

UNITED STATES-PERU TRADE PROMOTION AGREEMENT

CHAPTER 17: LABOR

PUBLIC REPORT OF REVIEW OF
OFFICE OF TRADE AND LABOR AFFAIRS
U.S. SUBMISSION 2010-03 (PERU)



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

AUGUST 30, 2012

EXECUTIVE SUMMARY

Purpose of the Report

On December 29, 2010, the U.S. Department of Labor's Office of Trade and Labor Affairs (OTLA) received a public submission under Chapter 17 (the Labor Chapter) of the United States-Peru Trade Promotion Agreement (PTPA) from the Peruvian National Union of Tax Administration Workers (SINAUT).¹

On July 19, 2011, the OTLA accepted for review U.S. Submission 2010-03 (Peru), stating that it met the criteria for acceptance, and published its decision to accept in a *Federal Register* notice on July 26, 2011.² The OTLA has reviewed extensive documentation provided by the submitters and by the Government of Peru and undertook a mission to Peru, during which representatives from the OTLA met with the SINAUT, the National Superintendant of Tax Administration (SUNAT), additional government agencies, and other organizations in Peru relevant to the submission. The OTLA has consulted with the U.S. Department of State and the Office of the U.S. Trade Representative throughout the review process. The purpose of the report is to make public the OTLA's findings and recommendations based on information obtained in accordance with the OTLA's Procedural Guidelines.

Summary of U.S. Submission 2010-03 (Peru)

In U.S. Submission 2010-03 (Peru), the SINAUT alleges that the employer, the SUNAT, failed to effectively recognize the union's right to collective bargaining with respect to both economic and non-economic issues.³ The SUNAT is the executive branch agency of the Peruvian government that oversees both customs and tax administration. The submission suggests that this failure occurred with respect to all three phases of the Peruvian collective bargaining process – direct negotiations, conciliation, and arbitration – and covers both the 2008-2009 and 2010-2011 collective bargaining periods.

Findings

Throughout the review process, the Peruvian government has demonstrated a willingness to discuss with the U.S. government the issues raised in the submission. Peruvian officials have met with U.S. government officials, provided requested information, and facilitated meetings with key government officials to address the allegations in the submission.

¹ U.S. Submission 2010-03 (Peru), *Complaint for non-compliance by the National Superintendency of Tax Administration (SUNAT) in the collective bargaining for the 2008-2009 term*, Official Letter No. 0191-2010/SINAUT-SUNAT, December 29, 2010 [hereinafter U.S. Submission 2010-03 (Peru)], available from <http://www.dol.gov/ilab/programs/otla/PeruSubmission2010.pdf>.

² 76 Fed. Reg. 44609 (July 26, 2011).

³ U.S. Submission 2010-03 (Peru), pp. 1-2.

Direct Negotiations

Article 57 of the Peruvian Collective Bargaining Law of 2003 requires that collective bargaining commence within ten calendar days of a union's presentation of its collective bargaining proposal to the employer.⁴ Collective bargaining between the SUNAT and the SINAUT commenced 167 days after the SINAUT's presentation of its collective bargaining proposal to the SUNAT for the 2008-2009 period and 55 days after the SINAUT presented its proposal to the SUNAT for the 2010-2011 period.

Conciliation

Under Article 58 of the Peruvian Collective Bargaining Law, if parties are unable to reach agreement through direct negotiations, they may request conciliation.⁵ The parties held four official conciliation meetings for the 2008-2009 collective bargaining period and nine for the 2010-2011 period. They were unable to reach agreement on economic or non-economic issues for either period.

Arbitration

Each time the parties were unable to reach agreement through conciliation, the SINAUT requested arbitration under Article 61 of the Peruvian Collective Bargaining Law on both the economic and non-economic matters contained in the union's bargaining proposal. The SUNAT declined both requests, contending that: 1) arbitration is voluntary and requires the acceptance of both parties to a dispute; and 2) the Peruvian Public Sector Budget Law prohibits the SUNAT, as a public sector entity, from submitting to arbitration on economic matters. The Peruvian Public Sector Budget Law also bans government entities from readjusting or increasing the remuneration of their employees beyond what it authorizes.⁶

During much of the period of review there was legal ambiguity regarding the two justifications cited by the SUNAT for failing to submit to arbitration. However, on September 17, 2011, the Government of Peru remedied one such ambiguity by issuing Supreme Decree 014-2011-TR and accompanying Ministerial Resolution 284-2011-TR. These instruments, (1) clarify that under Article 61 of the Collective Bargaining Law either party to a collective labor dispute can compel mandatory arbitration in certain narrowly defined circumstances; (2) establish more robust mechanisms and procedures

⁴ The Peruvian Collective Bargaining Law of 2003 (Decreto Supremo No. 010-2003-TR), art. 57. The full text of the Peruvian Collective Bargaining Law is available from the Ministry of Labor and Promotion of Employment's website at <http://www.mintra.gob.pe/contenidos/archivos/prodlab/TUO%20%20Relaciones%20Colectivas%20de%20Trabajo%20TUO%20DL.25593%20DS.%200010-2003-TR%2005-10-03.pdf> (last visited June 12, 2012).

⁵ The Peruvian Collective Bargaining Law, art. 58.

⁶ 2006 Public Sector Budget Law (*Ley del Presupuesto para el Año 2006*), Law 28652, art. 8.

for applying Article 61; and (3) more clearly delineate the negotiating parties' and the Government of Peru's responsibilities and obligations under the law.⁷

Under the new Supreme Decree and Ministerial Resolution, the SUNAT and the SINAUT attended arbitration for the 2008-2009 bargaining period on March 16, 2012. On March 29, the arbitral panel issued its award granting the SINAUT each of the requests contained in its bargaining proposal, including the economic issues, though in amounts less than the union had requested.⁸ On April 12, 2012, the SUNAT appealed this award, contending that it reflects a misapplication and misinterpretation of the Public Sector Budget Law. The appeal is still pending. For the 2010-2011 bargaining period, the SUNAT and the SINAUT have each appointed an arbitrator, but to date neither these arbitrators nor the Government of Peru have named a third arbitrator to serve as panel president

Conclusion

Based on the extensive review process, the OTLA has determined that the Peruvian Ministry of Labor and Promotion of Employment appears to have fulfilled its duties during the collective bargaining processes at issue and to be upholding the September 2011 enactments, including by establishing the National Registry of Collective Bargaining Arbitrators, training those arbitrators, and appointing a replacement arbitrator for the 2010-2011 bargaining period dispute between the SINAUT and the SUNAT.

However, the OTLA has also determined that the SUNAT failed to comply with the Collective Bargaining Law, at least with respect to non-economic issues, when it failed to commence direct negotiations for the 2008-2009 and 2010-2011 periods within the ten-day limit for beginning collective bargaining under Article 57.

With regard to all other issues raised in the submission, the OTLA has determined that important legal ambiguity during the period at issue prevents a finding that the SUNAT failed to comply with the law or that the Government of Peru failed to comply with or enforce its own labor laws during that time.

Cooperative Labor Consultations

As discussed, the Government of Peru has made significant progress in addressing the underlying issues in the submission, in particular through the enactment of Supreme Decree 014-2011-TR and Ministerial Resolution 284-2011-TR. The Government of Peru also continues to engage in ongoing and regular productive cooperation and dialogue with the U.S. government on these issues.

⁷ Government of Peru, The President of the Republic, Supreme Decree (Decreto Supremo) No. 014-2011-TR, El Peruano, September 17, 2011, 450080.

⁸ Award of the 2008-2009 SINAUT-SUNAT arbitral panel, Expediente Administrativo No. 21704-2008-MTPE/2/12.210, March 29, 2012.

The OTLA does not believe formal consultations are needed to continue positive engagement and progress on these matters. As a result, the OTLA does not recommend formal consultations between the U.S. government and the Peruvian government under Article 17.7.1 of the PTPA Labor Chapter.

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I. INTRODUCTION

On December 29, 2010, the U.S. Department of Labor's Office of Trade and Labor Affairs (OTLA) received a public submission under Chapter 17 (the Labor Chapter) of the United States-Peru Trade Promotion Agreement (PTPA) from the Peruvian National Union of Tax Administration Workers (SINAUT).⁹ The submission alleges that the Government of Peru violated its obligation under the PTPA Labor Chapter to effectively enforce its labor laws when Peru's National Superintendant of Tax Administration (SUNAT) failed to fulfill its collective bargaining obligations with the SINAUT.

Peru ratified the PTPA in June 2006 and a Protocol of Amendment in June 2007.¹⁰ The agreement entered into force on February 1, 2009.¹¹ Under the Labor Chapter, the PTPA Parties reaffirm their obligations as members of the International Labor Organization (ILO).¹² The Parties also commit: (1) to adopt and maintain in their statutes and regulations, and practices thereunder, the rights as stated in the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up; (2) not to waive or derogate or offer to waive or derogate from those statutes or regulations where doing so would be inconsistent with a fundamental right; and (3) not to fail to effectively enforce their labor laws through a sustained or recurring course of action or inaction.¹³

The Labor Chapter states that each Party shall establish an office within its labor ministry or equivalent entity to serve as a contact point with the other Party and with the public.¹⁴ For the United States, the OTLA was designated as this contact point in a *Federal Register* notice published on December 21, 2006.¹⁵ Under the Labor Chapter, each Party's contact point provides for the submission, receipt, and consideration of communications from persons of a Party on matters related to the Chapter and reviews such communications in accordance with domestic procedures.¹⁶

The same *Federal Register* notice informed the public of the Department of Labor's Procedural Guidelines that the OTLA follows for the receipt and review of public submissions. According to the definitions contained in Section B of the Procedural Guidelines, a "submission" means "a communication from the public containing specific

⁹ U.S. Submission 2010-03 (Peru), *Complaint for non-compliance by the National Superintendency of Tax Administration (SUNAT) in the collective bargaining for the 2008-2009 term*, Official Letter No. 0191-2010/SINAUT-SUNAT, December 29, 2010 [hereinafter U.S. Submission 2010-03 (Peru)], available from <http://www.dol.gov/ilab/programs/otla/PeruSubmission2010.pdf>.

¹⁰ Office of the United States Trade Representative, Peru Trade Promotion Agreement, available from <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa>.

¹¹ *Ibid.*

¹² United States-Peru Trade Promotion Agreement (PTPA), art. 17.1. For the full text of the agreement, see <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>.

¹³ PTPA, arts. 17.2.1, 17.2.2, 17.3(a). To establish a violation of these provisions, a Party must demonstrate that the breach occurred "in a manner affecting trade or investment between the Parties." *Ibid.*

¹⁴ *Ibid.*, art. 17.5.5.

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

¹⁶ PTPA, arts. 17.5.5(c), 17.5.6.

allegations, accompanied by relevant supporting information, that another Party has failed to meet its commitments or obligations arising under a labor chapter.”¹⁷

The Procedural Guidelines also state that the OTLA shall consider six factors, to the extent that they are relevant, in determining whether to accept a submission for review. These factors are: (a) whether the submission raises issues relevant to any matter arising under the labor chapter; (b) whether a review would further the objectives of the labor chapter; (c) whether the submission clearly identifies the person filing the submission, is signed and dated, and is sufficiently specific to determine the nature of the request and permit an appropriate review; (d) whether the statements contained in the submission, if substantiated, would constitute a failure of the other Party to comply with its obligations or commitments under a labor chapter; (e) whether the statements contained in the submission or available information demonstrate that appropriate relief has been sought under the domestic laws of the other Party, or that the matter or a related matter is pending before an international body; and (f) whether the submission is substantially similar to a recent submission and significant, new information has been furnished that would differentiate the submission from the one previously filed.¹⁸

On July 19, 2011, the OTLA accepted for review U.S. Submission 2010-03 (Peru), stating that it met the criteria for acceptance, and published its decision to accept the submission in a *Federal Register* notice on July 26, 2011.¹⁹

Under the Procedural Guidelines, the OTLA shall issue a public report within 180 days of the acceptance of a submission for review, unless circumstances as determined by the OTLA require an extension of time. On January 10, 2012, the OTLA notified the Government of Peru and the submitters that it was extending the period for review. The Guidelines further state that the report shall include a summary of proceedings and any findings and recommendations.²⁰ The Guidelines also establish that the OTLA may make a recommendation at any time to the Secretary of Labor as to whether the United States should request consultations with another Party pursuant to Article 17.7.1 of the PTPA.

The objective of the review has been to gather information to assist the OTLA to better understand and publicly report on the issues raised by the submission. Throughout the review process, the OTLA has consulted with the U.S. Department of State and the Office of the U.S. Trade Representative. In addition, the OTLA submitted questions to the point of contact at the Peruvian Ministry of Labor and Promotion of Employment (MTPE) and the SINAUT. The OTLA has reviewed extensive documentation provided by the submitters and by the Government of Peru. Additionally, the OTLA undertook a mission to Peru to interview relevant stakeholders and to gather additional information on the issues raised in the submission. On September 20 and 21, 2011, two representatives from the OTLA, as well as the Human Rights and Labor Officer and the Trade Promotion

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

¹⁸ Ibid.

¹⁹ 76 Fed. Reg. 44609 (July 26, 2011).

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

Specialist for the U.S. Embassy in Peru, met with officials from the Ministry of Economy and Finance, the Ministry of Foreign Affairs, the MTPE, the SUNAT, the SINAUT, and other organizations in Peru relevant to the submission. The OTLA has also reviewed relevant materials from the ILO's supervisory mechanisms, including cases filed with the ILO Committee on Freedom of Association and observations made by the Committee of Experts on the Application of Conventions and Recommendations.

II. SUMMARY OF U.S. SUBMISSION 2010-03 (PERU)

The SUNAT is the executive branch agency of the Peruvian government that oversees both customs and tax administration. The SINAUT, the Lima-based union that filed U.S. Submission 2010-03 (Peru), was founded on February 18, 2008, and is composed of 1,896 SUNAT employees. Although the SUNAT is a division of the Peruvian government, its workers, including SINAUT members, are subject to the private sector labor regime.²¹

In U.S. Submission 2010-03 (Peru), the SINAUT alleges that the SUNAT has violated “the fundamental principle and right of effective recognition of the right to collective bargaining.”²² The submission suggests that this failure occurred with respect to all three phases of the Peruvian collective bargaining process: direct negotiations, conciliation, and arbitration.²³

A. The 2008 – 2009 collective bargaining period

1. The direct negotiation phase of the collective bargaining process

On July 31, 2008, the SINAUT submitted to the SUNAT a proposal to negotiate the union's first collective bargaining agreement, covering the period of August 1, 2008 – July 31, 2009.²⁴ This proposal addressed both economic and non-economic issues.²⁵ In

²¹ Consolidated Text of the Statute of the SUNAT, Superintendent's Resolution 041-98/SUNAT, art. 30, March 27, 1998, available from <http://www.sunat.gob.pe/legislacion/superin/1998/041.htm> (last visited June 12, 2012).

²² U.S. Submission 2010-03 (Peru), pp. 1-2.

²³ The Peruvian Collective Bargaining Law of 2003 (Decreto Supremo No. 010-2003-TR) [hereinafter PCBL] specifically countenances three phases of the collective bargaining process in Peru: direct negotiations or bargaining (arts. 57, 58), conciliation (arts. 58, 59), and arbitration (art. 61). In addition, the parties may engage in extra-procedural meetings not specifically referenced in the PCBL as “valid means for the peaceful resolution of the controversy” (art. 60). Article 1 of the PCBL limits its scope of application to workers employed under the private labor regimen, including public sector workers employed under the private labor regimen, such as SUNAT employees, when this does not oppose specific limitations on the benefits of those workers. The full text of the PCBL is available from the MTPE's website at

<http://www.mintra.gob.pe/contenidos/archivos/prodlab/TUO%20%20Relaciones%20Colectivas%20de%20Trabajo%20TUO%20DL.25593%20DS.%20010-2003-TR%2005-10-03.pdf> (last visited June 12, 2012).

²⁴ The SINAUT 2008-2009 Collective Bargaining Proposal, July 31, 2008. In addition, throughout this report, the Spanish term *pliego* is translated as “proposal of collective bargaining issues” or some iteration of this phrase.

²⁵ Examples of economic issues contained in the SINAUT's 2008-2009 collective bargaining proposal include basic salary increases ranging from 24-50%, an annual productivity bonus, and hazard pay.

conformity with Peruvian law,²⁶ the SINAUT also presented a copy of the negotiating proposal to the MTPE on August 1, 2008. On August 4, the MTPE opened a file for the matter and notified the parties that the collective bargaining process had begun.²⁷

According to Article 57 of the Peruvian Collective Bargaining Law, collective bargaining must commence within ten calendar days from the union's presentation of proposed collective bargaining issues to the employer.²⁸ On August 13, 2008, the SINAUT sent a letter to the SUNAT requesting that collective bargaining be initiated.²⁹ The next day, the SUNAT responded by letter that the MTPE had granted it eight days to provide documentation related to the projected costs of the matters contained in the SINAUT's collective bargaining proposal.³⁰ When the SINAUT contended that the provision of such documentation was unrelated to the statutory requirement that collective bargaining be initiated within ten days,³¹ the SUNAT replied on August 26 that it was in the process of designating its representatives for collective bargaining with the union.³²

On August 27, 2008, the Government of Peru named a new Superintendent of the SUNAT.³³ On that same day, the SUNAT passed a resolution designating the persons who would represent it in bargaining with the SINAUT and, on August 29, the SUNAT sent a copy of the resolution to the union.³⁴ The SUNAT sent a letter to the MTPE on September 1, 2008, indicating that it was waiting for a communication from the Ministry that it should begin negotiations with the union.³⁵

On November 3, the SINAUT sent the SUNAT a letter requesting that bargaining be initiated within three days.³⁶ In a letter to the MTPE dated November 14, the SINAUT informed the Ministry of its intent to treat the direct bargaining period as having

Examples of non-economic issues contained in the same proposal include a more transparent hiring and promotion process, new uniforms, and five days of paternity leave for new fathers.

²⁶ PCBL, art. 53. The Spanish phrasing of article 53 is: "*El pliego se presenta directamente a la empresa, remitiéndose copia del mismo a la Autoridad de Trabajo.*"

²⁷ MTPE notice to open collective bargaining, Expediente No. 210704-2008-MTPE/2/12.210, August 4, 2008.

²⁸ PCBL, art. 57. The Spanish phrasing of article 57 is: "*La negociación colectiva se realizará en los plazos y oportunidades que las partes acuerden, dentro o fuera de la jornada laboral, y debe iniciarse dentro de los diez (10) días calendario de presentado el pliego.*"

²⁹ The SINAUT request to initiate collective bargaining, Oficio No. 040-2008/SINAUT-SUNAT-TI, August 13, 2008.

³⁰ The SUNAT response to the SINAUT request to initiate collective bargaining, Oficio No. 410-2008-SUNAT/2F3000, August 14, 2008.

³¹ The SINAUT second request to initiate collective bargaining, Oficio No. 042-2008/SINAUT-SUNAT-TI, August 18, 2008.

³² The SUNAT response to the SINAUT second request to initiate collective bargaining, Oficio No. 426-2008-SUNAT/2F3000, August 26, 2008.

³³ Government of Peru, Resolution Naming New Superintendent of the SUNAT, Resolución Suprema No. 070-2008-EF, August 27, 2008.

³⁴ The SUNAT designation of bargaining representatives, Oficio No. 436-2008-SUNAT/2F3000, August 27, 2008.

³⁵ The SUNAT letter to the MTPE asking when to begin collective bargaining, Oficio No. 437-2008-SUNAT/2F3000, September 1, 2008.

³⁶ The SINAUT letter requesting that collective bargaining be initiated, Carta Notarial No. 16,817, October 31, 2008 (notarized on November 3, 2008).

concluded and requested that the MTPE open the conciliation phase of the process, as provided for by the Peruvian Collective Bargaining Law when parties have been unable to reach agreement through direct negotiations.³⁷ On November 19, the SUNAT sent a letter of response to the union in which it explained that it had previously been unable to commence collective bargaining due to its internal administrative changes and the replacement of its collective bargaining representatives.³⁸

2. The conciliation phase of the collective bargaining process

On November 27, 2008, the MTPE notified the parties that the direct negotiation phase of the bargaining process had been concluded and that the conciliation phase had commenced.³⁹ The Conciliator of the MTPE informed the parties on December 11 that their first conciliation meeting would be scheduled for January 14, 2009.⁴⁰ The parties met officially for conciliation on that date and three additional times during the 2008-2009 collective bargaining period.⁴¹ When these four official meetings did not bring the parties closer to agreement, they held ten extra-procedural meetings.⁴² These extra-procedural meetings, though not specifically referenced in the Peruvian Collective Bargaining Law, appear to be permitted under Article 60 of the Collective Bargaining Law as alternative “valid means for the peaceful resolution of the dispute.”⁴³ The parties were unable to reach agreement on any of the collective bargaining issues.

3. The arbitration phase of the collective bargaining process

After the parties were unable to reach an agreement in the direct negotiation and conciliation phases of the bargaining process, on March 11, 2009, the SINAUT informed the SUNAT that it was opting to submit the 2008-2009 bargaining matters to

³⁷ The SINAUT letter to the MTPE requesting that the conciliation phase of the bargaining process be opened, SINAUT Expediente No. 210704 MTPE/2/12.210, November 14, 2008; PCBL, art. 58. The Spanish phrasing of article 58 is: “*Las partes informarán a la Autoridad de Trabajo de la terminación de la negociación, pudiendo simultáneamente solicitar el inicio de un procedimiento de conciliación. Si ninguna de las partes lo solicitara, la Autoridad de Trabajo podrá iniciar dicho procedimiento de oficio, si lo estimare necesario o conveniente, en atención a las características del caso.*”

³⁸ The SUNAT letter announcing replacement of collective bargaining representatives, Oficio No. 021-2008-SUNAT/100000, November 19, 2008.

³⁹ The MTPE notice that the conciliation phase of the bargaining process is opened, Expediente No. 210704-2008-MTPE/2/12.210, November 27, 2008.

⁴⁰ The MTPE notice scheduling the parties for a conciliation meeting on January 14, 2009, Expediente No. 152253-08-MTPE/2/12.210, December 11, 2008.

⁴¹ For the 2008-2009 collective bargaining period, the SUNAT and the SINAUT attended conciliation meetings on the following dates: January 14, 2009; January 26, 2009; February 16, 2009; March 2, 2009. Email from the SINAUT to the OTLA, November 15, 2011.

⁴² For the 2008-2009 collective bargaining period, the parties held extra-procedural meetings on the following dates: March 26, 2009; March 30, 2009; April 24, 2009; May 4, 2009; May 12, 2009; May 20, 2009; May 28, 2009; December 9, 2009; December 15, 2009; December 17, 2009. Email from the SINAUT to the OTLA, November 15, 2011.

⁴³ PCBL, art. 60. The Spanish phrasing of article 60 is: “*Las partes conservan en el curso de todo el procedimiento el derecho de reunirse, por propia iniciativa, o a indicación de la Autoridad de Trabajo, y de acordar lo que estimen adecuado. Asimismo, podrán recurrir a cualquier medio válido para la solución pacífica de la controversia.*”

arbitration.⁴⁴ After several exchanges between the parties, the SUNAT formally refused to go to arbitration on March 25, 2009.⁴⁵ The SUNAT contended that the submission of the matter to arbitration required the voluntary agreement of both parties and that it did not agree to arbitration.⁴⁶ In light of the SUNAT's refusal to agree to arbitration and the parties' inability to reach an agreement through direct negotiation, conciliation, or extra-procedural meetings, the SINAUT exercised its right to strike. The union engaged in a 48-hour strike authorized by the MTPE on December 17-18, 2009.⁴⁷

On January 27, 2010, the SINAUT filed a case against the SUNAT in the First Constitutional Court of Lima alleging that the SUNAT had unlawfully refused to submit to mandatory arbitration.⁴⁸ On September 30, 2011, the First Constitutional Court of Lima issued a decision in the case. The court found in favor of the union and ordered the SUNAT to submit to arbitration with regard to the 2008-2009 collective bargaining request, on both economic and non-economic matters.⁴⁹

On October 13, 2011, the SUNAT filed a notice of appeal with the Civil Chamber of the Superior Court of Lima.⁵⁰ On April 11, 2012, the Fourth Civil Chamber of the Superior Court of Lima reversed the First Constitutional Court's September 30, 2011 decision, ruling that since the SINAUT had been notified on March 25, 2009 of the SUNAT's refusal to submit to arbitration, but had not filed its case until January 27, 2010, the 60-day statute of limitations for filing such a claim had expired.⁵¹ The SINAUT filed a notice of appeal of this decision on May 25, 2012.⁵² Nevertheless, the SUNAT had already submitted to arbitration for the 2008-2009 period prior to the April 11, 2012 decision, rendering the point moot.

B. The 2010-2011 collective bargaining period

1. The direct negotiation phase of the collective bargaining process

After failing to reach an agreement during the 2008-2009 period, the SINAUT submitted its bargaining requests for the 2010-2011 collective bargaining period to the SUNAT on

⁴⁴ The SINAUT letter announcing intention to submit matter to arbitration, Oficio No. 0019-2009/SINAUT-SUNAT, March 11, 2009.

⁴⁵ The SUNAT letter refusing to go to arbitration, Oficio No. 0193-2009-SUNAT/100000, March 25, 2009.

⁴⁶ *Ibid.*

⁴⁷ Government of Peru, MTPE, Directive finding the SINAUT strike to be legal, Auto Directoral No. 153-2009-MTPE/2/12.2, December 18, 2009.

⁴⁸ The SINAUT legal brief to the First Constitutional Court of Lima, January 27, 2010.

⁴⁹ First Constitutional Court of Lima, Expediente No. 04427-2010-0-1801-JR-CI-01, September 30, 2011, Lima.

⁵⁰ Notice of Appeal of First Constitutional Court of Lima decision of September 30, Law Office of Carlos Blancas Bustamante, Memorandum No. 118-2011/E.CBB, October 13, 2011, Lima.

⁵¹ Superior Court of Justice of Lima, Fourth Civil Chamber, Expediente No. 04427-2010-0-1801-JR-CI-01 (N^o Ref. Sala: 00066-2012-0), Resolution Number 26, April 11, 2012, Lima.

⁵² The SINAUT Appeal of the Superior Court of Justice of Lima, Fourth Civil Chamber, decision of April 11, 2012, Expediente 4427-2010, Recurso de Agravio Constitucional, May 25, 2012, Lima.

February 26, 2010.⁵³ The requests again addressed both economic and non-economic issues. On March 5, 2010, the MTPE opened a file for the matter and notified the parties that they could begin collective bargaining.⁵⁴ On April 12, 2010, the SINAUT sent a letter to the SUNAT requesting that direct negotiations begin on April 14, 2010.⁵⁵ In a letter dated April 13, 2010, the SUNAT instead suggested April 22 for the commencement of direct negotiations for the 2010-2011 bargaining period.⁵⁶ The SINAUT agreed. The parties' first direct negotiation meeting occurred on April 22, 2010, 55 calendar days after the SINAUT submitted its 2010-2011 bargaining request to the SUNAT, and the parties discussed and agreed upon the time and frequency of future meetings. The second and final direct negotiation was held on May 6, 2010, during which the SUNAT requested that the SINAUT further elaborate on its demands.⁵⁷ No agreement was reached on either economic or non-economic matters.

2. The conciliation phase of the collective bargaining process

On May 7, 2010, the SINAUT notified the SUNAT of its decision to treat the direct negotiation phase of the bargaining process as having ended and accused the SUNAT of dilatory tactics and of lacking any intent to negotiate.⁵⁸ The MTPE informed the parties on May 12, 2010, that direct negotiations had been officially concluded and that the conciliation phase had commenced.⁵⁹ The SINAUT and the SUNAT held their first conciliation meeting on June 11, 2010, and held eight subsequent official conciliation meetings during the 2010-2011 bargaining period.⁶⁰ In addition, the SUNAT and the SINAUT held six extra-procedural meetings as part of this bargaining period.⁶¹ The SUNAT made no proposals or counter-proposals with respect to either the economic or non-economic bargaining issues, and the parties were unable to reach any collective

⁵³ SINAUT 2010-2011 Collective Bargaining Proposal, February 26, 2010. This collective bargaining proposal was intended to cover the period from March 1, 2010 – February 28, 2011.

⁵⁴ The MTPE notice to open collective bargaining, Expediente No. 32509-2010-MTPE/2/12.210, March 5, 2010.

⁵⁵ The SINAUT letter to the SUNAT requesting initiation of direct negotiations, Oficio No. 040-2010/SINAUT-SUNAT, April 12, 2010.

⁵⁶ The SUNAT letter to the SINAUT suggesting that the parties meet on April 22, 2010, SUNAT re: Oficio No. 040-2010/SINAUT-SUNAT, April 13, 2010.

⁵⁷ The SINAUT letter to the MTPE regarding the SUNAT failure to collectively bargain as violation of PTPA, Oficio No. 016-2011/SINAUT-SUNAT, February 21, 2011.

⁵⁸ The SINAUT letter notifying the SUNAT of conclusion of direct negotiations, Oficio No. 051-2010/SINAUT-SUNAT, May 7, 2010.

⁵⁹ The MTPE notice that the conciliation phase of the bargaining process is opened, Expediente No. 32509-2010-MTPE/2/12.210, May 12, 2010.

⁶⁰ For the 2010-2011 collective bargaining period, the parties held conciliation meetings on the following dates: June 11, 2010; June 24, 2010; July 12, 2010; July 22, 2010; August 10, 2010; August 19, 2010; September 1, 2010; September 8, 2010; September 21, 2010. SINAUT letter to MTPE regarding the SUNAT's failure to collectively bargain as violation of the PTPA, Oficio No. 016-2011/SINAUT-SUNAT, February 21, 2011.

⁶¹ For the 2010-2011 collective bargaining period, the parties held extra-procedural meetings on the following dates: November 22, 2010; November 25, 2010; December 10, 2010; January 11, 2011; January 18, 2011; January 25, 2011. Email from the SINAUT to the OTLA, November 15, 2011.

agreement.⁶² Nevertheless, the SUNAT acceded, in practice, to a number of the SINAUT's non-economic proposals and made changes to workplace terms and conditions, including with respect to work uniforms, an open system for promotions and hiring, a system for worksite transfer requests, and paid and unpaid leave days.⁶³

3. The arbitration phase of the collective bargaining process

On November 4, 2010, when the parties reached another impasse, the SINAUT again requested that the SUNAT agree to submit the matters to arbitration.⁶⁴ The union reiterated its request in its extra-procedural meetings with the SUNAT on December 10, January 11, and January 25, but received no formal response.⁶⁵ On February 3, 2011, the SINAUT sent a letter to the MTPE requesting that it obligate the SUNAT to submit to arbitration.⁶⁶ The MTPE acknowledged receipt of this letter and put the SUNAT on official notice that the union had made this request, but in accordance with its role at the time as a facilitator of the arbitration process, did not take steps to obligate the SUNAT to arbitrate.⁶⁷ The SUNAT did not respond.

III. ANALYSIS AND FINDINGS

The OTLA analysis of U.S. Submission 2010-03 (Peru) focuses on the SINAUT's and the SUNAT's collective bargaining-related obligations under Peruvian law at the time of these events, the Government of Peru's effective enforcement of those obligations, and recent legislative and regulatory enactments by the Government of Peru, which seek to address some of the issues raised in the submission.

A. The direct negotiation phase of the collective bargaining process

Article 57 of the Peruvian Collective Bargaining Law requires that collective bargaining commence within ten calendar days from a union's presentation of its collective bargaining proposal to the employer.⁶⁸ The MTPE's role in the collective bargaining process was primarily as a facilitator, charged with such tasks as opening each phase of the process,⁶⁹ determining the economic value of items contained in a party's collective bargaining proposal,⁷⁰ and training and providing qualified conciliators.⁷¹

⁶² The SINAUT letter to the MTPE regarding the SUNAT failure to collectively bargain as violation of the PTPA, Oficio No. 016-2011/SINAUT-SUNAT, February 21, 2011.

⁶³ Meeting between the OTLA and the SUNAT, September 20, 2011, Lima. Each of these concessions was requested in the SINAUT's 2008-2009 collective bargaining proposals. The SINAUT Collective Bargaining Proposal, July 31, 2008.

⁶⁴ The SINAUT request for arbitration, Oficio No. 166-2010/SINAUT-SUNAT, November 4, 2010.

⁶⁵ The SINAUT letter to the MTPE regarding the SUNAT failure to collectively bargain as violation of the PTPA, Oficio No. 016-2011/SINAUT-SUNAT, February 21, 2011.

⁶⁶ The SINAUT request that the MTPE compel SUNAT to arbitrate, Oficio No. 007-2011/SINAUT-SUNAT, February 3, 2011.

⁶⁷ Government of Peru, MTPE, Expediente No. 32509-2010-MTPE/2/12.210, February 17, 2011.

⁶⁸ PCBL, art. 57. For the Spanish phrasing of article 57, *see* fn. 28.

⁶⁹ PCBL, art. 58. For the Spanish phrasing of article 58, *see* fn. 37.

⁷⁰ PCBL, art. 56. The Spanish phrasing of article 56 is: "*En el curso del procedimiento, a petición de una de las partes o de oficio, el Ministerio de Trabajo y Promoción del Empleo, a través de una oficina*

On July 31, 2008, the SINAUT first submitted its request to engage in collective bargaining for the 2008 – 2009 collective bargaining period to the SUNAT on July 31, 2008.⁷² The request contained both economic and non-economic issues. The SUNAT did not engage in direct negotiations with the SINAUT for that period. Collective bargaining began on January 14, 2009, when the MTPE opened the conciliation period pursuant to the SINAUT’s request.⁷³ The first meeting took place 167 calendar days after the submission of the bargaining request.

On February 26, 2010, the SINAUT re-submitted its bargaining requests to the SUNAT, for the 2010-2011 collective bargaining period. The first direct negotiation meeting occurred on April 22, 2010, 55 calendar days after the submission of the bargaining request.

The 167-day time period for launching collective negotiations for the 2008-2009 period and the 55-day period for the 2010-2011 period far exceed the ten-day period for beginning collective bargaining established by Article 57 of the Peruvian Collective Bargaining Law. As such, although the MTPE appears to have fulfilled its legal role during both periods, the SUNAT appears to have violated Article 57 of the Peruvian Collective Bargaining Law, at least with respect to non-economic matters and possibly with respect to economic matters, as discussed in more detail below.

B. The conciliation phase of the collective bargaining process

According to Article 58 of the Peruvian Collective Bargaining Law, if the parties are unsuccessful in reaching agreement through direct negotiations, they may request that the MTPE begin the conciliation phase of the bargaining process.⁷⁴ Pursuant to Article 58, the MTPE opened the conciliation phase of the collective bargaining process on January 14, 2009, at the request of the SINAUT, for the 2008-2009 collective bargaining period and on May 12, 2010, for the 2010-2011 bargaining period.⁷⁵ The parties held four official conciliation meetings during the 2008-2009 bargaining period and nine official conciliation meetings as part of the 2010-2011 bargaining process.⁷⁶

especializada, practicará la valorización de las peticiones de los trabajadores y examinará la situación económico-financiera de las empresas y su capacidad para atender dichas peticiones...”

⁷¹ PCBL, art. 59. The Spanish phrasing of article 59 is: “*La función conciliatoria estará a cargo de un cuerpo técnico especializado y calificado del Ministerio de Trabajo y Promoción del Empleo, pudiendo las partes, sin embargo, si así lo acuerdan, encomendársela a personas privadas, caso en cual deberán remitir a la Autoridad de Trabajo copia de las actas que se levanten.*”

⁷² The SINAUT Collective Bargaining Proposal, July 31, 2008.

⁷³ The SINAUT legal brief to the First Constitutional Court of Lima, January 27, 2010; Email from the SINAUT to the OTLA, November 15, 2011.

⁷⁴ PCBL, art. 58. For the Spanish phrasing of article 58, see fn. 37.

⁷⁵ The SINAUT legal brief to the First Constitutional Court of Lima, January 27, 2010; the SINAUT letter to MTPE regarding the SUNAT’s failure to collectively bargain as violation of the PTPA, Oficio No. 016-2011/SINAUT-SUNAT, February 21, 2011.

⁷⁶ Email from the SINAUT to the OTLA, November 15, 2011; the SINAUT letter to the MTPE regarding the SUNAT failure to collectively bargain as violation of the PTPA, Oficio No. 016-2011/SINAUT-SUNAT, February 21, 2011.

Article 60 of the Collective Bargaining Law establishes that if the parties are unable to reach an accord through direct negotiations and conciliation, they may utilize “any other valid means for the peaceful resolution of the dispute.”⁷⁷ In practice, this means that the parties may engage in additional extra-procedural meetings in an effort to advance the collective bargaining process. As indicated above, the parties held ten extra-procedural meetings during the 2008-2009 collective bargaining process and six extra-procedural meetings during the 2010-2011 bargaining process.⁷⁸ Nevertheless, they were unable to reach agreement on any of the collective bargaining issues, though the SUNAT acceded, in practice, to a number of the SINAUT’s non-economic proposals and made the corresponding changes to workplace terms and conditions.

The SINAUT contends that the parties could not reach an accord because the SUNAT never made any proposals or counter-proposals on economic or non-economic bargaining issues during the meetings and, generally, failed to negotiate in good faith.⁷⁹ This allegation, if found to be substantiated, at least with respect to non-economic matters, would appear to violate the requirement in Article 54 of the Collective Bargaining Law that “the parties are obligated to negotiate in good faith and abstain from any injurious action which may be to the contrary.”⁸⁰ The SUNAT did not provide a justification for its alleged failure to negotiate on non-economic matters. However, the SUNAT maintains that, as a public sector entity, it was legally barred by the Public Sector Budget Law from meaningfully negotiating with the SINAUT on any economic matters.⁸¹ If the Public Sector Budget Law did not ban the SUNAT from bargaining on economic matters, it appears that the SUNAT’s failure to bargain on economic matters may also have violated Article 54 of the Collective Bargaining Law.

The Public Sector Budget Law

Since Fiscal Year 2006, the Public Sector Budget Law has prohibited government entities from readjusting or increasing the remuneration of their employees beyond what it authorizes.⁸² This law defines prohibited forms of remuneration readjustments or increases to include the approval of new wage scales, bonuses, per diem payments, allowances, salaries, and benefits of all kinds.⁸³ Beginning with Fiscal Year 2010, this ban also explicitly includes any readjustments or increases that may result from arbitral awards in collective labor disputes.⁸⁴

⁷⁷ PCBL, art. 60. For the Spanish phrasing of article 60 see fn. 43.

⁷⁸ Email from the SINAUT to the OTLA, November 15, 2011.

⁷⁹ U.S. Submission 2010-03 (Peru), p.5.

⁸⁰ PCBL, art. 54. The Spanish phrasing of article 54 is: “*Las partes están obligadas a negociar de buena fe y abstenerse de toda acción que pueda resultar lesiva a la contraria*” (emphasis added).

⁸¹ The SUNAT initial response to the SINAUT request for arbitration, Oficio No. 0181-2009-SUNAT/100000, March 15, 2009.

⁸² 2006 Public Sector Budget Law (*Ley del Presupuesto para el Año 2006*), Law 28652, art. 8.

⁸³ *Ibid.*

⁸⁴ 2010 Public Sector Budget Law (*Ley del Presupuesto para el Año 2010*), Law 29465, art. 6.

Article 28 of the Peruvian Constitution indicates that “the state recognizes the rights of unionization, collective bargaining, and strike. It will exercise caution democratically to: (1) guarantee freedom of association, (2) promote collective bargaining and peaceful solutions to collective labor conflicts.”⁸⁵

In reviewing the Public Sector Budget Law being mindful of the Constitution, in 2008, the MTPE suggested that the provision that prohibits remuneration readjustments by government entities would be unconstitutional if it restricted the right to collective bargaining.⁸⁶ This interpretation is also reflected in the below judicial and arbitral panel decisions, including one arbitral panel award issued under the 2010 Public Sector Budget Law.

In a 2002 decision, the Peruvian Constitutional Court held that remuneration increases for municipal level public sector workers, covered by the Budget Law, are appropriate when: they are reached through proper procedures, such as collective bargaining; and, the public entity in question has available funds in its current budget.⁸⁷ The right under the Peruvian Constitution of public sector workers to bargain collectively on economic matters was also affirmed in 2009 by the Superior Court of Justice in Lima. In that case, the court found that legislation that capped total remuneration for public sector workers by eliminating economic concessions previously won through collective bargaining was invalid because it violated, *ex post facto*, the government’s constitutional duty to “promote collective bargaining.”⁸⁸ Several arbitration panels have also issued economic awards for public sector workers in collective bargaining disputes with their employers, including a June 2011 award issued after the 2010 Public Sector Budget Law had entered into force.⁸⁹

According to the SUNAT, these executive and judicial branch opinions are not binding on the SUNAT. The SUNAT contends that because the 2002 Constitutional Court decision concerned municipal workers, not federal workers, it did not create binding precedent for the SUNAT.⁹⁰ The SUNAT further asserts that the MTPE’s opinion, non-Constitutional Court decisions, and arbitral awards are only binding on the specific cases for which they are issued and create no precedent for the SINAUT-SUNAT case.⁹¹

⁸⁵ Constitution of Peru (*Constitución Política del Perú*), available from <http://www.tc.gob.pe/legconperu/constitucion.html> (last visited June 12, 2012).

⁸⁶ Government of Peru, the MTPE, Internal memorandum discussing the constitutionality of the Public Sector Budget Law, Informe No. 308-2008-MTPE/9.110, May 30, 2008.

⁸⁷ Constitutional Court of Peru, Resolución del Tribunal Constitucional No. 1035-2001-AC/TC, Sindicato de Obreros Municipales de Breña, August 5, 2002, Lima.

⁸⁸ Third Chamber (Labor) of the Superior Court of Justice of Lima, Sentencia Arequipa, Expediente No. 48-06/AP, May 20, 2009, Lima.

⁸⁹ In each of these cases the public sector employers agreed to submit to arbitration voluntarily. See, e.g., National System of Public Registries (SUNARP) vs. Federation of National System of Public Registries Workers (FETRASINARP), January 11, 2011; National Registry of Identification and Civil Status (RENIEC) vs. Union of National Registry of Identification and Civil Status Workers (SINTRARENIEC), June 28, 2011; National Supervisory Commission of Businesses and Securities (CONASEV) vs. Union of National Supervisory Commission of Businesses and Securities Workers (SITCONASEV), July 25, 2008.

⁹⁰ Meeting between the OTLA and the SUNAT, September 20, 2011, Lima.

⁹¹ *Ibid.*

C. The arbitration phase of the collective bargaining process

Under Article 61 of the Peruvian Collective Bargaining Law, if parties engaged in collective bargaining are unable to reach an agreement through direct negotiation or conciliation, at the request of the workers, the parties may refer the dispute to arbitration.⁹² The SUNAT contends that the use of the phrase “the parties may” in Article 61 suggests that the referenced arbitration is voluntary and requires the express acceptance of both parties.⁹³

The Constitutional Court of Peru examined this provision in a June 10, 2010, decision addressing a maritime and port workers union’s request that their employer submit to arbitration, noting that under Peruvian law there exist three types of arbitration: (1) voluntary (*voluntario*) arbitration, which must be initiated through the joint agreement of the parties; (2) mandatory (*potestativo*) arbitration, in which one of the parties has the ability to compel the other to submit to arbitration; and (3) obligatory (*obligatorio*) arbitration, in which arbitration is imposed by a third actor or source, distinct from the parties.⁹⁴ The court found that the arbitration referenced in Article 61 is mandatory (*potestativo*) arbitration and that “in the absence of agreement and one of the parties having expressed its desire to go to arbitration, the other has the obligation to accept this means of resolving the conflict”.⁹⁵

As noted above, the SINAUT first notified the SUNAT that it was opting to go to arbitration for the issues contained in the 2008-2009 collective bargaining period on March 11, 2009, and the SUNAT subsequently issued a letter declining to go to arbitration on March 25.⁹⁶ Article 61 of the Peruvian Collective Bargaining Law of 2003, discussed above, was in effect at the time, but the Constitutional Court had not yet ruled that Article 61 provides for mandatory (*potestativo*) arbitration.⁹⁷ Therefore, at the time of the SUNAT’s refusal to submit to arbitration for the 2008-2009 bargaining period, there still appeared to be a legal ambiguity regarding whether one party could compel another party to arbitrate a collective bargaining dispute.

For the issues contained in the 2010-2011 bargaining period, however, the SINAUT first requested arbitration on November 4, 2010, nearly five months after the Constitutional Court found arbitration under Article 61 of the Peruvian Collective Bargaining Law to be

⁹² PCBL, art. 61. The Spanish phrasing of article 61 is: “*Si no se hubiese llegado a un acuerdo en negociación directa o en conciliación, de haberla solicitado los trabajadores, podrán las partes someter el diferendo a arbitraje.*”

⁹³ The SUNAT letter opposing arbitration, Oficio No. 0193-2009-SUNAT/100000, March 25, 2009.

⁹⁴ Constitutional Court of Peru, Resolución del Tribunal Constitucional No. 03561-2009-PA/TC, Sindicato Único de Trabajadores Marítimos y Portuarios del Puerto del Callao (SUTRAMPORPC), June 10, 2010, Lima [hereinafter Constitutional Court decision, June 10, 2010].

⁹⁵ Ibid. (“[A]nte la falta de acuerdo, y manifestada la voluntad de una de las partes de acudir al arbitraje, la otra tiene la obligación de aceptar esta fórmula de solución del conflicto.”) p. 2, ¶ 8.

⁹⁶ The SINAUT letter announcing intention to submit matter to arbitration, Oficio No. 0019-2009/SINAUT-SUNAT, March 11, 2009; the SUNAT letter refusing to go to arbitration, Oficio No. 0193-2009-SUNAT/100000, March 25, 2009.

⁹⁷ Constitutional Court decision, June 10, 2010.

mandatory (*potestativo*) upon request by workers. Consequently, it appears that the SINAUT was authorized to “compel” the SUNAT to arbitrate the dispute in November 2010.

On February 3, 2011, the SINAUT formally requested that the MTPE obligate the SUNAT to submit to the requested arbitration for the 2010-2011 period.⁹⁸ At the time, however, since the MTPE’s role in the collective bargaining process, including arbitration, was as a facilitator, it did not have the legal authority to mandate arbitration.⁹⁹ As a result, although the MTPE acknowledged receipt of this letter requesting arbitration and put the SUNAT on official notice of the union’s request,¹⁰⁰ it took no steps to obligate the SUNAT to submit to arbitration.

The SUNAT contends that it was justified in failing to submit to arbitration for the 2010-2011 bargaining period. It contends that even if the SINAUT’s arbitration request for the 2010-2011 bargaining period was mandatory (*potestativo*), the Public Sector Budget Law would have forbidden the SUNAT from complying with any resulting arbitral award regarding economic issues such as mandatory salary adjustments or increases for workers, thereby justifying the SUNAT’s failure to arbitrate.¹⁰¹ The SUNAT did not provide any justification for its refusal to submit to arbitration on the non-economic bargaining matters for the 2010-2011 period.

In light of the June 10, 2010 Constitutional Court decision finding arbitration mandatory (*postestativo*), the SUNAT’s refusal to submit the parties’ non-economic bargaining issues for the 2010-2011 bargaining period to arbitration in November 2010 may constitute a failure to comply with Article 61 of the Collective Bargaining Law. In addition, if the Public Sector Budget Law, as understood at the time, did not bar the SUNAT from complying with an arbitral award addressing economic matters, the refusal to accede to arbitration on the SINAUT’s request concerning economic matters appears to constitute a failure to comply with Article 61.

D. Recent enactments to clarify the use of arbitration in collective labor disputes

Recent enactments of the Government of Peru attempt to codify the June 10, 2010, Constitutional Court decision regarding the application of Article 61 of the Peruvian Collective Bargaining Law. Specifically, on September 17, 2011, the Government of Peru issued Supreme Decree 014-2011-TR, which adds Article 61a to the regulations for the implementation of the Collective Bargaining Law to explicitly permit either party to a collective labor dispute to compel mandatory (*potestativo*) arbitration under the following

⁹⁸ The SINAUT request that the MTPE compel the SUNAT to arbitrate Oficio No. 007-2011/SINAUT-SUNAT, February 3, 2011.

⁹⁹ Meeting between the OTLA and the Peruvian Ministry of Economics and Finance, September 20, 2011, Lima; Meeting between the OTLA and the Peruvian Ministries of Labor and Foreign Affairs, September 21, 2011, Lima.

¹⁰⁰ Government of Peru, Ministry of Labor and Promotion of Employment, Expediente No. 32509-2010-MTPE/2/12.210, February 17, 2011.

¹⁰¹ The SUNAT brief to the 1st Constitutional Tribunal of the Superior Court of Justice of Lima Expediente No. 4427-2010-01801-JR-CI-01, December 17, 2010, p. 22.

circumstances: (a) the parties have not reached an agreement in their first attempt at collective bargaining, with respect to either the level or content of the collective bargaining agreement; or (b) during collective negotiations, when one of the parties acts in bad faith, thereby delaying, hindering, or avoiding an agreement.¹⁰² In addition, Ministerial Resolution 284-2011-TR, issued on September 24, 2011, by the MTPE, establishes a non-exhaustive list of circumstances that constitute “bad faith” bargaining.¹⁰³

According to the MTPE, a party requesting mandatory arbitration also may submit a matter to the arbitrators for an initial finding as to whether either of these newly established prerequisites for mandatory (*potestativo*) arbitration exists.¹⁰⁴ Furthermore, the MTPE has clarified that under the new arbitration system, the MTPE has a proactive duty to appoint an arbitrator under three specific circumstances: (1) when a party fails to designate an arbitrator within five business days of the other party’s arbitration request; (2) when the two designated arbitrators are unable to agree on a third arbitrator to serve as panel president; and (3) when a designated arbitrator resigns or fails to attend the arbitration.¹⁰⁵

Supreme Decree 014-2011-TR also tasks the MTPE with establishing a National Registry of Collective Bargaining Arbitrators to hear labor disputes,¹⁰⁶ and Ministerial Resolution 284-2011-TR tasks the MTPE with ensuring that such arbitrators receive training on the public sector budget laws and other legal parameters affecting collective bargaining with

¹⁰² Government of Peru, The President of the Republic, Supreme Decree (Decreto Supremo) No. 014-2011-TR, *El Peruano*, September 17, 2011, 450080 [hereinafter Supreme Decree No. 014-2011-TR]. Even though Supreme Decree 014-2011-TR joins the two articulated prerequisites with the conjunction “and,” implying that they are both required for a party to a collective dispute to be authorized to compel arbitration, the MTPE has informed the OTLA that the Decree should contain the conjunction “or” and that the existence of either prerequisite is sufficient (in Spanish: “*Es correcto, hay un error, se entiende como ‘o’ y no ‘y’*”). Government of Peru, Ministry of Labor and Promotion of Employment, Email to the U.S. Department of Labor, Office of Trade and Labor Affairs, October 12, 2011. The current text of the Decree, in Spanish, is: “*Las partes tienen la facultad de interponer el arbitraje potestativo en los siguientes supuestos: (a) Las partes no se ponen de acuerdo en la primera negociación, en el nivel o su contenido, y, (b) Cuando durante la negociación del pliego se adviertan actos de mala fe que tengan por efecto dilatar, entorpecer o evitar el logro de un acuerdo.*” Supreme Decree No. 014-2011-TR.

¹⁰³ Government of Peru, Ministry of Labor and Promotion of Employment, Ministerial Resolution (*Resolución Ministerial*) No. 284-2011-TR, *El Peruano*, September 24, 2011, 450489-450490 [hereinafter Ministerial Resolution No. 284-2011-TR]. This list of circumstances that constitute “bad faith” in collective bargaining includes “refusing to receive the workers’ representatives or to negotiate in the timeframes or opportunities established in the Collective Bargaining Law.”

¹⁰⁴ Government of Peru, Ministry of Labor and Promotion of Employment, General Directorate Resolution (*Resolución Directoral General*) No. 01-2012-MTPE/2/14, January 18, 2012 [hereinafter MTPE Resolution No. 01-2012-MTPE]; Meeting between the the OTLA, Peruvian Ministries of Labor and Foreign Affairs, September 21, 2011, Lima.

¹⁰⁵ Government of Peru, Ministry of Labor and Promotion of Employment, Memo regarding the application of mandatory arbitration to collective bargaining by public entities with personnel covered by the private labor regime, Informe No. 002-2012-MTPE/2/14, January 3, 2012.

¹⁰⁶ Supreme Decree No. 014-2011-TR.

government workers.¹⁰⁷ In addition, the Ministerial Resolution mandates that the first of the referenced training courses must commence within 60 business days from the publication of the Ministerial Resolution on September 24, 2011, and that the new arbitration system be operational within 90 business days of the publication date.¹⁰⁸

On December 21 and 22, 2011, the MTPE fulfilled its training-related obligations under the Ministerial Resolution by conducting the Training Course on Collective Bargaining Addressed to the Public Sector for arbitrators and subsequently published in the National Register of Arbitrators for Collective Bargaining the list of qualified arbitrators who received the training. On December 22, the MTPE also published on its website a list of the 20 qualified arbitrators who had received the training. The MTPE amended this list to 19 qualified arbitrators on January 4, 2012.¹⁰⁹

Application of the recent enactments to the SINAUT and the SUNAT case

On December 22, 2011, the SINAUT reiterated to the SUNAT its request to submit both the 2008-2009 and 2010-2011 bargaining disputes to arbitration and asked that the SUNAT name its arbitrators for both bargaining periods by January 3, 2012.¹¹⁰

The 2008-2009 collective bargaining period

On December 29, 2011, the SUNAT selected an arbitrator from the list of qualified arbitrators to hear the parties' dispute arising from the 2008-2009 bargaining period, on both economic and non-economic issues.¹¹¹ On that same date, the SINAUT also selected an arbitrator from the list to serve on the panel for that period.¹¹² On January 31, 2012, the two arbitrators selected a third arbitrator to serve as panel president and scheduled February 24, 2012 for panel installation and the commencement of arbitration for the 2008-2009 bargaining period.¹¹³ On March 16, 2012, the full arbitral panel held oral hearings in which both the SUNAT and the SINAUT presented their bargaining proposals.¹¹⁴

The SINAUT's proposal to the arbitral panel contained primarily economic requests, in specific amounts, such as an increase in the daily meal allowance from \$2.63 to \$9.38, an annual \$375 Christmas bonus for each union member, and a \$3,750 bonus to each union member once the parties reach a collective bargaining agreement.¹¹⁵

¹⁰⁷ Ministerial Resolution No. 284-2011-TR; Government of Peru, Ministry of Labor and Promotion of Employment, Email to the U.S. Department of Labor, Office of Trade and Labor Affairs, September 28, 2011.

¹⁰⁸ Ministerial Resolution No. 284-2011-TR.

¹⁰⁹ MTPE Resolution No. 01-2012-MTPE.

¹¹⁰ Oficio No. 116-2011/SINAUT-SUNAT, December 22, 2011.

¹¹¹ Award of the 2008-2009 SINAUT-SUNAT arbitral panel, Expediente Administrativo No. 21704-2008-MTPE/2/12.210, March 29, 2012.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*; The SINAUT 2008-2009 Collective Bargaining Proposal, July 31, 2008.

The SUNAT's proposal to the arbitral panel contained various non-economic commitments, such as a new system of performance evaluation and promotion.¹¹⁶ Its only proposal with a specific monetary value was an offer of a \$131 bonus to each member of the SINAUT once the parties reach a collective bargaining agreement.¹¹⁷ The SUNAT's proposal also included a pledge to issue Superintendent's Resolutions in the future to address certain economic issues, like annual performance bonuses and bonuses for critical or hazardous work, and to request that the Ministry of Economy and Finance modify its pay scales.¹¹⁸

On March 29, 2012, the arbitral panel issued its award granting the SINAUT each of the requests contained in its proposal, though in amounts less than the union had requested, including a daily meal allowance of \$5.25, a \$187 Christmas bonus for each union member, a \$2,625 bonus to each member of the SINAUT once the parties reach a collective bargaining agreement.¹¹⁹ In reaching its decision, the panel held that the Public Sector Budget Law is superseded by the Government of Peru's Constitutional duty in Article 28 to promote collective bargaining and peaceful solutions to collective labor conflicts.¹²⁰

On April 12, the SUNAT appealed the arbitral panel's decision to the Labor Chamber of the Superior Court of Justice of Lima.¹²¹ The union characterized both the appeal and the SUNAT's immediate lack of compliance with the arbitral award as contrary to Article 66 of the Collective Bargaining Law.¹²²

Article 66 states that arbitral awards are not appealable, may only be contested if they are invalid or if they contain fewer rights for workers than established by law, are not automatically stayed pending such a contest, and are only stayed if ordered by the appropriate judicial official.¹²³ The MTPE has characterized the arbitral award as a misapplication of the law by the arbitrators, and thus as arguably invalid and potentially appealable under Article 66, in that they failed to properly consider the Public Sector

¹¹⁶ Award of the 2008-2009 SINAUT-SUNAT arbitral panel, Expediente Administrativo No. 21704-2008-MTPE/2/12.210, March 29, 2012.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ The SINAUT denouncement of the SUNAT's failure to comply with the arbitral panel award, published in *El Diario Gestión*, p.5, April 27, 2012.

¹²² The SINAUT letter to Minister of Labor Villena Petrosino requesting that he enforce the arbitral panel award, Oficio No. 026-2012-SINAUTSUNAT, April 11, 2012; The SINAUT denouncement of the SUNAT's failure to comply with the arbitral panel award, published in *El Diario Gestión*, p.5, April 27, 2012.

¹²³ PCBL, art. 66. The Spanish phrasing of article 66 is: "*El laudo, cualquiera sea la modalidad del órgano arbitral, es inapelable y tiene carácter imperativo para ambas partes. Es susceptible de impugnación ante la Sala Laboral de la Corte Superior, en los casos siguientes: (a) Por razón de nulidad. (b) Por establecer menores derechos a los contemplados por la ley en favor de los trabajadores. La interposición de la acción impugnatoria no impide ni posterga la ejecución del laudo arbitral, salvo resolución contraria de la autoridad judicial competente.*"

Budget Law's limitation on arbitral awards involving economic issues.¹²⁴ On May 18, the 27th Specialized Labor Chamber of the Superior Court of Justice of Lima suspended the application of the arbitral award pending the appeal.¹²⁵ However, on July 4, this same court overturned its decision in part by ruling that the SUNAT must comply with the part of the arbitral award that granted the SINAUT 1,250 work hours to be used for union activities, because it is not affected by the Public Sector Budget Law and a continued stay on this part of the award would inhibit the union's freedom of association.¹²⁶ The court did not overturn the stay on the economic parts of the arbitral award. As of the date of this report, no decision has been made regarding the SUNAT's appeal.

The 2010-2011 collective bargaining period

On January 3, 2012, the SINAUT designated its arbitrator for the 2010-2011 bargaining period dispute.¹²⁷ The SUNAT, however, did not name an arbitrator within five business days of the SINAUT's December 22, 2011 request, as required by the new arbitration regime. In compliance with its obligations under the new arbitration system, the MTPE appointed an arbitrator on January 5, 2012 on behalf of the SUNAT.¹²⁸ The SUNAT challenged the designation of this arbitrator, but on January 18, 2012, the MTPE issued a resolution rejecting the SUNAT challenge.¹²⁹ The SUNAT appealed this decision to the Vice Minister of the MTPE on January 25.¹³⁰ However, before the Vice Minister could issue an opinion, the arbitrator appointed by the MTPE resigned for personal reasons on January 27.¹³¹ On February 9, the SINAUT asked the MTPE to name a replacement arbitrator.¹³² On March 3, the SUNAT notified the MTPE that it was appointing the same arbitrator for the 2010-2011 bargaining period that it had designated for 2008-2009.¹³³ Nevertheless, on May 3, this arbitrator also resigned.¹³⁴ On May 9, the SUNAT named yet another replacement arbitrator for the 2010-2011 period.¹³⁵ The MTPE

¹²⁴ El Diario Gestión, *880 labor claims in the State could generate a crisis*, pp. 1-2, April 30, 2012.

¹²⁵ The 27th Specialized Labor Chamber of the Superior Court of Lima, Expediente No. 183427-2012-9914, Resolución No. 1, May 18, 2012.

¹²⁶ The 27th Specialized Labor Chamber of the Superior Court of Lima, Expediente No. 09914-2012-91-0, Resolución No. 5, July 4, 2012.

¹²⁷ The SINAUT designation of arbitrator for the 2008-2009 bargaining periods, Oficio No. 001-2012/SINAUT-SUNAT, January 3, 2012.

¹²⁸ Government of Peru, Ministry of Labor and Promotion of Employment, General Directorate Order (*Auto Directoral General*) No. 01-2012-MTPE/2/14, January 5, 2012.

¹²⁹ MTPE Resolution No. 01-2012-MTPE.

¹³⁰ The SUNAT appeal of MTPE General Directorate Order No. 01-2012-MTPE/2/14, January 25, 2012.

¹³¹ Letter of resignation from Jaime Zavela to Christin Sánchez Reyes, Director-General of Labor, Escrito Con No. 1699-2012-Ext, January 27, 2012.

¹³² The SINAUT request for a replacement arbitrator, Oficio No. 011-2012/SINAUT-SUNAT, February 9, 2012.

¹³³ The SUNAT letter to the MTPE announcing the appointment of Jorge Luis Acevedo Mercado as arbitrator for the 2010-2011 period, Oficio No. 34-2012-SUNAT/4F0000, March 3, 2012.

¹³⁴ Letter of resignation from Jorge Luis Acevedo Mercado to the SUNAT, Ref. Cedula de Notificación Exp. 32509-2010-MTPE/2/12.210, May 3, 2012.

¹³⁵ The SUNAT letter to the MTPE announcing the appointment of Roberto Matallana Ruiz as arbitrator for the 2010-2011 period, Oficio No. 136-2012-SUNAT/4F0000, May 9, 2012.

officially recognized the SUNAT's new arbitrator on May 14.¹³⁶ The SINAUT and the SUNAT arbitrators were unable to agree on a third arbitrator to serve as panel president. The 2012 Public Sector Budget Law, however, created a new mechanism to address such a situation.

The 2012 Public Sector Budget Law provides that in cases of labor arbitration involving public sector entities where the parties are unable to decide on a person to serve as president of the arbitral panel, a council will name the panel president.¹³⁷ On June 3, 2012, the Government of Peru published Supreme Decree No. 009-2012-TR in its federal register, creating a Special Council, based in the MTPE, to fill this role.¹³⁸ According to this Decree, once the last of the parties has named its arbitrator, the two named arbitrators have five business days to agree on a third arbitrator to serve as panel president.¹³⁹ If this five-day period passes without an agreement, either party may request that the Special Council name the panel president.¹⁴⁰ Once it receives such a request, the Special Council has ten business days to designate the arbitral panel president.¹⁴¹

On July 16, 2012, the SINAUT sent a letter to the Special Council notifying it that the SUNAT and the SINAUT arbitrators had been unable to agree on a third arbitrator and requesting that the Council name the third arbitrators.¹⁴² The SINAUT reiterated this request to the Special Council in a letter dated August 3.¹⁴³ As of the date of the report, the Special Council had not selected a third arbitrator to serve as panel president.

IV. CONCLUSION

Throughout the review process, the Peruvian government has demonstrated a willingness to engage the U.S. government in productive discussions concerning the issues raised in the submission and to take action to remedy certain issues. Peruvian officials have met with U.S. government officials, provided requested information, and facilitated meetings with key government officials to address the allegations in the submission. In addition, the MTPE appears to have fulfilled its duties during both collective bargaining processes at issue and, appears to be upholding the September 2011 enactments, including by establishing the National Registry of Collective Bargaining Arbitrators, training those arbitrators, and appointing a replacement arbitrator for the 2010-2011 bargaining period dispute between the SINAUT and the SUNAT.

¹³⁶ Government of Peru, Ministry of Labor and Promotion of Employment, Announcement of the appointment of Roberto Matallana Ruiz as the SUNAT's arbitrator for the 2010-2011 bargaining period, Expediente No. 32509-2010-MTPE/2/12.210, May 14, 2012.

¹³⁷ 2012 Public Sector Budget Law (*Ley del Presupuesto para el Año Fiscal 2012*), Law 29812.

¹³⁸ Government of Peru, The President of the Republic, Supreme Decree (Decreto Supremo) No. 009-2012-TR, *El Peruano*, June 3, 2012, 467671-467672.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² The SINAUT's first request that the Special Council designate a labor arbitrator for the 2010-2011 bargaining period, Oficio No. 0138-2012/SINAUT-SUNAT, July 16, 2012.

¹⁴³ The SINAUT's second request that the Special Council designate a labor arbitrator for the 2010-2011 bargaining period, Oficio No. 0144-2012/SINAUT-SUNAT, August 3, 2012.

Based on the extensive review process, the OTLA has determined that the SUNAT failed to comply with the Collective Bargaining Law, at least with respect to non-economic matters, when it failed to commence direct negotiations for the 2008-2009 and 2010-2011 periods within the ten-day limit for beginning collective bargaining under Article 57.

However, with regard to all other issues raised in the submission, the OTLA has determined that important legal ambiguity during the period at issue prevents a finding that the SUNAT failed to comply with the law or that the Government of Peru failed to comply with or enforce its labor laws during that time. Specifically, during the relevant period, legal ambiguity existed with respect to two issues directly relevant to the SUNAT's collective bargaining-related obligations under the law and thus critical to the submission: 1) whether, under Article 61 of the Peruvian Collective Bargaining Law, an employer must submit to mandatory arbitration at the request of workers during an unresolved collective bargaining dispute; and 2) whether the Public Sector Budget Law prohibits covered employers from bargaining in good faith and submitting to arbitration on economic matters.

In September 2011 and June 2012, the Government of Peru took important steps towards remedying legal and procedural ambiguities related to the application of Article 61 of the Collective Bargaining Law. The Government of Peru issued Supreme Decree 014-2011-TR, clarifying that, under Article 61 of the Collective Bargaining Law, either party to a collective labor dispute can compel mandatory arbitration in certain narrowly defined circumstances. Supreme Decree 014-2011-TR, together with the accompanying Ministerial Resolution 284-2011-TR, also establishes more robust mechanisms and procedures for applying Article 61 and more clearly delineates the negotiating parties' and the Government of Peru's responsibilities and obligations under the law. Finally, the Government of Peru's issuance of Supreme Decree 009-2012-TR created a Special Council to designate the president of a labor arbitration panel when the parties are unable to do so and one of the parties is a public sector entity.

The enactment of these legal instruments is a positive step that directly addresses significant issues underlying this submission. Their effective and prompt application and compliance by government agencies, including expeditious selection by the Special Council of an arbitral panel president for the 2010-2011 SINAUT-SUNAT bargaining period dispute, will greatly facilitate the effective enforcement of Article 61.

As discussed, the Government of Peru has made significant progress in addressing the underlying issues in the submission. The Government of Peru also continues to engage in ongoing and regular productive cooperation and dialogue with the U.S. government on these issues.

The OTLA does not believe formal consultations are needed to continue positive engagement and progress on these matters. As a result, the OTLA does not recommend formal consultations between the U.S. government and the Peruvian government under Article 17.7.1 of the PTPA Labor Chapter.