

Lima, April 23, 2019

Mrs.

**Madelaine Tuininga**  
General Director of Trade  
European Commission

**Subject:** *Reply to the letter sent in response to the Complaint against the Peruvian Government for failing to comply with its labour and environmental commitments under Title IX of the Trade Agreement between Peru and the European Union*

Dear Mrs. Tuininga

We are writing to you on behalf of the 14 European civil society organizations and 27 Peruvian organisations that sent you a **Complaint against the Peruvian Government for failing to comply with its labour and environmental commitments under Title IX of the Trade Agreement between Peru and the European Union** in October 2017. We would like to offer you our greetings and at the same time express our grave disappointment in, and disagreement with, the brief reply we received about this matter on March 26 this year, 17 months after we first lodged our complaint. Your reply offers no further analysis or recommendations on the issues we raised and the releases issued by the Peruvian Government. It does not commit the Government to any concrete action. This reply is clearly in stark contrast with the letter the Malmström commissioner sent to the Peruvian authorities in July 2018.

In response to the reply to our complaint, we would like to state the following:

We welcome the fact that the European Union (EU) and Peru have stepped up dialogue in order to move forward with the implementation of Title IX on Trade and Sustainable Development of the Trade Agreement (TA). We also welcome the fact that this has enabled the identification of relevant policy initiatives to be implemented; initiatives the Peruvian government has expressed a general willingness to adopt in order to make improvements on the field. However, this disposition for improvement has not, in fact, led to any concrete objectives or set deadlines for evaluation.

**Regarding the matter of labour**, your letter states that efforts are being made to improve the application of labour standards (including measures to safeguard the workers' right of association); enhance faculties for labour inspections; work towards eradicating child labour; cut down the informal labour market; and increase social dialogue.

However, Commissioner Malmström's letter, addressed to the then Minister of Foreign Trade and Tourism, Mr. Rogers Valencia, paints a different picture. This letter expressly and precisely sets out the EU's concerns about shortcomings in the effective application of ILO Conventions 87 and 98 on freedom of association and protection of the rights of association and collective bargaining; noting, furthermore, that these shortcomings are still not being addressed, despite the recommendations of the ILO Committee of Experts. The letter also points out that Peru has one of the highest levels of informality in the labour market, and a persistently high level of child labour. "All these issues have been at the centre of discussions in the Sub Committee on Trade and Sustainable Development for the past five years, and there is still a lot of work to do to achieve substantial progress," says the Commissioner.

Meanwhile, at the 5<sup>th</sup> (V) Meeting of Sub-Committee on Trade and Sustainable Development, held in December 2018, the Peruvian government discussed purported progress in labour matters (as specified in the Minutes of the meeting), giving an account of its Sector Strategy for the 2018-2021 Formalisation of Labour

and highlighting the importance of reinforcing the labour inspection system through the use of the SUNAFIL institution. The government also discussed its supposed commitment to guarantee freedom of association and to eradicate child labour. However, despite all the grand speeches, evidence out on the field paints a very different picture: there's a strong indication that the Peruvian government has, in fact, done very little to advance progress in these matters since our complaint was first lodged:

- Unlike most other countries in the Americas, Peru still lacks a Labour Code and has one of the lowest minimum wages in Latin America.
- Peru remains one of the countries lodging the greatest number of complaints with the ILO's supervisory bodies, and registering a significant shortage of Decent Employment – in other words, work that gives Peruvians access to productive employment that gives them: a fair income; safety at the workplace; social protection for families; better prospects for personal development and social integration; freedom for individuals to express their opinions, organise themselves and participate in decisions that affect their lives; and equal opportunities and treatment for all workers, male and female.
- In Peru, the rate of unionisation in the private sector is 5 times lower than it was 30 years ago. As regards collective bargaining, the situation is even worse, and consecutive use of fixed-term work contracts in the non-traditional export sector continues to be an obstacle impeding workers from joining unions and contributing to discrimination against trade union activists.
- Peru's labour market has one of the highest proportions of informal work in the world (75% of the EAP). This is largely due to the fact that the country's institutions are ineffectual at ensuring that the labour law is applied effectively, which, in practice, means that a vast proportion of workers remain outside the protection afforded by the internationally recognised rights safeguarding the dignity of workers.

**Regarding the matter of the environment**, your letter states that Peru is committed to continuously enhancing its capacity and tools for the implementation of environmental impact assessments, and to improving the monitoring and enforcement of environmental legislation. The government has also committed itself to preventing and mitigating the effects of air pollution on human health and the environment. However, the same situation applies here as with labour: the statements issued by the government are not backed by clear commitments to precisely defined objectives, there are no set deadlines, and there are no cross-sector commitments to establish how these promises are to materialise.

In the afore-mentioned letter, Commissioner Malmström clearly set out the importance of establishing such concrete objectives and deadlines, so that the Peruvian government may take effective action and respect its commitments under the Title IX on Trade and Sustainable Development. "To effectively reduce environmental damage and protect the environment, it is not enough to guarantee that relevant laws and initiatives are in place, particularly with regard to environmental impact evaluations and the regulation of industrial activities," says the Commissioner. "Peru also has to have legal transparency and the institutional clout to enforce its laws".

According to the Minutes of the 5<sup>th</sup> (V) Meeting of Sub-Committees on Trade and Sustainable Development held in Quito (as mentioned earlier), the Peruvian government states that Peru is placing its focus on continuously improving the National System of Environmental Impact Assessment (SEIA). But the pre-publication of the 'Guide to defining baseline studies of environmental impact under the SEIA' and the 'Guide to identifying and defining environmental impact' shows that, while these documents help to further the development of projects, they are non-binding and they do nothing to redress the weaknesses in the SEIA's approach. Additionally, on the subject of Supporting Technical Reports (ITS), the government lists purported improvements in its National System of Environmental Evaluation and Audit, particularly highlighting the process of transferring sector functions to the OEFA, as well as the development of technological tools that give administrators and citizens access to information about actions carried out by the OEFA and the results of those actions.

At this meeting, the Peruvian government also states that the establishment of measures to prevent and mitigate the effects of air pollution on health and the environment is a top priority. In spite of all these declarations, the reality on the ground is as follows:

- The ITS continues to be a device that allows companies to modify or expand any part of their investment projects. These reports are not rigorous, the procedure to obtain them is quick (15 working days) and they generally do not involve citizen participation, nor do they consider specialised opinions from other governmental bodies. In other words, the ITS is a simplified procedure that authorises modifications in major components of a project or successive modifications of a single component, adding up to significant overall change. In the same vein, the Peruvian authorities give their permission for frequent changes to be made to a single unit (sometimes simultaneously), in cases where modifications authorised by the regular EIA modification procedure are combined with modifications authorised by ITS. All this has led to projects being reconfigured without first modifying the feasibility studies. Impact identification is therefore fragmented and inadequate, which violates the principle of integrity that is supposed to guide environmental management and its respective instruments. One consequence of this twist is that a considerable proportion of the modifications that are being carried out on productive units are done by ITS. According to SENACE, out of a total of 78 files submitted from December 2015 to January 2017, 46 were requests for ITS and only 7 for EIA modification provisions. The government is still turning a blind eye to what the implementation of the ITS means for the SEIA, despite the fact that civil society has been clamouring about it for years and demanding change.
- The government keeps implementing new measures that promote public and private investment projects at the cost of lowering environmental standards. Article 2 of Supreme Decree No. 060-2013-PCM, Law 30230, establishes provisions that streamline the EIA approval process by: (a) reducing the term for the evaluation of the Detailed and Semi-Detailed EIAs and for the approval of the Terms of Reference applicable to projects with common characteristics; (b) prohibiting public officials from requesting additional information or corrections; and (c) not taking into account the opinion of authorities that were previously considered "advisors". These norms put pressure on public officials, threatening sanctions for those who fail to meet the deadlines established for carrying out EIA evaluations. Rules, resolutions and decisions that do away with bureaucratic hurdles are therefore still being promoted, which ultimately debilitates environmental legal frameworks and institutions such as SENACE. This process of undermining environmental authorities is ongoing. For instance, through Resolution N° 0077-2019 / CEB-INDECOPI, INDECOPI recently ordered SENACE to reduce the evaluation term of an EIA modification from 120 to 30 days.
- Additionally, Law No. 30230, whose purpose is to promote investment in the country, simplifies procedures and permit requests at the cost of lowering environmental standards. Whilst article 19 of the afore-mentioned regulation was rendered invalid in July 2017, many of the regulatory standards that were previously approved to activate it are still in force.
- Supreme Decree N° 039-2014-EM on the Regulation of Environmental Protection in Hydrocarbon Activities effectively lowered the previous environmental and social standards, notably with regard to the classification of environmental evaluation in the field of hydrocarbon exploration activities, and also with regard to the right to civic participation.
- It should also be noted that conflicts are continually arising in relation to breaches of environmental and labour rights in areas where extractive companies are operating, both in the mining and hydrocarbon industries, as well as in the agricultural industry. This is proof of Peru's continuous failure to comply with environmental standards. For instance, the ongoing conflict in the mining project of Las Bambas – a conflict that is continually flaring up and that has led to the loss of human lives – was sparked by the afore-mentioned regulatory modifications. Such changes involved the use of ITS along with unlawful changes to the environmental impact study, which flouted the processes for civic information and participation.
- In the matter of prior consultation, the government has also taken a step backwards. The multi-sector commission in charge of monitoring the implementation of prior consultation has reduced its mandate

to merely following up on established agreements. The way consultation with extractive companies is regulated means that no influence may be exerted over the conditions in which the projects are established, nor on the defence of collective rights.

- In addition, it is common knowledge that Supreme Decree N ° 003-2017 has modified the Environmental Quality Standards (ECA) for Air, increasing the permitted level of sulphur dioxide to 12 times more than the recommended WHO average of 20 µg / m<sup>3</sup> over 24 hours. The Ministry of the Environment (MINAM), for its part, sets the maximum level at 250 µg / m<sup>3</sup> of SO<sub>2</sub>, an amount that can cause damage to health. This same decree also doubles the permitted level of sizeable particulate matter, without solid technical backing from the MINAM and without wider cooperation with the Ministry of Health (MINSA) or any specialised or civil society organisations.
- And finally, the draft hydrocarbon law is still under discussion. This law was, in fact, observed by civil society and by the Ombudsman's Office during 2018. Pending debate at Congress, it still contains articles that could lead to infringement of indigenous territory and breaches of the prior consultation process, amongst other things.

None of these issues have been addressed. Instead, as pointed out earlier, the kinds of changes continuously being pushed forward are those that undermine the environmental framework and environmental institutions.

**Regarding the procedures of consulting civil society**, your letter states that Peru has agreed to use the existing mechanisms in a more proactive way. The letter expresses your intention to organise specific discussions on matters related to labour and the environment, involving the implementation of Title IX, in the Higher Technical Labour Committee of the National Council for Labour and Employment Promotion and in the National Climate Change Committee. The letter also draws attention to the fact that the EU encourages Peruvian CSOs to participate constructively and in good faith with the Peruvian government until the expiry of the procedures within the existing (and imperfect) national consultation mechanisms.

On this subject, the letter sent by Commissioner Malmström says that the European Commission has not been given clear indications about exactly how the Peruvian participation systems operate under the TA framework, or about how frequently hearings take place and whether the implementation of Title IX is discussed at those hearings. As the Commissioner points out, this implies that European civil society does not have a defined counterpart on the Peruvian side. As a result, dialogue between the two domestic groups is much less effective.

Regarding this matter, in the 5<sup>th</sup> (V) Meeting of Sub-Committees held last December, Peru confirmed that discussions on implementing the provisions of Title IX would take place in the same sectors as before the TA came into force.

However, as we have repeatedly pointed out, Peru's existing national mechanisms for consultation in the fields of labour and the environment are far from satisfying the requirements of article 281. These mechanisms do not offer satisfactory channels for dialogue, where opinions or recommendations on the application of Title IX can be shared. Also, while members of civil society are indeed invited to participate – albeit in a piecemeal manner – these communication channels do not, in fact, guarantee effective and committed participation in deciding on how the TA shall be implemented. Lastly, as mentioned earlier, the issues involved in this agreement have not been substantively addressed there.

Therefore, in the interest of effective dialogue and adequate monitoring of the trade agreement, Peruvian civil society insists on the need to secure recognition of Peru's Domestic Advisory Group (DAG), in the same manner as happens in Ecuador, Colombia and the European Union. Peru needs a DAG formed through civil society's initiative exclusively to discuss and analyse the issues related to Title IX.

Additionally, regarding the national mechanisms referred to by the Peruvian government as appropriate channels for discussing the implications of the TA, we state the following:

#### About the National Council of Labour and Employment Promotion (CNTPE):

- Theoretically, this body holds sessions once a month. In practice, however, this is not the case.
- Plenary agreements are adopted by consensus of the three sectors, but the way these are composed means that a consensus is hardly ever reached. Social organisations involved in the sector and participating in the CNTPE are excluded from this consensus.
- Since this is a tripartite space controlled by the government, there has been no in-depth discussion of the TA since it came into force five years ago. It was not until 2018, following a visit by the mission of the European Commission, that the subject was very summarily addressed in the context of our complaint.
- The CNTPE has gone through a number of breakdowns in the past, arising precisely because consensuses were not respected. For example, in 2018, there was a 15-month stoppage and hearings were only resumed in August. In addition, this year, at this very moment, Peru's two biggest trade union confederations (the CGTP and the CUT) have suspended their participation in these sessions for reasons that include, amongst other things, the fact that the agreement reached by consensus on December 3, on prior consultation of the National Competitiveness and Productivity Plan, was disregarded: this plan was later approved unilaterally and without consultation.

#### About the National Climate Change Committee (CNCC)

- MINAM has prepared a draft Supreme Decree that adapts the CNCC to the Framework Law on Climate Change (Law 30754), increasing the number of non-governmental representatives. However, while this includes new indigenous groups and new representatives from the academic field and the private sector, it excludes representatives from some of the populations most vulnerable to climate change, such as women, young people, farmers and Afro-Peruvian people.
- It's worth mentioning that Peru's Environment and Climate Group – a group of organisations that sets up initiatives and proposals to reach a new, global climate agreement that is both fair and binding – issued four separate requests for their representatives to be allowed to participate as observers in the hearings and in the working groups. Authorisation was granted only on three occasions, with more constraints imposed each time, such as the requiring the presence of observers to be approved by the CNCC on the day of the session and requiring the observers to wait for that approval before entering.
- Observers were denied participation in the Working Group created to set out the details of the participative process that channels Peru's Nationally Determined Contributions in the fight against climate change.
- The low turn-out to many of the CNCC's hearings, due mainly to the lack of attendance by appointed and/or alternative representatives of governmental bodies, has generally meant no decisions could be taken.
- A multi-stakeholder participation process was indeed carried out for the preparation of the Framework Law on Climate Change, supported by the European Union, both in Lima and in the provinces. There was openness towards the opinions of civil society organisations, and a willingness to reconsider the wording and direction of the draft of the afore-mentioned Regulation. Despite all this, however, very little of what was said actually found its way into the final document. This led civil society to issue a public statement requesting the inclusion of its views and opinions, including those of indigenous peoples, who were the least represented of all.
- And finally, to claim that this commission is a space for dialogue is to disregard a great many issues, since even though climate change is a crucial issue nowadays, it's far from being the only environmental problem arising from Title IX.

It should be noted that the complaint lodged in October 2017 was preceded by a series of letters and communiqués expressing the above concerns and drawing attention to the country's need to increase the level of civil society participation. None of the issues raised were answered until after the complaint was filed.

Even then, the Peruvian authorities still failed to engage in serious dialogue, and Peruvian officials made no real effort to put our requests on the agenda concerning the Peruvian government's choice of participation channels.

We are also concerned about the fact that our complaints have not been included in the results of the public hearing that took place between authorities and civil society in Quito last December 12. In the Minutes of the Sub-Committee on Trade and Sustainable Development, there is not a single reference to the issues discussed in our complaint, despite all the statements made by civil society. Moreover, the extensive duration of the meeting and the number of attendees is barely mentioned.

We would like to emphasise our alarm at the continuing approval of policies that seek to promote investments at the cost of human rights, such as the recent approval of the National Policy on Competitiveness and Productivity in Peru on December 31, 2018. This is yet another policy that threatens to stretch labour and environment boundaries ever further.

Before we take leave of you, we would like to express our appreciation for the efforts of the Mission of the European Commission to analyse the Complaint and reiterate our willingness to collaborate constructively with our Government in the matters concerning the TA. We also reaffirm our commitment to maintain an open and genuine dialogue aimed at contributing to the application of the TA.

Lastly, we believe it is necessary for you to share your analyses and recommendations with civil society. These should serve as the basis for a "well-defined and time-bound" Action Plan to comply with the commitment to respect and safeguard labour and environmental rights, and the commitment to establish genuine participation in Peru, as recommended by Commissioner Malmström in her first letter.

Yours sincerely,

A handwritten signature in black ink that reads "Ana Romero". The signature is written in a cursive style and is underlined with a single horizontal stroke.

**Ana Romero Cano**  
Coordinator  
Domestic Advisory Group - Peru