uno y otros deberán abstenerse de toda clase de actos que tiendan a coactar, restringir o menoscabar, en cualquier forma, el derecho de sindicalización de los trabajadores, y de intervenir en modo alguno en la creación, administración o sostenimiento de las organizaciones sindicales que éstos constituyen."

illegal and considered a “very serious offense,” subject to the highest fine rate available under the law.⁹⁹

Despite these legal protections, workers have reported that employers often do not renew the short-term contracts of workers who attempt to exercise their right to freedom of association.¹⁰⁰ Several entities have expressed concern about employers’ use of consecutive short-term contracts under Decree Law 22342 to undermine workers’ associational rights. A 2011 MTPE memorandum references the negative impact of Decree Law 22342 on workers’ ability to exercise their associational rights and suggests that the market need for short-term contracts in the NTE sectors is already fulfilled by Law 728.¹⁰¹ Similar concerns have been raised by the International Labor Organization,¹⁰² civil society organizations,¹⁰³ and Peruvian newspapers.¹⁰⁴

⁹⁹ Supreme Decree 019-2007-TR, Article 25.10. The Spanish text of Article 25.10 reads: “*Son infracciones muy graves, los siguientes incumplimientos: La realización de actos que afecten la libertad sindical del trabajador o de la organización de trabajadores, tales como aquellos que impiden la libre afiliación a una organización sindical, promuevan la desafiliación de la misma, impidan la constitución de sindicatos, obstaculicen a la representación sindical, utilicen contratos de trabajo sujetos a modalidad para afectar la libertad sindical, la negociación colectiva y el ejercicio del derecho de huelga, o supuestos de intermediación laboral fraudulenta, o cualquier otro acto de interferencia en la organización de sindicatos.*” Government of Peru, Directive 001-2007/MTPE/2/11.4, *Directiva Nacional Para la Ejecución del Programa Nacional de Regularización y Verificación de Contratos a Plazo Fijo y su Incidencia en el Ejercicio de la Libertad Sindical y la Negociación Colectiva*, 2007, Article 6.1, available at http://www.mintra.gob.pe/archivos/file/SNIL/normas/2007-09-28_001-2007-MTPE-2-11.4_2985.pdf. The Spanish text of Article 6.1 reads: “*En cuanto a la aplicación de los artículos 25.5 7 25.10 que establece infracciones muy graves en materia de relaciones laborales, las normas comprenden todo acta de interferencia en la organización de sindicatos y de afectación de la libertad sindical, lo que implica también que la contratación a tiempo determinada no puede ser utilizada con la intención o efecto de dañar o limitar el ejercicio de los derechos asociación y de negociación colectiva o violar el principio de no discriminación y que no puede utilizada para eludir los derechos de libertad sindical y de negociación colectiva.*”

¹⁰⁰ Meeting between the OTLA and worker representatives, Lima and Trujillo, December 7-8, 10, and 12, 2015.

¹⁰¹ Government of Peru, *Informe No. 23-2011-MTPE/2/14*, November 15, 2011, available at http://www.mintra.gob.pe/archivos/file/DGT/opinion/INFORME_023_2011_DGT.pdf.

¹⁰² International Labor Organization, Committee on Freedom of Association (CFA), Report 357 (June 2010), para. 868, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_142021.pdf. In a case concerning allegations that Decree Law 22342 is being used to restrict workers’ freedom of association, the CFA cites to the GOP’s response in noting that, “in the light of the detailed statistical data set out in report No. 111-2008-MTPE/5, it is apparent that temporary contracts have been used repeatedly as a means of discouraging trade union membership and have had prejudicial effects.” International Labor Organization, CFA, Report 375 (June 2015), para. 482, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_375796.pdf. In a case concerning allegations that Decree Law 22342 is being used to restrict workers’ freedom of association, the CFA notes that, “fixed-term contracts should not be used deliberately for anti-union purposes and that, in certain circumstances, the employment of workers through repeated renewals of fixed-term contracts for several years can be an obstacle to the exercise of trade union rights.”

¹⁰³ See, e.g., Eight Peruvian workers’ organizations, *La Agenda Laboral Pendiente del TLC Perú-Estados Unidos: Cuando la Competitividad se Basa en la Reducción de los Derechos Laborales*, Lima, 2014, available at <http://www.iesiperu.org.pe/documentos/publicaciones/TLC%20EEUU%20PERU.pdf>; Labor Development Program (PLADES), *Implicaciones en la Libertad Sindical del Régimen Laboral Especial del Decreto Ley No. 22342, Ley de Promoción de Exportación no Tradicional*, Lima, 2010, available at http://www.plades.org.pe/images/imgarticulos/pinforma/evento6/implicancias_libertad_sindical_17Jun.pdf.

¹⁰⁴ La Republica, *DL 22342: Tres décadas de abusos laborales*, March 25, 2013, available at <http://larepublica.pe/columnistas/contracorriente/dl-22342-tres-decadas-de-abusos-laborales-25-03-2013>. This editorial states that, “Decree Law 22342 permits employers to employ workers on one month contracts, which means that workers’ continuous work is dependent on signing one short-term contract after another (up to more than

Further, a 2013 letter from six multinational apparel brands that source from Peru to President Ollanta Humala states that, “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 labor rights and therefore poses an obstacle to the proper application of our codes of conduct.”¹⁰⁵ The rate of unionization in the NTE sectors is less than half the rate for workers employed on an indefinite basis.¹⁰⁶ While stakeholders suggest that workers employed under the short-term contract regime of Law 728 have a similar precariousness during the first five years of their employment, they also identify the five-year limit on short-term contracts as an important improvement for protecting workers’ associational rights.¹⁰⁷

In addition, workers raised concerns related to the pace of the administrative and judicial processes meant to enforce the labor law protections described above. Information provided to the OTLA indicates that these administrative and judicial processes can often take years to reach a final resolution, during which time, workers are not reinstated and do not receive back pay owed and employers are not required to pay any fines imposed.¹⁰⁸ In one example where labor inspectors received an inspection request in November 2009 alleging that an NTE employer had failed to renew the short-term contracts of union members, while renewing the short-term contracts of other workers,¹⁰⁹ a final resolution ordering the employer to reinstate the affected workers and to pay a fine was not issued until May 2013.¹¹⁰ Moreover, by the time the case was ultimately resolved, the employer had closed and filed for bankruptcy, so there were no positions with the company to which the workers could be reinstated.¹¹¹ In another example where labor inspectors issued a violation report in February 2012 finding that an employer was employing 740 workers under Decree Law 22342 whose contracts did not comply with the requirements of that law,¹¹² the case was still pending before the court of second instance as of December 2015.¹¹³ In a similar example where the administrative labor authority found in September 2013 that an employer was employing 925 workers under Decree Law 22342 whose contracts did not

100 contracts with the same employer), which facilitates their firing if they speak up in favor of their rights or attempt to form a union.”

¹⁰⁵ Letter from six multinational apparel brands (Nike, PVH, VF, New Balance, Life is Good, Forty Seven Brand) to President Ollanta Humala Tasso, March 4, 2013, available at http://www.industrialunion.org/sites/default/files/uploads/documents/Peru/joint_letter_to_president_ollanta_humala_-_march_4_2013.pdf.

¹⁰⁶ The Government of Peru reported that the rate of unionization for workers employed on an indefinite basis under Law 728 is 7.5%, while the rate of unionization for workers employed under Decree Law 22342 is 3.7%. Government of Peru, Ministry of Labor and Promotion of Employment, *Estadísticas en Materia Laboral*, September 15, 2015. Government of Peru, Ministry of Labor and Promotion of Employment, *Planilla Electronica*, March 2015.

¹⁰⁷ Meeting between the OTLA and worker representatives, Lima and Trujillo, December 7-8, 10, and 12, 2015.

¹⁰⁸ Ibid.

¹⁰⁹ Government of Peru, 4th Specialized Constitutional Court, Superior Court of Justice of Lima, Case 00446-2010, Resolution 12, July 27, 2011.

¹¹⁰ Government of Peru, 4th Specialized Constitutional Court, Superior Court of Justice of Lima, Case 00446-2010, Resolution 15, May 21, 2013.

¹¹¹ Meeting between the OTLA and worker representatives, Lima, December 8, 2015.

¹¹² Government of Peru, Ministry of Labor and Promotion of Employment, Expediente 785-2012-MTPE/1/20.45, Resolución Sub Directoral 350-2012, MTPE/1/20.45, Lima, May 29, 2012.

¹¹³ Government of Peru, December 2015 response, p. 11.

comply with the requirements of that law,¹¹⁴ the case was still pending before the court of first instance in December 2015.¹¹⁵

C. Law and Practice Related to Agricultural Exports

Employment contracts and benefits in Peru's agricultural sector are covered by a special law. Law 27360, the Law that Approves the Norms for Promotion of the Agricultural Sector, provides less vacation time, compensation in case of wrongful termination, and health insurance than general Peruvian law,¹¹⁶ lesser benefits about which workers have repeatedly raised concerns,¹¹⁷ and it also permits employers to hire workers on either a permanent or short-term basis.¹¹⁸ However, unlike Decree Law 22342, the use of short-term employment contracts under Law 27360 is regulated by Law 728. This means that Law 728's five-year limit on the consecutive use of short-term employment contracts applies in the agricultural sector.¹¹⁹ Peru's

¹¹⁴ Government of Peru, Ministry of Labor and Promotion of Employment, Expediente 149419-2012-MTPE/1/20.23, Resolución Directoral 309-2013-MTPE/1/20.2, Lima, September 12, 2013. Government of Peru, Ministry of Labor and Promotion of Employment, Expediente 131155-2012-MTPE/1/20.23, Resolución Directoral 313-2013-MTPE/1/20.2.

¹¹⁵ Government of Peru, December 2015 response, p. 12.

¹¹⁶ U.S. Submission 2015-01 (Peru), p. 23. For example, in other sectors: workers are entitled to 30 days of paid vacation time per year; in cases of wrongful termination, workers are entitled to a payment equivalent to 1.5 times their monthly wage per year for each year worked, up to a maximum of 12 months' wages; and employers are required to contribute an amount equal to 9 percent of a worker's monthly wages towards that worker's health insurance account. See, Government of Peru, Legislative Decree 713, *Consolidan la legislación sobre descansos remunerados de los trabajadores sujetos al régimen laboral de la actividad privada*, 1991, Article 10, available at <http://www.mintra.gob.pe/contenidos/archivos/prodlab/D.Leg.%20713%20-%2008-11-91.pdf>; Law 728, Articles 38 and 76; and, Government of Peru, Law 26790, *Ley de Modernización de la Seguridad Social en Salud*, Ley 26790, 1997, Article 6, available at [http://www2.congreso.gob.pe/sicr/cendocbib/con4_uibd.nsf/180F23BAE62B76C505257BD4005DF5F9/\\$FILE/8_L_26790-1997.pdf](http://www2.congreso.gob.pe/sicr/cendocbib/con4_uibd.nsf/180F23BAE62B76C505257BD4005DF5F9/$FILE/8_L_26790-1997.pdf). In the agricultural sector: workers are entitled to 15 days of paid vacation time per year for each year worked; in cases of wrongful termination, workers are entitled to a payment equivalent to 15 days' wages for each year worked, up to a maximum of 180 days' wages; and, employers are required to contribute an amount equal to 4 percent of a worker's monthly wages towards that worker's health insurance account. See, Government of Peru, Law 27360, *Ley Que Aprueba Las Normas de Promoción del Sector Agrario*, 2000, Articles 7(2)(b), 7(2)(c), and 9(2), available at <http://docs.peru.justia.com/federales/leyes/27360-oct-30-2000.pdf>.

¹¹⁷ U.S. Submission 2015-01 (Peru), pp. 23-39. International Commission of Jurists, Social Rights and Special Regimes for Export Promotion: The Case of the Agriculture for Export in Peru, Case study in the Valley of Ica, 2014, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/11/Peru-Social-Rights-for-Export-Promotion-Publications-thematic-report-2014-ENG.pdf>; Eight Peruvian workers' organizations, *La Agenda Laboral Pendiente del TLC Perú-Estados Unidos: Cuando la Competitividad se Basa en la Reducción de los Derechos Laborales*.

¹¹⁸ Law 27360, Article 7(1).

¹¹⁹ Many of the top growing NTEs are also agricultural products. In 2014, among the top grossing non-traditional export products were grapes, asparagus, avocados, quinoa, textiles, and apparel. Government of Peru, National Superintendent of Tax Administration, *Estadísticas de Comercio Exterior 2014, Cuadro No. 17: Principales Subpartidas Nacionales según Tipo de Sector Económico*, available at http://www.sunat.gob.pe/estad-comExt/modelo_web/Bol2014.htm. The GOP informed the OTLA that if an employer qualifies under both Decree Law 22342 and Law 27360 the employer may choose under which law they wish to register a worker's contract, so long as the legal requirements for registering contracts under that law are met in the case of that worker. Meeting between the Government of Peru and the Government of the United States, Lima, December 7, 2015. However, in practice, textile and apparel exporting employers told the OTLA that their workers are employed under Decree Law 22342, while agricultural exporting employers told the OTLA that their workers are employed under Law 27360.

occupational safety and health (OSH) law establishes minimum standards and sets out employers' and workers' rights and duties.¹²⁰ Among an employer's OSH-related obligations are: guaranteeing the safety and health of workers in the performance of all aspects of their work in the workplace;¹²¹ eliminating hazardous situations and agents in the workplace and, if this is not possible, replacing them with circumstances that pose less danger;¹²² and providing indemnification in cases of workplace injuries or illnesses verified by labor inspectors.¹²³

Despite these legal protections, the submitters report that labor cases can often take several years to reach a final enforceable decision through the GOP's administrative and judicial processes. The submitters document such delays in cases in which labor inspectors found violations of Law 728, the OSH law, and legal instruments protecting workers' freedom of association.¹²⁴

In May 2014, for example, labor inspectors issued a violation report to one of the three agricultural enterprises referenced in the submission finding that the enterprise violated the law by failing to renew the short-term contracts, or requiring mandatory unpaid leave, of workers who attempted to join or participate in unions and was also illegally employing workers on short-term contracts after the five-year mark of their employment.¹²⁵ After administrative processes, the findings of the May 2014 violation report were confirmed in December 2014.¹²⁶ However, according to the GOP, the employer appealed this decision to the judicial system and, as of the publication of this report, a decision by the court of first instance is still pending.¹²⁷

In a violation report issued in 2010, labor inspectors found another one of the agricultural enterprises referenced in the submission to be in violation of Peru's OSH law and issued a violation report with a fine recommendation.¹²⁸ Over five years later, and after the fine was confirmed at each stage of the administrative process, the case is still pending before the court of first instance and remains unresolved.¹²⁹ In 2012 and 2014, labor inspectors issued subsequent

Meetings between the OTLA and textile and apparel sector employers, Lima, December 9 and 14, 2015. Meetings between the OTLA and agricultural sector employers, Trujillo and Lima, December 11 and 14, 2015.

¹²⁰ Government of Peru, Law 29783, *Ley de Seguridad y Salud en el Trabajo*, 2011, available at

<http://www.sunafil.gob.pe/portal/images/docs/normatividad/LEYDESEGURIDADSAUDTRABAJO-29783.pdf>.

¹²¹ Ibid., Article 49(a). The Spanish text of Article 49(a) reads: "*El empleador, entre otras, tiene las siguientes obligaciones: (a) Garantizar la seguridad y la salud de los trabajadores en el desempeño de todos los aspectos relacionados con su labor, en el centro de trabajo o con ocasión del mismo.*"

¹²² Ibid., Article 50(c). The Spanish text of Article 50(c) reads: "*El empleador aplica las siguientes medidas de prevención de riesgos laborales: (c) Eliminar las situaciones y agentes peligrosos en el centro de trabajo o con ocasión del mismo, y, si no fuera posible, sustituirlas por otras que entrañen menor peligro.*"

¹²³ Ibid., Article 53. The Spanish text of Article 53 reads: "*El incumplimiento del empleador del deber de prevención genera la obligación de pagar las indemnizaciones a las víctimas, o a sus derechohabientes, de los accidentes del trabajo y de las enfermedades profesionales. En el caso en que producto de la vía inspectiva se haya comprobado fehacientemente el daño al trabajador, el Ministerio de Trabajo y Promoción del Empleo determina el pago de la indemnización respectiva.*"

¹²⁴ U.S. Submission 2015-01 (Peru), pp. 23-39.

¹²⁵ Government of Peru, SUNAFIL, Acta de Infracción 024-2014-SUNAFIL, Trujillo, May 16, 2014.

¹²⁶ Government of Peru, Regional Ministry of Labor and Promotion of Employment of La Libertad, Resolución Sub Gerencial 031-2014-GR-LL-GGR/GRSTPE-SGIT, Trujillo, December 12, 2014.

¹²⁷ Government of Peru, December 2015 response, p. 13.

¹²⁸ Government of Peru, Regional Ministry of Labor and Promotion of Employment of San Martín, Acta de Infracción 008-2010-SDI-OZTT-DRTPE-SM, Tocache, November 23, 2010.

¹²⁹ Government of Peru, December 2015 response, p. 14.

violation reports that found the same employer to again be in violation of the OSH law.¹³⁰ Also in 2014, labor inspectors issued a violation report finding the same employer liable for the workplace death of a worker.¹³¹ In 2015, inspectors found this same employer liable for a serious workplace injury.¹³² These repeated violations by the same employer, despite labor inspectors' repeated fine recommendations, raise concerns about the recurrence of labor law violations by specific employers.

In addition, workers reported to the OTLA that there is no local labor court and no current SUNAFIL presence in the region of Peru where one of the agricultural companies referenced in the submission is located.¹³³ Thus, in order for workers in this region to pursue judicial remedies for violations of their labor rights, they must find the time and economic resources to travel to Lima.¹³⁴

III. Findings

The OTLA conducted a review of information related to the submission's allegations that the GOP has failed to fulfill its commitments under the PTPA Labor Chapter.

A. Efforts by Peru

Since the PTPA was signed, the GOP has taken a number of positive steps intended to improve its enforcement of labor laws, including enacting legal instruments in 2007 to clarify that employers using short-term contracts that restrict workers' freedom of association are committing a "very serious offense" subject to the highest fine rate legally available; enacting the New Procedural Labor Law in 2010; and creating SUNAFIL and the Labor Inspection Court in 2013. In 2014, the GOP also agreed to cooperate with a U.S. Department of Labor-funded technical assistance project developing a labor inspection protocol to help inspectors better identify cases in which short-term contracts are illegally being used to limit workers' freedom of association in the NTE sectors.¹³⁵

B. Freedom of Association in Law and Practice

Article 17.2.1 of the PTPA states that "[e]ach party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the ILO Declaration on

¹³⁰ Government of Peru, Regional Ministry of Labor and Promotion of Employment of San Martin, Acta de Infracción 007-2012-OZTPE-T-SM, Tocache, June 6, 2012. Government of Peru, SUNAFIL, Acta de Infracción 70-2014, Lima, August 14, 2014.

¹³¹ Government of Peru, Acta de Infracción 007-2014-SDI-OZTPE-T, Tocache, October 1, 2014.

¹³² Government of Peru, Regional Ministry of Labor and Promotion of Employment of San Martin, Acta de Infracción 007-2015-OZTPEAH-T-SM, Tocache, October 15, 2015.

¹³³ Meeting between the OTLA and agricultural worker representatives, Lima, December 8, 2015.

¹³⁴ Ibid.

¹³⁵ U.S. Department of Labor, News Release: Funds to Help Build the Capacity of Labor Inspectorates in Peru and the Philippines Announced by U.S. Labor Department, Release Number 14-2314-NAT, December 22, 2014, available at <http://www.dol.gov/newsroom/releases/ilab/ilab20142314>.

Fundamental Principles and Rights at Work and its Follow-Up (1998): (a) freedom of association.”¹³⁶

In the first five years after the PTPA entered into force, revenue from the export of NTEs from Peru to the United States increased by 80 percent, while total export revenues from Peru to the United States increased by 26 percent.

While legal instruments enacted in 2007 provide that short-term contracts shall not undermine workers’ freedom of association, many workers on short-term contracts in the NTE sectors who attempt to exercise their right to freely associate report that they do not have their contracts renewed.¹³⁷ If such workers challenge the legality of their contracts’ non-renewal as an act of anti-union discrimination, or if they challenge the use of short-term contracts as contrary to Decree Law 22342, they can wait years for relief while their cases are resolved through administrative and judicial processes. Penalties cannot be enforced until the conclusion of these lengthy processes and only the courts can compel employers to reinstate workers or comply with other remediation orders.

Exacerbating these concerns, there does not appear to be a policy or mechanism for confirming the legality of short-term contracts under Decree Law 22342 before they enter into force, and therefore there is nothing to ensure that employers use these contracts only for their prescribed legal purpose. Contracts appear to be automatically approved after 60 days without any affirmative action taken by the DRTPE and workers can begin working and, in some cases, even perform all contracted services before contracts are approved by DRTPE.

These concerns contribute to a labor law enforcement process that may embolden employers who seek to undermine freedom of association by not renewing the short-term contracts of workers who attempt to form or participate in a union, as the affected workers have little incentive to pursue claims and employers have little fear of enforceable repercussions. It therefore is not surprising that the rate of unionization in the NTE sectors is less than half the rate for workers employed on an indefinite basis and that workers employed under Decree Law 22342 might find it more difficult to exercise their associational rights without fear of retaliation by their employer.¹³⁸

In contrast to other sectors where consecutive short-term contracts cannot be used for more than five years, Decree Law 22342 permits unlimited consecutive short-term contracts in the NTE sectors. Based on the evidence gathered as part of the review, the OTLA has 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.

¹³⁶ PTPA, Article 17.2.1.

¹³⁷ Meeting between the OTLA and worker representatives, Lima and Trujillo, December 7-8, 10, and 12, 2015.

¹³⁸ Ibid.

C. Enforcement of Laws Relating to Freedom of Association and Occupational Safety and Health

Article 17.3.1(a) of the PTPA states that “[a] Party shall not fail to effectively enforce its labor laws, including those it adopts or maintains in accordance with Article 17.2.1, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties, after the date of entry into force of this Agreement.”¹³⁹ Article 17.8 of the PTPA defines labor laws as “a Party’s statutes and regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights: (a) freedom of association; . . . and (f) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.”¹⁴⁰

Since the PTPA was signed, the GOP has taken a number of positive steps to improve its enforcement of labor laws. The OTLA finds these steps encouraging and will continue to monitor their implementation. Nonetheless, the OTLA’s review raises questions about labor law enforcement. The OTLA has questions, specifically, with respect to the DRTPEs’ enforcement of the requirements of Decree Law 22342. The OTLA also has questions more generally regarding GOP labor law enforcement, in particular in the NTE and agricultural sectors, related to low inspectorate staffing levels; the number of SUNAFIL offices; the length of time for resolution of cases through the administrative and judicial processes; and the inability of the administrative labor authority to compel employers to comply with reinstatement and other remediation orders.

IV. Recommendations and Next Steps

The OTLA will continue to monitor the issues raised by the submission, including any progress that the GOP may make with respect to addressing the questions and concerns identified in this report. The OTLA offers the following recommendations to the GOP to help guide subsequent engagement between the U.S. government and the GOP aimed at addressing the questions and concerns identified during the review:

- Adopt and implement legal instruments and other measures to ensure that the use of short-term contracts in the NTE sectors does not restrict workers’ associational rights, which could include:
 - placing a limit on the consecutive use of short-term employment contracts in the NTE sectors, similar to the five-year limit on such contracts contained in Article 74 of Law 728;
 - authorizing the administrative labor authority to: (1) compel employers to renew workers’ contracts or convert workers employed on short-term contracts into permanent employees in cases of recurrent employer failure to comply with the requirements of Decree Law 22342 or when contract non-renewal is found to be

¹³⁹ PTPA, Article 17.3.1(a).

¹⁴⁰ Ibid., Article 17.8.

due to anti-union discrimination, and; (2) not permitting stay of those actions during any subsequent administrative or legal proceedings;

- requiring the labor authority to verify and approve proactively, based on an established protocol, that contracts under Decree Law 22342 meet the legal requirements and establishing a time period for verification and approval that is appropriate for very short-term contracts;
- Establish SUNAFIL offices in all regions of Peru as expeditiously as possible;
- Increase support for SUNAFIL's enforcement activities, including labor inspections and administrative sanction processes, in a manner that allows for more effective and expeditious enforcement of Peru's labor laws in all regions of Peru;
- Expand Labor Courts of First Instance and increase the judiciary's budget for labor cases generally, including under the New Procedural Labor Law, in a manner that allows for more effective and expeditious adjudication and resolution of labor cases.

The U.S. government will offer to meet with the GOP as soon as possible to discuss the questions and concerns identified in this review and the above recommendations, or similar measures, to address those questions and concerns. The OTLA, in consultation with USTR and the State Department, will use progress towards implementing these recommendations, or similar measures, for determining appropriate next steps in engagement with the GOP, and will assess any such progress by the GOP within nine months and thereafter, as appropriate.