COMPLAINT

SINGLE ENTRY POINT

On non-compliance by the Colombian and Peruvian Governments of Chapter IX, on Sustainable Development, of the Trade Agreement with the European Union

Submitted by: CNV Internationaal, in support of the Trade Unions:
Sintracarbon,
Sintracerrejón and
Union of Metallurgical Mining Workers of Andaychagua Volcan Mining Company and of the Specialised Companies, Contractors and Intermediary Companies that provide services to Volcan Mining Company - Andaychagua.

Submitted to: Chief Trade Enforcement Officer CTEO

17 May 2022

IDENTITY OF THE COMPLAINANT

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1.6. The complainant is:

1.6.1. A non-governmental organisation formed in accordance with the law of a Member State of the EU.

1.7. Company/Organisation name

CNV Internationaal

1.8. Please indicate whether the complainant is acting exclusively on its behalf or whether is acting also on behalf of other persons/entities.

1.8.1. CNV Internationaal is acting on behalf of the trade union organisations 'Sintracarbón' and 'Sintracerrejon' (Colombia) and 'Sindicato de Trabajadores Mineros Metalúrgicos de Andaychagua Volcan Compañía Minera y de las Empresas Especializadas, Contratistas y de Intermediación que prestan servicios en Volcan Compañía Minera – Andaychagua' (Peru).

1.9. In the affirmative, please provide the information required (Information on the entities on behalf of which complainant is acting:)

SINTRACARBÓN

The SINDICATO NACIONAL DE TRABAJADORES DE LA INDUSTRIA DEL CARBÓN "SINTRACARBÓN", is a trade union organisation operating at local as well as industry-wide level, in accordance with the International Labour Standards, the Political Constitution, the Substantive Labour Code and other relevant provisions on the subject, throughout the national territory of Colombia. The union shall be made up of workers or employees who provide their personal services to the company 'Carbones del Cerrejón, Limited' or to other companies, organisations or entities, whether public, private or mixed, natural or legal persons, dedicated directly or indirectlyto the coal industry, including associates, contractors, subcontractors or intermediaries, in its different activities, such as exploration, exploitation, transport, marketing, financing and other activities related to the coal industry throughout the national territory of Colombia (Sintracarbón Statutes, article 1).

- Chairman: - Igor Díaz
- Vice-President: - Orlando Cuello

SINTRACERREJÓN

The SINDICATO NACIONAL DE TRABAJADORES DE CARBONES DEL CERREJÓN LIMITED, "SINTRACERREJÓN", is established as a trade union organisation at local and company (Cerrejón Ltd.) level, which operates in accordance with the International Labour Standards applicable in Colombia, International Labour Organisation conventions ratified by the Colombian state, the Political Constitution, the Substantive Labour Code and other relevant provisions on the subject, throughout the national territory of Colombia.

The union is made up of workers or employees who provide their personal services to the company 'Carbones del Cerrejón, Limited', to any other company that arises from the transformation, modification or merger of this company with another of the same or similar nature or from any change of company name, regardless of its denomination, as well as by those who provide services to other companies, of public or private nature, in which 'Carbones del Cerrejón, Limited' has a legal economic interest, located in any part of the national territory, and who join the union.

- President: Wilfer Velasquez
- Treasurer: Luis Avila

UNION OF METAL MINING WORKERS AT 'ANDAYCHAGUA VOLCAN COMPAÑÍA MINERA' AND THE SPECIALISED COMPANIES, CONTRACTORS AND INTERMEDIARIES THAT PROVIDE SERVICES TO 'VOLCAN COMPAÑÍA MINERA - ANDAYCHAGUA'

The 'Union of Metal Mining Workers at Andaychagua Volcan Mining Company and the Specialised, Contracting and Intermediary Companies providing services to Volcan Mining Company - Andaychagua', in Peru, was founded on 12 August 1973 and officially registered by Divisional Resolution N 013-98 - DNCRGP - LAO, of 12 May 1998. (Union Statutes, article 1).

The 'Sindicato de Trabajadores Mineros Metalúrgicos de Andaychagua Volcan Compañía Minera y de las Empresas Especializadas, Contratistas y de Intermediación que prestan servicios en Volcan Compañía Minera - Andaychagua' amended its union statutes in December 2020 in order to extend its scope of membership to subcontracted workers working at the Andaychagua site.

- Secretary General: Alex Edilberto Tinoco Román
- Deputy Secretary-General: Jhony Rúben Ramos Ravichagua

2. TSD/GSP VIOLATION

2.1. Title: VIOLATION OF THE RIGHT TO TRADE UNION FREEDOM, COLLECTIVE BARGAINING AND THE RIGHT TO EQUALITY / Complaint short description

COLOMBIA's violation of Title IX arises from:

1. WAGE INEQUALITY BETWEEN DIRECT EMPLOYEES AND OUTSOURCED WORKERS.
   Colombia does not comply with international obligations by allowing outsourcing to make working conditions precarious and at the same time violate the right to 'equal pay for work of equal value'. As we will see below, one of the facts underlying the present petition is the wage inequality between Cerrejón employees and outsourced workers who carry out the same functions, with the same working day and equal efficiency conditions, in the same work space, which goes against fundamental principles and labour rights.
2. ILLEGAL employment intermediation
   Colombia failed to adopt legislation guaranteeing labour rights and limiting illegal employment intermediation. Although there have been attempts to regulate the issue of illegal placement, efforts on the matter are not reflected in a formal norm. Businesses, for their part, are increasingly moving towards outsourcing the greater part of their operations, in order to reduce labour costs and formal benefits while at the same time undermining trade union membership.
3. INADEQUATE LABOUR INSPECTION
   Colombia fails to properly implement national legislation by not carrying out proper labour inspection. Therefore the principle of 'equal pay for work of equal value' is not applied by the Labour Inspectorate in the cases referenced here; the fact that specific activities are carried out for Carbones del Cerrejón by outsourced workers as well as direct employees testifies of the illegal employment intermediation and constitutes unfounded discrimination against workers, mainly in the areas of maintenance, transport and firefighting.

PERU's violation of Title IX arises from:

1. VIOLATIONS OF FREEDOM OF ASSOCIATION AND OF THE RIGHT TO COLLECTIVE BARGAINING
   Peru fails to comply with international obligations by permitting outsourcing to make working conditions precarious while at the samen time limiting the right to freedom of association. The unjustified refusal of collective bargaining violates the principle of negotiating in good faith, established by ILO Convention No. 98. It also contravenes provisions in Peru's national constitution guaranteeing and promoting freedom of association and collective bargaining.

   As we will see below, our petition is based on violations of the rights of the workers of the 'Union of Metallurgical Mining Workers at Andaychagua Volcan Compañía Minera and at the Specialised Companies, Contractors and Intermediary Companies that provide services to Volcan Compañía Minera – Andaychagua' to freedom of association and collective bargaining.

   Volcan has refused to negotiate with the union. This happened shortly after the union decided to unionise outsourced workers in 2020. Collective bargaining power is what gives a union its strength, and refusing to negotiate is a clear attack on the union to prevent it from growing, and to prevent it from asserting the rights of outsourced workers. It is worth noting that before the union took this decision, the company had negotiated with the trade union to which the Andaychagua union was affiliated. One of the ways of weakening a trade union organisation is the refusal to negotiate, and this is what Volcan has been doing.

2. LACK OF ADEQUATE LEGISLATION
   Peru failed to adopt legislation guaranteeing labour rights especially in relation to ILO Convention No. 98. There have been attempts at legislation but these have been unsuccessful or contrary to progressive labour standards. Supreme Decree 001-2022-TR that has been issued was a step forward, but there is currently strong pressure from employers to repeal it.

3. LACK OF PROPER IMPLEMENTATION OF LEGISLATION – INADEQUATE LABOUR INSPECTION
   Peru lacks adequate implementation of domestic legislation on inspections that carry penalties in the event of a company's refusal to comply with rulings imposed by the authorities. The labour inspectorate has neither sanctioned nor urged the Volcan company to negotiate.

2.2. Countries violating TSD commitment or GSP regulation provision

- Peru
- Colombia

2.3. Legal basis

Below we will indicate the articles of Title IX of the Trade Agreement between the European Union, Colombia and Peru which we consider are being violated and should be analysed by the European Commission, for strict compliance with the chapter on sustainable development. The rules to which we will refer are in the Articles 267, 269, 271 and 277, and they relate to the fulfilment of obligations concerning decent work; more specifically the obligation to comply with fundamental labour rights, freedom of association and the right to equality.

We will also reflect the ILO-issued international labour standards that we consider are not being complied with, given that they have been ratified by Colombia and Peru. Furthermore we will include some pronouncements of the ILO's supervisory bodies (the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association). This will allow us to identify the position of the only tripartite United Nations Agency on the matter, and it will provide the European Commission with more relevant information, with a view to promoting the resolution of this case.

Finally, we will also mention some regulatory standards which, although not ratified by the countries concerned, are relevant for the Commission to appreciate the precarious employment to which outsourced workers are exposed and to identify when employment relationships exist, despite multinational companies using tricks to cover up that fact.

A. VIOLATIONS OF PROVISIONS IN THE FTA

"ARTICLE 267
[1. …
2.…the objectives of this Title [IX] are, among others, to:]

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

[...];
(d) strengthen the commitment to labour principles and rights in accordance with the provisions of this Title, as an important element to enhance the contribution of trade to sustainable development;

(e) promote public participation in matters covered by this Title.

3. The Parties reaffirm their full resolve to fulfil their commitments under this Title, taking into account their own capacities, in particular technical and financial capacities.
[4. … 5. … .]"

COMMENT

One of the objectives of this title will be achieved if the European Commission's good offices promote dialogue between companies, governments and trade unions, as well as cooperation to facilitate compliance with freedom of association in the case of Peru and the realisation of the right to 'equal pay for equal work' in the case of Colombia. This will strengthen trade relations between the parties.

Compliance with ILO Conventions 87, 98, and 111, are important elements in improving the contribution of trade towards sustainable development. The parties to the FTA have reaffirmed that they have the capacity to enforce compliance with their commitments. This however has not been reflected, in the case of Peru, in their ordering Volcán to sit down to negotiate or in using their power to impose sanctions for the company's refusal to respect the right to freedom of association. In the case of Colombia, there is the failure of the Ministry of Labour to fulfil its preventive function to avoid violating the right to equal pay for equal work.

"Article 269
Multilateral labour standards and agreements
[..]
3. **Each Party commits to the promotion and effective implementation in its laws and practice and in its whole territory of internationally recognised core labour standards as contained in the fundamental Conventions of the International Labour Organisation (hereinafter referred to as the "ILO"):** : (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. [..]**"**

COMMENT

Decent work implies the fulfilment of fundamental labour rights, namely freedom of association and collective bargaining as well as the right to equality along the principle of 'equal pay for equal work'.

These rights cannot be disregarded because workers are outsourced to a multinational that holds all the economic power in the regions where it operates.

In filing this complaint, we want to create an opportunity for the FTA parties to work together to find out how to prevent the violation of these rights of outsourced workers.

"Article 271

Trade favouring sustainable development

1. **The Parties reaffirm that trade should promote sustainable development. The Parties also recognise the beneficial role that core labour standards and decent work can have on economic efficiency, innovation and productivity, as well as the value of greater coherence between trade policies on the one hand, and labour policies on the other.**
[...]
3. The Parties agree to promote best business practices related to corporate social responsibility.
[...]**"**

COMMENT

Precarious labour is not consistent with sustainable development; having coherent trade and labour policies which promote progress in labour rights will be mutually beneficial for both sides.

In a world of globalised supply chains where employers seek to eliminate their responsibilities in the name of 'flexibility' and 'competitiveness', and where governments have all but given up on the goal of full employment and decent work, workers have been increasingly forced to accept types of work arrangements that offer lower wages, as in Colombia, and poorer security, less favourable working conditions and increasingly difficult access to their right of collective bargaining, as in Peru.

As the ILO states it:
"These precarious forms of employment are the result of deliberate strategies on the part of multinationals, who through savage forms of subcontracting managed to evade their social responsibilities and de facto deprive workers from the right to collective bargaining. While the authors provide inspiring examples of union battles to stop the casualization of labour, they both stress the fact that the fight must also be waged in the political arena and at the international level" (ILO, 2013. p6).

> **"Article 277**
> **Maintaining levels of protection**
>
> 1. **No Party shall encourage trade or investment by reducing the levels of protection afforded in its environmental and labour laws**. Accordingly, **no Party shall waive or otherwise derogate from its environmental and labour laws in a manner that reduces the protection afforded in those laws, to encourage trade or investment**.
> 2. **A Party shall not fail to effectively enforce its environmental and labour laws through a sustained or recurring course of action or inaction** in a manner that affects trade or investment between the Parties.
> [...]"

COMMENT

By definition, precarious workers are more vulnerable than other categories of workers, and they often face inequalities and difficulties in exercising their rights. But while precariousness increasingly threatens all types of workers, some categories are more frequently affected; such is the case for outsourced (subcontracted) workers.

Reducing labour protection levels through excessive outsourcing, even in activities essential for the company and normally carried out by direct employees, constitutes an exploitation of outsourcing, as indirect workers are afraid to join a trade union organisation or do not benefit from the conventional rights that have been achieved through the trade union struggle. This, of course, directly impacts benefits and working conditions. Outsourced workers also get lower wages and suffer more rights violations.

The ILO states:
"Clearly, the development of an ever-increasing mass of precarious workers poses a growing problem for trade unions trying to secure collective bargaining coverage" (ILO, 2013. P7).

And also:
"By definition, precarious workers are more vulnerable than other categories of workers and often face inequalities and difficulties in exercising their rights" (ILO, 2013. P14).

The International Metalworkers' Federation makes the following obeservations:

> "Precarious work is fast becoming the biggest obstacle to the respect of labour rights. Every day, increasing numbers of workers are found in precarious jobs where they lack even the right to join a trade union, let alone bargain collectively with their employer. Some are formally excluded because their basic rights are denied by law. Others have rights on paper, but in reality the laws are not enforced. Still others are too afraid to exercise their rights because they could lose their jobs at any time. As a result, millions of workers around the world, and even workers in entire categories of employment, are de facto excluded from the scope of ILO Conventions Nos. 87 and 98, as well as from a host of other labour rights. [...] The wages of precarious workers are much lower than those of permanent workers; our affiliates report that in many cases the wages of precarious workers are 50% lower than those of permanent employees" (IMF-IMB-FIOM-FITIM-FISM, 2010).

B. PROVISIONS OF INTERNATIONAL LABOUR LAW VIOLATED, FUNDAMENTAL ILO CONVENTIONS RATIFIED BY COLOMBIA AND PERU

B.1. ILO Conventions 87 and 98

"The right to freedom of association is enshrined in the Preamble to the ILO Constitution, as well as in a series of key Conventions and Recommendations. In this article, we will mainly focus on the principles linked to two fundamental Conventions in this area, the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)" (ILO, 2013, p.117).

Article 2 of ILO Convention No. 87 states:

> "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation". This implies that even outsourced workers have the right to exercise their right to freedom of association. Thus, our comrades in Peru have legitimately decided to affiliate outsourced workers.

Article 4 of ILO Convention No. 98 states:

> "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

This means that there is an obligation to promote collective bargaining and, as the ILO has stated on many occasions, ensure that such bargaining is effective. Unfortunately, in the case against Peru, the company repeatedly refuses to engage in a constructive dialogue with the trade union organisation.

The ILO's Committee on Freedom of Association (CFA) has stated that,

> "The right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers and employers organizations should have the right to organize their activities and to formulate their programmes." (ILO, 2018, p.240).

The ILO supervisory bodies, and in particular the Committee on Freedom of Association (CFA), have developed international labour law on the subject, and some of the most significant CFA decisions dealing with temporary agency workers refer to the fact that using employment agencies to deny workers their rights to freedom of association and collective bargaining violates ILO Conventions Nos. 87 and 98. (see cases against the Republic of Korea, Case No. 2602 and against Colombia, Case No. 2556).

The ILO Committee on Freedom of Association's 2008 Report on Labour Relations details how, by outsourcing activities essential to its bottleling operations, Coca-Cola in Colombia systematically denies and restricts the ability of workers to exercise their right to join a trade union of their choice (ILO, 2008).

We would like to highlight that the Committee on Freedom of Association (precisely in a case against Colombia - Case 2555 -) states that

> "the legal nature of the relationship between the workers and the employer should not have any effect on the right to join workers' organisations and participate in their activities".

It is clear that when we refer to activities we are referring to the right to collective bargaining. The CFA also stresses that

> "all workers, without distinction whatsoever, shall have the right to establish and join organisations of their own choosing, whether they are permanent employees, temporary contract workers or seasonal workers".

Many precarious workers find themselves in a triangular working relationship: they are hired by a temporary agency, a subcontractor, or another third party in formal terms, but in practice they do the work for another company.

From a business perspective, it is an extra benefit of precarious work that it eliminates the need to deal with a unionised workforce. For some, this is the real driver behind industrial relations that deny workers any effective possibility to join a union and bargain collectively with their employer.

> "The impact of precarious forms of employment on workers' access to freedom of association and collective bargaining rights is currently one of the main concerns of the trade union movement around the world. It is argued that these forms of employment are increasingly used by employers, both in the private and public sectors, to undermine the right to organise and eliminate or weaken the right to collective bargaining as well as to deprive workers of labour protection." (ILO, 2013. p.52)

The ILO, through its supervisory body, the CFA, states that the right to freedom of association should be enjoyed by all workers, including those who are in a triangular employment relationship; and that their legitimate right to negotiate collectively must also be guaranteed. Trade union freedom is not only reflected in the right of free association but also in the right to work on improving the working conditions of workers, especially outsourced workers who, as we have said and as the ILO itself has stated, find themselves in the most precarious conditions.

In the case of Peru, the refusal of Volcan Compañia Minera S.A.A. to negotiate is a clear violation of the right to collective bargaining, and the lack of activity of the Labour Inspectorate and its failure to impose sanctions has led to the company's continued refusal to negotiate, violating trade union rights in contravention of international and national minimum standards.

B.2. ILO Convention 111, ratified by Colombia and Peru

The principle of equal treatment is essential to ensure that workers in precarious conditions do not suffer less favourable situations than workers in general (ILO, 2013. p.17).

Article 1 of ILO Convention No 111 ('C.111') states that discrimination means

> "any distinction, exclusion or preference […] which has the effect of nullifying or impairing equality of opportunities or equal treatment in employment and occupation."

The definition of discrimination set out in Convention No. 111 offers some spcae for broadening the grounds of discrimination, when it adds that the term discrimination, in addition to the inherent characteristics, also includes "any other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation [...]". This could include, for example, employment status, and if the Commission were to adopt this interpretation it would be a progressive step forward on the part of the Commission.

This would mean that precarious workers, including those hired through employment agencies, should be guaranteed the same wages and benefits as permanent workers who do the same work. In this way, employers will have no incentive to use outsourced workers as cheap labour.

Article 2 of C.111 also requires that

> "Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof".

Moreover, Article 3 emphasises that States must among other things enact laws, repeal contrary regulations, and make policies to ensure the proper application of the Convention.

The outsourcing of labour through illegal subcontracting, is today more than ever an example of precariousness. Having workers performing the same functions between direct company employees and indirect, subcontracted workers is nothing more than illegal employment intermediation, it is a form of intermediation that should not exist; these discriminated workers should be put on the payroll of the company itself, in this case Carbones Colombianos del Cerrejon S.A.S.

In the case of Colombia, the Ministry of Labour's preventive inspection function has not been operational; it has not been able to identify and sanction as a matter of course these types of violations to which outsourced workers are exposed.

C. ILO STANDARDS NOT RATIFIED BY PERU AND COLOMBIA, RELEVANT TO THE EUROPEAN COMMISSION

C.1. ILO Convention 181

This Convention imposes efforts to address abuses by private employment agencies, and in particular to provide temporary workers with access to their fundamental labour rights and adequate protection of their working conditions.

C.2. ILO Recommendation 198

Despite its non-binding nature, one of the most valuable ILO instruments dealing with precariousness is the Employment Relationship Recommendation, 2006 (No. 198). We hope it may serve as an inspiration for the European Commission.

Recommendation 198 calls on governments to monitor developments in the labour market and the organization of work and to make recommendations for the adoption and implementation of measures concerning employment relationships. Governments should collect information and statistical data and conduct studies on changes in the structure and patterns of work, at national and sectoral levels.

This ILO Recommendation, despite not being subject to ratification, gives us some indications to be able to identify the existence or not of an employment relationship: is there a situation of subordination, who is the beneficiary of the work activity, who supervises the activity, what is the duration of the activity, does the worker have to be available, is the worker economically dependent, who assumes any financial risks?

D. CASES DECIDED BY THE COMMITTEE ON FREEDOM OF ASSOCIATION RELEVANT TO THE EUROPEAN COMMISSION

Now, the ILO Committee on Freedom of Association has also made recommendations on the situation of outsourced workers, making recommendations to the different States on the matter, such as in Case 2602 against the Republic of Korea, where:

- The Committee calls for the development, in consultation with the social partners concerned, of appropriate mechanisms, including a previously agreed social dialogue mechanism, aimed at strengthening the protection of the rights to freedom of association and collective bargaining of subcontracted workers, thereby preventing subcontracting from being abusively engaged in as a means of circumventing in practice the exercise of fundamental rights by subcontracted workers. (Committee on Freedom of Association, para. 401)
- The Committee states that it is incumbent upon the Government to take appropriate measures to ensure, on the one hand, that subcontracting is not used as a means of circumventing the guarantees of freedom of association provided by law and, on the other hand, that trade unions representing subcontracted workers

can effectively promote the improvement of the living and working conditions of those they represent. (Committee on Freedom of Association Digest of Recommendations, para. 1413).

The Committee on Freedom of Association has indicated that it has "competence to examine allegations concerning obstacles to the effective exercise of the rights of subcontracted workers to organise and bargain collectively" (Case 2602). In the same case, the Committee states that "Protection against acts of anti-union discrimination is not sufficient if an employer can resort to subcontracting as a means of circumventing, in practice, the rights to freedom of association and collective bargaining". Furthermore, the CFA also states in this case that "Collective bargaining between the relevant trade union and the party determining the working conditions of self-employed or subcontracted workers should always be possible". (ILO, Committee on Freedom of Association, Case 2602).

2.4. Factual description of the TSD/GSP violation:

2.4.1. Indicate the measure alleged to breach TSD
- Is Legal
- Is Practice

2.4.2. Absence of legislative instrument to stop outsourcing:

We will now turn to the national legislation in both Peru and Colombia on freedom of association and the right to equal pay for equal work, which will allow the European Commission to understand the regulatory context at the national level. We will then proceed to comment on the attempts to legislate on illegal employment intermediation after the trade agreement was adopted.

a. <u>Colombian Labour Legislation breaches 'Trade for Sustainable Development' principle</u>

FREEDOM OF ASSOCIATION

On 16 November 1976, Colombia ratified ILO Convention 87 on freedom of association and protection of the right to organise, by means of Law 26 of that year. Article 39 of the Colombian Constitution guarantees the right to freedom of association.

The country has experienced high rates of anti-union behaviour. Currently such behaviour is specifically penalised under Article 200 of the Penal Code.

EQUALITY AND NON-DISCRIMINATION

On 4 March 1969, Colombia ratified ILO Convention 111 on Discrimination (Employment and Occupation), by means of Law 22 of 1967. Article 13 of the Colombian Constitution guarantees the right to equal treatment.

Article 143 of the Substantive Labour Code states in its numeral 1: "Equal pay must correspond to equal work performed in the same position, working hours and conditions of efficiency, including all the elements referred to in Article 127[1] ".

The first indent of Article 143 sets out the three elements that constitute "equal work": (i) equal office or position, (ii) equal working hours, and (iii) equal conditions of efficiency in the performance of the work. The concurrence of these three elements results in the wage equalisation between workers who perform the same job but who do not earn an equivalent remuneration.

Article 143 states in its numeral 3: "Any differential treatment in respect of wages or remuneration shall be presumed to be unjustified until the employer proves objective factors of differentiation". The above provision explicitly places the burden on the employer to prove that objective factors justfy a differentiation in pay. If differentiated treatment in terms of pay or remuneration is demonstrated and the employer fails to justify it, wage equalisation in favour of the worker is applicable (CSJ, Molina. 2014).

As we will see below, one of the facts underlying the present petition is the wage inequality between outsourced Cerrejón workers who perform the same functions, same working hours and same conditions of efficiency, in the same work space, but nevertheless earn a lower wage than workers hired directly by Cerrejón.

ILLEGAL OUTSOURCING / INTERMEDIATION

In recent years, several regulatory instruments have been adopted in Colombia to respond to the illegal use of outsourcing (illegal intermediation) as an instrument of labour precarisation. However, these efforts have been insufficient, as today most of these regulations have been declared null and void and there is no protective regulation left to limit the excessive use of illegal intermediation. In addition to this, labour inspection to identify these bad practices in the coal sector is lacking.

The Colombian Substantive Labour Code mentions the figure of contracting an independent company, highlighting that this figure operates when the contracted company, with its own structure and in total independence,

1 Article 127 refers to the elements of wages. "Wages constitute not only the ordinary, fixed or variable remuneration, but also everything that the worker receives in money or in kind as direct consideration for the service, whatever form or denomination it may take, such as bonuses, additional wages, regular bonuses, the value of supplementary work or overtime, the value of work on days of compulsory rest, percentages on sales and commissions.

assumes all the risks of the result for which it was contracted. Law 1429, on the formalisation and generation of employment, states that this figure cannot be used for the purpose of developing a permanent activity: *'The personnel required in any institution and/or public and/or private company for the development of permanent mission activities may not be contracted through Associated Work Service Cooperatives that pactice labour intermediation or under any other modality of contract that affects the constitutional, legal and benefit rights enshrined in the labour regulations in force'*.

Several decrees have been issued by the Ministry of Labour to regulate its implementation and establish sanctions for infringements of this law. These decrees state that decentralising operations that belong to the main productive activity of a company is prohibited. The general rule is that workers should be hired by a company directly, through individual contracts, for 'workers are not commodities'.

Regulation 2021 allows the Labour Inspector to identify illegal operations in the following cases: direct and indirect workers providing the same service; lack of financial independence of the contracting company; the existence of corporate links with the contracting company; lack of autonomy concerning the means of production or in the execution of processes and sub-processes; the contracting company exercising regulatory and disciplinary power over its workers; the contracting company giving instructions as to time, manner and place to the subcontracting company; social security payments being made by the contracting company; or the contracting company or the subcontractor having engaged in conduct that violates labour principles and standards.

REGULATORY CHANGES ON FREEDOM OF ASSOCIATION AND ON ILLEGAL OUTSOURCING / INTERMEDIATION UNDER THE TRADE AGREEMENT: COLOMBIA

Decree No. 2025, of 2011, regulated article 63[2] of Law 1429, of 2008[3], but the Decree was declared partially ineffective by the Council of State in 2018, arguing that it exceeded regulatory powers.

Now, the Ministry tried to resolve this partial nullity with Resolution 5670, of 29 December 2016, which was repealed with Resolution 2021, of 9 May 2018. This Resolution reiterates the prohibition of illegal labour intermediation. Likewise, workers and trade unions can make use of its clarifications and concepts to support any complaints they want to file with the Ministry of Labour in cases of

2 Article 63 of Law 1429 states: "The personnel required in any institution and/or public and/or private company for the development of permanent mission activities may not be employed through Associated Work Service Cooperatives that provide labour intermediation or under any other form of employment that affects the constitutional, legal and social security rights enshrined in the labour regulations in force".

3 Law on the Formalisation and Creation of Employment.

illegal labour outsourcing.

Today the issue needs to be regulated by a law as there are so many forms of intermediation that legislation is really needed through an exercise of democratic discussions without the violation of rights and more labour precariousness in Colombia.

Outsourcing should be the exception, yet it is becoming the general rule. Today, companies in the coal sector in northern Colombia are opting to reduce their labour commitments by using outsourcing and short-term contracts, at the same time weakening the trade union movement and social progress of the regions that make their living from coal. One of the ways to discourage outsourcing would be to equalise the rights of outsourced workers with those of direct employees of companies; another one would be promoting solidarity between the outsourcing company and the main company.

b. Peruvian Labour Legislation breaches 'Trade for Sustainable Development'

FREEDOM OF ASSOCIATION

In 1960 Peru ratified ILO Convention 87, and the country has also ratified Convention 98 on the right to organise and collective bargaining. Article 28 of the 1993 Constitution of Peru enshrines the right to freedom of association, stating that 'the State recognises the rights to organise, to nogatiate collectively and to strike. It safeguards their democratic exercise: 1. It guarantees freedom of association. [...]".

The Constitutional Court of Peru recognises the close link between freedom of association and other collective rights, and the need for its protection (Constitutional Court, 2009), linking it to the right to strike and the right to collective bargaining.

As we will see below, our petition is based on the violation of the right to freedom of association, especially a denial of the right to collective bargaining for the workers of the 'Union of Metallurgical Mining Workers of Andaychagua Volcan Compañía Minera and of the Specialised Companies, Contractors and Intermediary Companies that provide services to Volcan Compañía Minera –

Andaychagua'. The company refuses to negotiate, and that refusal started after the union started to admit subcontracted workers; before that, the company had accepted to negotiate with the union. This at least creates the impression that the company uses a denial of the right to collective negotiations as a means of undermine freedom of association.

ILLEGAL OUTSOURCING / INTERMEDIATION

Law No. 29245, adopted in 2008, which regulates outsourcing services in Peru, defines Illegal Outsourcing / Intermediation in the following terms:

"*... the contracting of companies to carry out specialised activities or works, provided that they assume the services rendered at their own risk; they have their own financial, technical or material resources; they are responsible for the results of their activities and their workers are under their exclusive subordination*". *(Article 2, Law No. 29245*)

Supreme Decree N° 006-2008-TR allows companies to contract other companies for the development of specialised activities or tasks, such a possibility being manifestly illegal. Supreme Decree N° 001-2022-TR finally puts an end to this illegality, clarifying that subcontracting cannot be used for activities that are part of a company's core business.

REGULATORY CHANGES ON THE FREEDOM OF ASSOCIATION AND ILLEGAL OUTSOURCING / INTERMEDIATION UNDER THE TRADE AGREEMENT: PERU

Since the signing of the Trade Agreement with the EU, the Peruvian Congress has treated three legislative initiatives on the issue of outsourcing. In 2014 there was the "Bill amending Law 29245, regulating outsourcing services"; in 2014 and 2016 there was the "Bill regulating the right to equal remuneration for workers of subcontractor companies and participation in the profits of the main companies"; and finally, in 2015, the "Bill amending Article 2 of Legislative Decree 892 and considering participation in profits for workers in outsourcing constructions". Neither of these three were successful.

From 2016 to 2021, there have been 6 bills (CNV Internationaal, Fentecamp. 2021). In 2021, Law N° 31254 is approved, which prohibits outsourcing and all forms of labour intermediation for public cleaning services and related services provided by municipal workers.

A bill currently before Congress, promoted by FENTECAMP, is the "Bill for the protection of the fundamental rights of outsourced workers", making it clear that outsourcing in Peru harms and mistreats its workers. This form of contracting has generated significant increases in profits, which have been capitalised by the owners of companies and have not been redistributed equitably or proportionally among workers. The lack of labour stability and the enormous

difficulty for trade union organisation that characterises outsourcing generate an absolute imbalance in the power relations between employers and workers.

2.4.3. Practices causing breach of TSD:

COLOMBIA - FACTS

1. Compañía Carbones Colombianos del Cerrejón S.A.S. operates coal exploitation and exploration operations in the north of Colombia, specifically in the department of La Guajira.
2. In January 2022, Glencore acquires all stakes in Cerrejón
3. Inside the Company, the same jobs are performed by both outsourced workers and Cerrejón employees.
4. Outsourced workers are paid 3 times less than Cerrejón employees.
5. Carbones Colombianos del Cerrejón S.A.S. works with approximately 250 subcontractors.

Through anonymous interviews, we have identified:

- CHM Mining Company, engine rebuilding area. Workers with the same functions as workers of the company Carbones Colombianos del Cerrejón S.A.S. Outsourced workers with fixed-term contracts, earning wages of 1,375,000 while workers contracted by Cerrejón earn 4,000,000.
- Maxo S.A.S., maintenance area. They have not been given holidays for more than three periods, their salaries are lower than those of the direct workers of the company Carbones Colombianos del Cerrejon S.A.S. that perform the same functions.
- Masa Stork Company, area of maintenance, reconstruction and welding. Workers with more than 10 years of service, with fixed-term contracts (one year). Working day of 12 hours, with the same functions as employees of the company Carbones Colombianos del Cerrejon S.A.S. and with an average salary of 1.300.000, considerably less than the salary of a direct worker.
- Hermanos Luna Company, area of preservation and recovery of components. Workers with the same functions as workers of Carbones Colombianos del Cerrejon S.A.S. but with lower salaries than workers directly hired by the latter.
- In the area of emergency response, the Riohacha Fire Department has firefighters with a salary of less than one and a half million pesos, while the firefighters directly contracted by Carbones Colombianos del Cerrejon S.A.S. earn a salary of more than 4 million pesos.

PERU - FACTS

1. Glencore has several mining projects in Peru. Among them is the Andaychagua mining project (Yauli, Junín), 'Volcan Compañía Minera S.A.A.'

2. In 2017, Glencore International AG obtains 63% of Volcan's class 'A' shares, thus taking control of its mines, including Andaychagua (CNV Internationaal, J. Mujica. 2021,p 6).

3. The local union amended its statutes to allow the union to affiliate outsourced workers. This was done in a meeting in December 2020 and was reported to the company in April 2021.

4. The union registered the change of its statutes with the labour authority. In April the union disclosed the change of the statutes to Volcan Compañía Minera S.A.A.

5. Faced with this change of statutes, the company sent a communication to the labour authority of the region to request that the change of statutes be null and void. This clearly constitutes an interference in union autonomy.

6. In response to the request for nullity, the regional authority issued a resolution stating that the company's request was inadmissible.

7. As part of these actions by the company, the union's general secretary was harassed and disciplinary proceedings were opened against him with a view to his dismissal, but in the end they were unsuccessful.

8. On 23 July 2021, the Union submitted the draft collective agreement 2021-2022 to Volcan in order to start the collective bargaining process.

9. On other occasions (before the union decided to affiliate outsourced workers) the union had negotiated with Volcan Compañía Minera S.A.A.

10. The scope of collective bargaining was intended to cover all workers working or providing services directly in the selected establishment or unit, the Andaychagua Unit.

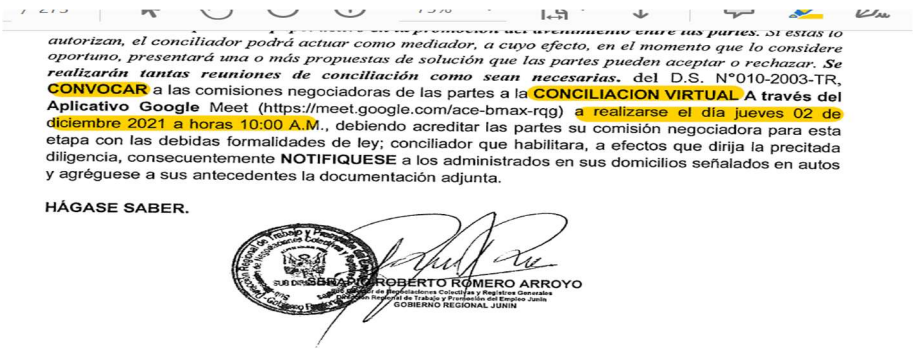
11. On 9 August, the Regional Directorate of Labour and Promotion of Employment of Junín informed Volcán of the opening of the collective bargaining procedure, in order to initiate the direct settlement stage.

12. On 31 July 2021, the company informed the Union of its opposition to initiating the bargaining procedure, stating:

    a. [...] The **Union is a minority organisation that works in the same area with other organisations that affiliate more workers**. Specifically, it states that it **has opened company-wide collective bargaining negotiations** with the Federación de Trabajadores Mineros Metalúrgicos de Volcan Compañía Minera S.A.A. and the Sindicato Único de Empleados de Volcan Compañía Minera S.A.A. The former represents the majority of workers and the latter the employees.
    b. In this regard, the company states that **there is no place for the Union to initiate collective bargaining proceedings**.

13. Four months and six days passed, and the company continued to delay negotiations, so the Labour Administrative Authority decided to

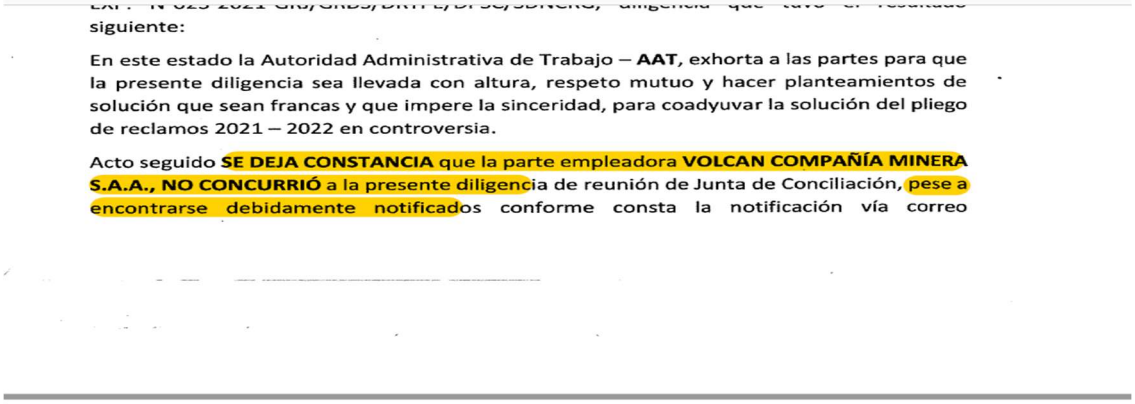
convene both parties to a virtual conciliation meeting. However, as recorded in the minutes and in the negotiation file, Volcán did not show up for the meeting.



*autorizan, el conciliador podrá actuar como mediador, a cuyo efecto, en el momento que lo considere oportuno, presentará una o más propuestas de solución que las partes pueden aceptar o rechazar. **Se realizarán tantas reuniones de conciliación como sean necesarias.*** del D.S. N°010-2003-TR, **CONVOCAR** a las comisiones negociadoras de las partes a la **CONCILIACION VIRTUAL A través del Aplicativo Google** Meet (https://meet.google.com/ace-bmax-rqg) a realizarse el día jueves 02 de diciembre 2021 a horas 10:00 A.M., debiendo acreditar las partes su comisión negociadora para esta etapa con las debidas formalidades de ley; conciliador que habilitara, a efectos que dirija la precitada diligencia, consecuentemente **NOTIFIQUESE** a los administrados en sus domicilios señalados en autos y agréguese a sus antecedentes la documentación adjunta.

HÁGASE SABER.

ROBERTO ROMERO ARROYO
GOBIERNO REGIONAL JUNIN



siguiente:

En este estado la Autoridad Administrativa de Trabajo – **AAT**, exhorta a las partes para que la presente diligencia sea llevada con altura, respeto mutuo y hacer planteamientos de solución que sean francas y que impere la sinceridad, para coadyuvar la solución del pliego de reclamos 2021 – 2022 en controversia.

Acto seguido **SE DEJA CONSTANCIA** que la parte empleadora **VOLCAN COMPAÑÍA MINERA S.A.A., NO CONCURRIÓ** a la presente diligencia de reunión de Junta de Conciliación, pese a encontrarse debidamente notificados conforme consta la notificación vía correo

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REGION JUNIN ¡Trabajando con la fuerza del pueblo!

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SUB DIRECCION DE NEGOCIACIONES COLCETIVAS Y REGISTROS GENERALES

"Año del Bicentenario del Perú: 200 años de Independencia"

electrónico, por lo que los recurrentes invocan a la Autoridad Administrativa de Trabajo –

14. Despite multiple oppositions from the company, the administrative authorities continued to recognise the union's right to bargain.

15. However, after the notification of the Directorial Order, Volcan's Deputy Labour and Social Relations Manager sent a communication to the Union in which he reiterated his refusal to initiate collective bargaining.

16. A strike was declared by the Union on 21 December 2021.

17. On 23 February 2022, the Regional Directorate of Labour and Promotion of Employment of Junín in its role as binding arbitrator issued an arbitration ruling, ending the strike and ordering Volcan to initiate direct dealings with the Union at the plant level.

18. However, as of the date of writing this petition, Volcan has not complied with this ruling, i.e. it continues to violate the right to collective bargaining, a fundamental part of the right to freedom of association, while at the same time violating an arbitration ruling.

2.4.3.1. Provide any available evidence of such practice, including written documents issued by the third country proving the existence of such practice, evidence from recognised international bodies, witness statements, records (including translation in English where required);

We will now present the different declarations made by the ILO supervisory bodies in direct relation to the cases of Colombia and Peru on the subject of outsourcing.

We will provide information on the following:
- recommendations of the ILO's Committee on Freedom of Association in response to the presentation of specific cases of violations of freedom of association,
- observations of the Committee of Experts on the Application of Conventions and Recommendations on the study of reports,
- the summoning of Colombia to answer before the International Labour Conference for violating ILO Convention 81 (on labour inspection, and the absence of inspection of outsourced workers), and also
- recommendations made by the ILO in 2011 when a High Level Mission visited Colombia and at that time already identified the precariousness to which outsourced workers are exposed.

a. Colombia

ILO position on outsourcing and illegal intermediation in COLOMBIA

Illegal intermediation in the case of Colombia, and its misuse to precaritise labour, has been in the eyes of different international bodies. Examples are Resolution 2628 of 2012 of the European Parliament; a study launched in 2016 by the OECD on the labour market and social policies in Colombia'; or the recommendations of the 2011 ILO High Level Mission.

All these documents agree on the need to curb illegal intermediation, improve workers' access to justice, defend trade union freedom, suppress anti-union

violence, eradicate impunity for crimes against trade unionists, and support victims' rights to truth, justice and reparation, as well as the need to reform the institutional framework for processing labour disputes.

We will now see how the trade union movement addressed the issue at the International Labour Conference in 2014, in response to violations of ILO Convention 81, which deals with labour inspection, and where it became clear that Colombian labour inspection was deficient in its functioning in this area.

- **Complaints made to the International Labour Conference - Committee on the Application of Standards**

Colombia was called before the International Labour Conference's Standards Committee in 2014, due to non-compliance with ILO Convention 81. Special mention was made in the Committee of the precarious situation of outsourced workers and the lack of preventive inspection to combat illegal intermediation.

In this ILO space, a worker member highlighted that "Labour inspection does not examine the most serious cases of violation of labour law, as about six million people are illegally employed and eight million are self-employed. Workers see their rights violated due to outsourcing, cooperatives, foundations, temporary service companies and union contracts, but the labour inspectorate does not intervene in these situations"[4] .

- **ILO High-Level Mission**

The ILO High-Level Mission that visited Colombia in February 2011 stated: "The Mission is deeply concerned by the repeated and detailed reports of acts of anti-union discrimination in enterprises and in the public sector, and the absence of effective action to put an end to such acts".

- **Committee on Freedom of Association, CASE NO 2556 (COLOMBIA)**

The ILO's 2008 report on industrial relations shows how outsourcing many activities that are central to the operations of companies systematically denies and restricts the ability of those workers to exercise their rights to join a trade union of their choice. The case concerned the government's refusal to register a union of workers in a chemical plant because they were employees of temporary service agencies. The Committee stated that "the contractual status under which workers are hired by an employer should have no effect on their right to join workers' organisations and participate in their activities" and that "all workers, without distinction whatsoever, whether employed on a permanent, fixed-term or subcontracted basis, must have the right to establish and join organisations of their own choosing"[5] (ILO, 2013. p38).

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4 Ver, ILO. https://www.ilo.org/dyn/normlex/es/f?p=1000:13101:0::NO:13101:P13101_COMMENT_ID:3253714

5 ILO, ver: 2008. 349. Informe del Comité de Libertad Sindical. Consejo de Administración, 301.a reunión, Octavo punto del orden del día. Ginebra, OIT. Disponible en www.ilo.org/wcmsp5/groups/public/---ed_norm/---

- **Committee on Freedom of Association, CASE NO 2946 (COLOMBIA)**

The USO Union alleged that the restrictions on the right to freedom of association through acts of anti-union discrimination were "***facilitated by the widespread use of outsourcing and of fixed-term contracts***", and claimed that the constant use of fixed-term contracts had a negative impact on unionization and trade union rights. The Committee held that "fixed-term contracts should not be used deliberately for anti-union purposes". Furthermore, it affirmed that "***the employment of workers through repeated renewals of fixed-term contracts over several years can be an obstacle to the exercise of trade union rights***[6]."

Several multinational mining companies operate in Colombia's coal sector: Drummond, Prodeco and Cerrejón. Glencore owns the latter two, Prodeco and Cerrejón.

In an interview with several trade unions (18 March 2021), it was revealed that Glencore employed 66% subcontracted workers and 34% direct employees. In its 2019 sustainability report (Cerrejón, 2019), Cerrejón stated that it employed 5,896 direct employees and 5,166 indirect workers. In its latest Sustainability Report (2020), the Company indicates it has 8,520 workers, between employees and contractors: 5,201 direct employees and 3,319 outsourced workers.

In general, the main problem with outsourced processes is the abuse of the many different forms of contracts used to provide personnel to the companies that hire them. This opens the door to excessive labour flexibilisation that leads to violations of labour rights at both the individual and collective level.

In view of the misuse of illegal outsourcing / intermediation, Colombian trade unions use the labour clauses in the Colombia-Canada and Colombia-US free trade agreements to file complaints. These have resulted in recommendations by Canada and the United States on illegal outsourcing / intermediation, in 2017 and 2016, respectively. Unions are also using agreements such as the Santos-Obama Labour Action Plan to take strict action against the misuse of temporary work and increase the number of Labour Inspectors trained to detect the inappropriate use of illegal outsourcing / intermediation.

The OECD Committee on Employment, Labour and Social Affairs has formulated specific recommendations for Colombia in similar terms, urging the Colombian Goverment to restrict the use of subcontracted services to disguise factual employment relations, as well as to implement adequate labour inspection in order to identify illegal intermediation and precarious working conditions.

A study conducted by Rudas *et al.* (2014) on behalf of the Friedrich-Ebert-

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relconf/documents/meetingdocument/wcms_091468.pdf Citado también Estudio de OIT (2013) International Labour Office. p.38. (2013)

6 ILO, ver https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3237688

Stiftung (FES) on coal mining in Colombia has also revealed the existence of several problems in terms of illegal outsourcing / intermediation. Outsourced workers work under minimal conditions of stability and protection of their labour rights, with short-term contracts of between 3 and 6 months and up to 1 year. Most of them do not receive any extra-legal social benefits. This type of labour flexibility is established by the large mining companies to ensure low costs. **There are significant differences between direct wage earners and outsourced workers, with differences of almost 30% in wages and in the degree of job stability.** The wage differences are related to the type of contract issued, with the distinction between 3 categories of workers: temporary workers, direct workers and outsourced workers.

More and more outsourced workers earn less than direct employees and receive fewer benefits, while working longer hours. These working conditions are inferior compared to those of direct wage earners, and thus poverty and misery increase among the outsourced.

According to the FES study, 63.7% of direct employees earned more than 1,428,481 pesos per month, and only 11.1% of outsourced workers earned more than this amount through temporary employment agencies. The rest of outsourced workers, hired through employment agencies, received less than this amount, and half of them even earned less than the legal minimum wage. Only emepployees with a direct contract with the main company earned wages of more than 2,321,000 pesos. Certainly the absolute wage figures have been adjusted since 2014, but there is no reason to assume that these marked differences between outsourced workers and direct wage earners have changed today.

Despite the well-known occupational risks in terms of accidents and illnesses inherent to coal work, unions of outsourced workers are not well represented in the country's mining sector. Organisations such as Sintracerrejón, Sintradem, Sintradrummond, Sintracarbón and Sintramienergética represent mostly direct employees, and not outsourced workers.

b. Peru

ILO's position on outsourcing and freedom of association in Peru

In the case of Peru, the ILO Committee of Experts on the Application of Conventions and Recommendations has also expressed itself on the issue of outsourcing, referring to Peru's non-compliance with ILO Conventions 87 and 98[7] found when reviewing reports (regular monitoring).

The Committee of Experts requests the Government of Peru to:

- provide information on any specific measures taken by the labour inspectorate to ensure effective protection of fixed-term workers

7 ILO, ver https://www.ilo.org/dyn/normlex/es/f?p=1000:13202:0::NO:13202:P13202_COUNTRY_ID:102805

against possible anti-union non-renewal of their employment contracts;
- consult with the representative organisations of workers and employers on the amendments to section 45 of the Law on Colective Labour Relations necessary to ensure that the level of collective bargaining is freely determined by the parties concerned as well as on the mechanism for the settlement of disputes concerning the level at which collective bargaining should take place;
- submit the issue of protection against anti-union discrimination of fixed-term workers to dialogue with the workers' and employers' organisations concerned and report on the outcome of this dialogue.

The information presented below is taken from the study carried out by Jaris Mujica, entitled "Estudio sobre vulneraciones de derechos laborales y sindicales en trabajadores tercerizados de los yacimientos mineros Andaychagua (Yauli, Junín) y Antapaccay (Espinar, Cusco)" (Study on violations of the labour and trade union rights of subcontracted workers in the mining sites of Andaychagua (Yauli, Junín) and Antapaccay (Espinar, Cusco)).

According to official Peruvian government data, in the mining sector, more workers are hired through illegal outsourcing / intermediation (subcontractors) than directly by mining companies (Ministry of Energy and Mines, 2019, p. 108).

A review of the Mining Statistical Bulletin, 02-2020 edition, confirms that outsourced workers make up 70% of the total workforce in the mining sector. **This is a very high percentage; almost three out of four mine workers thus find themselves with substantially lower wages and fewer rights than those of directly hired mining company employees.**

In the last decade, mining companies operating in Peru have increased the use of subcontracting agencies to carry out essential mining activities. Since the signing of the Free Trade Agreement with the European Union, the number of subcontracted and outsourced workers is steadily increasing, taking over tasks that used to be carried out exclusively by the main mining company (PLADES, 2019).

There is a big difference between mining companies and subcontracting agencies in terms of (fatal) accidents. According to a report by PLADES (2019), direct mining company employees suffered an average of 18.2 fatal accidents each year between 2000 and 2018; workers for subcontractor agencies suffered a yearly average of 31.6 fatal accidents over the same period. These figures indicate that subcontractor agencies have less demanding safety systems in place. And while the same study shows that the situation has improved between 2014 and 2018, with fewer accidents occurring, the data reveals that workers who are not on the payroll of the main mining

company are still significantly more vulnerable.

Illegal outsourcing / intermediation has generated serious problems regarding the protection and guarantee of workers' fundamental rights. In general terms, illegal outsourcing / intermediation serves to conceal de facto labour relations. More specifically, the intervention of a third party in the dynamics of labour subcontracting makes it difficult to identify the real employer and, therefore, to determine the employee's rights and the possibility of enforcing them (Balbin Torres, 2006).

As a result, wage gaps have been created (Sanguinetti, 2013) between workers in the main companies and those in subcontracting agencies, a situation that appears to be a violation of the principle of equal rights. Also, as a result of this situation, workers under illegal outsourcing / intermediation tend to be subjected to longer working hours and lack of adequate equipment for risky activities, making them more prone to be victims of occupational accidents and diseases (Sanguinetti, 2013).

Moreover, collective rights are directly affected, because the small size of these satellite companies, as well as the distribution of workers hired by one subcontractor agency over several user companies constitute obstacles for any group of workers who want to create a union in an outsourcing services company (Arce Ortiz, 2013, p. 152). Even if a union of outsourced workers is created, it will not have any representative relationship with the main employer, as several different companies are involved (Arce Ortiz, 2013, p. 153).

In practice, it has been proven that illegal outsourcing / intermediation serves primarily to reduce labour costs. **Wages, social benefits, working conditions, bonuses, health and safety rights are all lower for outsourced workers compared to direct employees**.

Peruvian law is clear on when outsourcing / intermediation is allowed or not. But the government also must be able to enforce the law.

Not a single outsourced worker has job stability; they are all under one of the types of temporary contracts provided for in the current regulatory framework. Contracts are renewed every three months, even though the contract for services between the contracting agency and the mining company lasts for several years. On top of that, approximately every two to three years there is rotation of many workers between various contracting agencies.

There are two reasons why workers are hired for three months and their contracts are renewed or rotated: i) the fulfilment of the minimum legal term of a temporary contract (5 years maximum), and ii) the organisation of workers (when they try to form or join a union). In other words, the job instability generated by temporary contracts is the reason why workers do not demand better employment conditions or form or join a trade union. This is also why they are unable to denounce the illegal nature of their temporary contracts. Companies find it easier and less costly not to

renew a worker's contract than to dismiss him or her arbitrarily and have to pay compensation.

3. IMPACT AND SERIOUSNESS/GRAVITY OF THE BREACH

3.1. Factual description of the measure's effects (provide supporting evidence and sources used)

The violation argument is in relation to Chapter IX on Sustainable Development of the Trade Agreement with the EU.
Goods exported to the European Union from Peru and Colombia where these undue labour precariousness practices are observed:

1. from Colombia: Coal - Cerrejón, owned by the Swiss multinational Glencore
2. from Peru: Zinc, Copper, Tin, Silver, Lead; Company: Volcán Compañía Minera S.A.A., owned by Swiss multinational, Glencore

The UN Guiding principles on Business and Human rights state that "guiding principles are to be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable"[8].
A law clinic at Amserdam University pointed out that "Outsourced and subcontracted workers are to be included in the group of people that is at a heightened risk of becoming vulnerable, as they are more likely to be victims of discriminatory practices[9]".
Below we will show some of the practices related to those outsourced workers that make them the most vulnerable workers in the production chain.

Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by both Colombia and Peru, establishes "the right of everyone to enjoy just and favourable conditions of work". Article 7(a)(i) establishes the right to "fair and equal pay for work of equal value, without distinction of any kind; in particular, women shall be assured conditions of work not inferior to those enjoyed by men, with equal pay for equal work". Unlike the ILO conventions on equal treatment and non-discrimination, this definition of unequal treatment goes beyond the definition based on "inherent characteristics": the formula "without distinction of any kind" is certainly broad enough to include, for example, the distinction between direct employees and subcontracted (agency) workers. Article 7(c) establishes the right to "equal opportunity for all to be promoted, within their work, to the next higher level of advancement to which they are entitled, without any consideration other than the factors of length of service and ability".

On the basis of Article 7 of the ICESCR, unequal treatment between permanent and temporary workers violates international human rights commitments, while Article 7(c) suggests that it is also a violation to keep temporary and agency

8 *Guiding principles on Business and Human rights*, Retrieved from: https://waps.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
9 Amsterdam University, Clinic of Law. Memo to CNV Internationaal 31 of march.

workers in a situation of permanent precariousness (ILO, 2013, p.39).

The duty to prevent or minimise the risk of potential human rights violations and to take corrective action when they occur opens the door for the view that subcontractors and employment agencies supplying labour have a duty to prevent potential human rights violations in the supply chain.

The expansion of precarious work constitutes a violation of the obligation of companies to minimise human rights risks, since failure to reduce precarious work would mean complicity in rights violations (ILO, 2013, p.40), a complicity that is reinforced by the State's inactivity in terms of inspection to ensure compliance with labour standards.

In short, the use of precarious work beyond the necessary limits violates human rights as well as trade union rights and the right to equality. The exercise of fundamental rights is not subject to qualification in the name of demands for more flexibility or seasonality: such demands find no basis in international human rights law.

Compliance with international human rights obligations requires companies to work with trade unions to negotiate the progressive reduction of precarious work, as part of their commitment to "human rights due diligence". Failure or refusal to do so constitutes a violation of the Ruggie Principles and makes a company liable to be sued under the OECD Guidelines. And for its part, a states' inaction in the face of the unconscionable use of illegal intermediation makes that state liable to international action for failure to ensure respect for fundamental rights in the workplace.

4.1. ACTION

- In Colombia, the Ministry of Labour is aware of the improper use of illegal intermediation; many complaints have been made at national and international level by the Colombian trade union movement. Despite this, preventive inspections and sanctions have not remedied this situation.
- In Peru, the Ministry of Labour and Promotion of Employment has been informed on the company's refusal to engage in collective bargaining negotiations, and has asked the company to initiate negotiations with the union; but the company in fact continues to refuse. The Regional Government of Junín has also been informed, through the Regional Directorate of Labour and Employment Promotion of Junín (the Regional Government is different from the Ministry of Labour). Regional Government of Junín - SUNAFIL (National Superintendence of Labour Inspection).

4.2. Please indicate if the appropriate international organisation(s) (for example, International Labour Organization) has undertaken any action in relation to the alleged breach of TSD commitment or GSP regulation provision. In the affirmative:

4.2.1. Indicate the international organisation which has or is examining the measure;

As mentioned in the previous section, the various ILO supervisory bodies (International Labour Conference, Committee on Freedom of Association, Committee of Experts on the Application of Conventions and Recommendations) have pronounced themselves on the issue of illegal intermediation and how this makes work precarious and jeopardises the fundamental labour rights of those who find themselves in this modality. The ILO has been intensively monitoring the issue.

The ILO has been emphatic about the right to freedom of association, stating that all workers, including outsourced workers, have the right to freedom of association and collective bargaining.

We also highlight that, in the case of Colombia, as mentioned in previous sections, there have been recommendations from the OECD Employment Committee on the matter where the Colombian government has been asked to put an effective stop to illegal intermediation. Specific recommendations were made to the Colombian government urging to restrict the use of subcontracted services to conceal factual labour relations, and implement an adequate labour inspection to identify illegal intermediation and precarious working conditions.

In the framework of the International Labour Conference in 2014, Colombia was on the list of countries called to account for non-compliance with

Convention 81 due to gaps in labour inspection, where one of the concerns expressed was the failure of the existing inspection to prevent and sanction illegal intermediation as a matter of fact.

Abusive outsourcing is an easy way for multinationals to weaken their workforce, cut down on conventional benefits for workers and thwart trade union organisations.

The Committee on Freedom of Association indicated in Case 2946 that "***the employment of workers through repeated renewals of fixed-term contracts over several years can be an obstacle to the exercise of trade union rights***[10]." The above judgement is given in the framework of complaints made by the USO union and expressing the situation in which outsourced workers generally find themselves: they do not enjoy employment stability, since most of the time they have fixed-term contracts, and this is an obstacle to the exercise of trade union freedom.

We also mention Case 2556, where the Committee on Freedom of Association calls on the Colombian government to register without delay the trade union it is demanding, despite having temporary workers, and also notes "In this regard, the Committee recalls that the legal nature of the relationship between the workers and the employer should not have any effect on the right to join workers' organisations and participate in their activities. The Committee also recalls that all workers, without distinction whatsoever, should have the right to form and join organizations of their own choosing, whether they are permanent workers, temporary contract workers or seasonal workers". (ILO, CFA Case 2556)

In the case of Peru, the Committee of Experts on the Application of Conventions and Recommendations has also recommended to the Peruvian government to report on inspection measures with a view to protecting workers on fixed-term contracts, ensure that collective bargaining is freely engaged in by the parties concerned, and protect workers on fixed-term contracts against anti-union discrimination.

4.3. Please indicate if you are aware that actors from a third country are also concerned by the regulation/practice and if they have sought help from their government. Please provide information on the state of play.

Glencore

Volcán and Carbones Colombianos del Cerrejón are owned by Glencore, A Swiss multinational and one of the world's most diversified natural resource companies.

The company states on its website that it follows and complies with

10 ILO, ver https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3237688

international human rights conventions and the ILO's Fundamental Declaration of Principles and Rights at Work, and indicates that it has established a protocol to guarantee the labour rights of its suppliers' subcontracted workers. It states that Glencore ensures that subcontractors comply with the correct working conditions and labour rights, but as we have observed in practice ,this is not happening in Colombia or Peru.

4.4. Please indicate what the complainant expects/asks the EU to do to resolve the issue.

PETITION

We consider that the European Commission will be able to prioritise this case due to the likelihood of resolving the problem, the basic legality and the seriousness of the infringement in terms of sustainability. We propose, as measures to resolve the case and repair the damage, to promote in Colombia and Peru, together with the EU, the achievement of clear objectives, subject to a timetable and based on results in each of the following points, which will constitute a roadmap and which should begin to materialise within one year:

a. Restitution measures

The guarantee of restitution in terms of reparation is aimed at returning things to the state of affairs prior to the violation, with this we propose to cease the acts of refusal to negotiate in the case of Peru and the discriminatory acts in the case of Colombia.

According to Art. 269 of the Trade Agreement, it is stated that the **Parties shall dialogue and cooperate, as appropriate, on** trade-related **labour issues** of mutual interest. Therefore, we propose to open a dialogue on these cases, in the framework of exports of metals and minerals to the EU and in compliance with the duty of due diligence to stop violations of the right to freedom of association and collective bargaining as well as the right to equality.

The above with the aim, in the case of Colombia, to:

- equalise salaries for positions in which the same functions are performed by direct workers of the company Carbones Colombianos del Cerrejon S.A.S. and by outsourced workers;
- establish a formalisation agreement for outsourced workers who meet the conditions of ILO Recommendation 198.

And in the case of Peru, to:

- urge Volcán Compañía Minera S.A.A. to sit down to collective bargaining with the 'Union of Metallurgical Mining Workers of Andaychagua Volcan Compañía Minera and the Specialised Companies, Contractors and Intermediary Companies that provide

services to Volcan Compañía Minera - Andaychagua' in good faith, refraining from anti-union behaviour and with the aim of achieving the signing of a collective agreement;
- request Volcán Compañía Minera S.A.A. to provide all the necessary documentation for a transparent and effective negotiation.

b. Non-repetition measures

As part of the reparation measures with a focus on non-repetition, i.e. with the aim that the alleged acts and violation of human rights at work do not happen again, we ask the Commission, recognising the importance of mutual cooperation, to use article 286 of the Trade Agreement as a source of inspiration and consider initiating the following actions:

a) Seek the implementation and enforcement of legislative acts and policy measures guaranteeing freedom of association, the right to collective bargaining and the right to equal pay, especially by limiting the abuse of intermediation;

b) Urge for strict labour inspections with penalties for wage discrimination, refusal to bargain collectively, unjustified dismissals, intimidation and threats against workers;

c) Immediately start assisting Colombia and Peru in setting up and implementing the process described above, and the requirement that it prepare a regular report to be submitted to the European Parliament for its assessment;

d) Seek ratification of ILO Convention 181, and use Recommendation 198 as a source of inspiration for the creation of standards on illegal intermediation;

e) Initiate an assessment of the labour impacts of labour outsourcing in the light of the Agreement, including activities aimed at improving methodologies and indicators for such assessment;

f) Initiate participatory research and monitoring to verify the effective application, in Colombia and Peru, of ILO core conventions, in particular ILO Conventions 87, 98 and 111, on outsourced workers;

g) Initiate a study on the functioning of the preventive and sanctioning labour inspection on illegal intermediation in coal mining in Colombia and metals in Peru, with recommendations for its better functioning.

h) Initiate a dialogue between stakeholders (workers, companies and governments) where information and experiences are exchanged on issues related to the promotion and application of good corporate

social responsibility practices, and on due diligence in relation to outsourced workers.

Finally, we ask the Commission to ask the governments signatory to the trade agreement with the EU, Peru and Colombia to demand that the companies we have mentioned in the complaint, create a corporate policy to tackle anti-union policies aimed at direct and outsourced workers and promote social dialogue, which should be made known in a public event with Glencore's contractors in Volcan and Cerrejon.

4. CONFIDENTIALITY

We agree with publication of this complaint.

TRADE UNIONS

SINTRACARBÓN :

_____

Igor Diáz
President

_____

Orlando Cuello
Vice-President

SINTRACERREJON :

_____

Wilfer Velasquez
President

_____

Luis Avila

Treasurer

Sindicato de Trabajadores Mineros Metalúrgicos de Andaychagua Volcan Compañía Minera y de las Empresas Especializadas, Contratistas y de Intermediación que prestan servicios en Volcan Compañía Minera – Andaychagua:

_____

Alex Edilberto Tinoco Román
Secretary General Alex Edilberto Tinoco Román

_____

Jhony Rúben Ramos Ravichagua
Deputy Secretary-General - Jhony Rúben Ramos Ravichagua

BIBLIOGRAPHY

Amsterdam University, Clinic of Law. Memos to CNV Internationaal 31 of march.

CNV Internationaal. Mujica. J., *Study on violations of labour and union rights of outsourcedworkers at the Andaychagua (Yauli, Junín) and Antapaccay (Espinar, Cusco) mining sites (Espinar, Cusco)*. 2021

EN_Study on violations of labor union rights in outsourced workersDEF.pdf (cnvinternationaal.nl)

ILO. Convention 87.

ILO. Convention 98.

ILO. Convention 111.

ILO. Recommendation 198.

International Labour Office. *International journal of labour research (Meeting the challenge of precarious work: a workers' agenda)*. Geneva : International Labour Office. Vol. 5, no. 1 (2013).

ILO. *ILO Committee on Freedom of Association Digest of Recommendations,* 2018.

International Metalworkers' Federation. 2010. Submission to the UN Special Representative of the Secretary-General for Business and Human Rights, May 2010. Available at: http://www.imfmetal.org/files/10053116205266/Ruggie_submission.pdf
Federación Internacional de los Trabajadores de las Industrias Metalúrgicas (FITIM). (2010)

FES.G. Rudas. *Large-scale coal mining in Colombia: economic, social, labour, environmental and territorial impacts.* 2014.
International Labour Office 2013 International journal of labour research (Meeting the challenge of precarious work: a workers' agenda). Geneva : International Labour Office. Vol. 5, no. 1 (2013).
Retrieved from: https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_216282.pdf

OECD Guidelines and Due Diligence, Retrieved from: https://www.oecdguidelines.nl/oecd-guidelines/due-diligence

PLADES. Minería Metálica, Comercio y Tercerización Laboral. Programa

Laboral de Desarrollo. (2019). Citado en: CNV Internationaal. Outsourcing in Peru, Colombia and Bolivia Identifying and understanding the hidden risks in mining supply chains (2021). Retrieved from: CNVI-0291 20210421 -OECD_position_paper_miningv4 .pdf (cnvinternationaal.nl)

Guiding principles on Business and Human rights, Retrieved from: https://waps.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

ANNEXES

EVIDENCE

PERU - STATEMENT OF FACTS AND EVIDENCE

1. Draft Collective Bargaining Agreement 2021-2022 proposed by the Union to Volcan, which **is intended to evidence** the commencement of collective bargaining and the Union's proposal on the level of bargaining.

2. Communication from the Regional Directorate of Labour and Promotion of Employment in Junín, which provides for the notification of the initiation of the direct negotiation stage, the purpose of which **is to accredit** that the Labour Authority did not observe any irregularity in the exercise of the right to collective bargaining and urged Volcan to initiate the corresponding stage.

3. Volcan's opposition to the collective bargaining proposed by the Union, which **aims to prove** that the company formulated its refusal to negotiate based on the argument of greater representativeness of another organisation, with a different scope.

4. Minutes of the virtual conciliation session convened by the Administrative Labour Authority, in which Volcan's absence is recorded, the purpose of which **is to prove** that the company denied any possibility of negotiating with the union, despite the intervention of the Ministry in the conflict.

5. Communication from Volcan dated 14 January 2022 signed by Volcan's Deputy Manager of Labour and Social Relations, Arnold Villar Bonilla, stating that they will maintain negotiations at company level, denying the possibility of negotiating at establishment level, which **is intended to prove** that the company denies any possibility of negotiating with the Union at establishment level.