



**Final Report:
THIRD PARTY COMPLAINT – HIALPESA
(PERU)**

On November 2, 2013, the Sindicato de Trabajadores de Hilandería de Algodón Peruano S.A. (Union of Workers of Hilandería de Algodón Peruano S.A., henceforth “the Union”) filed a Third Party Complaint with the Fair Labor Association (FLA) regarding the factory Hilandería de Algodón Peruano S.A. (henceforth “HIALPESA” or “the company”). The factory is located in the District San Juan Lurigancho, in Lima, Peru. The complaint alleged violations of the FLA Workplace Code of Conduct with respect to terms of employment, safety and health, and freedom of association. FLA Participating Company New Balance sources from HIALPESA.

Specifically, the complaint alleged: (1) failure on the part of HIALPESA to implement two resolutions by the Peruvian Ministerio del Trabajo y Promoción de Empleo (Ministry of Labor and Employment Promotion, MTPE) that found the application for approval of temporary employment contracts submitted by the factory pursuant to the special regime for the promotion of non-traditional exports (Decree 22342) to be improper/inadmissible; (2) health and safety concerns with regards to the relocation of machinery from one plant (Santuario) to another (Las Lomas), which allegedly resulted in overcrowding at the latter facility; and (3) the closure of one of the plants and the transfer of workers to other jobs was intended to reduce the number of union members.

Assessment by the Participating Company

FLA accepted the complaint at Step 2 of the Third Party Complaint process on December 17, 2013, and so notified New Balance and the complainant.¹ New Balance assessed the complaint and submitted a response to the FLA on February 5, 2014.

The New Balance assessment analyzed the case, including Decree 22342 of Peruvian law that allows employers who export more than 40% of their production to hire workers under temporary contracts; such contracts must meet certain requirements, such as being associated with a purchase order, specify a start and end date, and be registered by the

¹ Step 2: Internal Assessment of the Complaint by the Participating Company or Licensee--The Executive Director will inform any Participating Company or College or University Licensee involved in such Facility that a Complaint has been filed, and will provide the Participating Company or College or University Licensee with the information supplied by the Third Party. The Association will also provide a preliminary indication as to which Workplace Standards are potentially noncompliant. The Participating Company or College or University Licensee may request that the process go directly to Step 3 or will be permitted up to forty-five (45) days to investigate the alleged noncompliance internally.

MTPE. New Balance described its communication efforts – under the umbrella of the Americas Group, a multi-stakeholder forum that includes brands, initiatives such as the FLA, and labor groups, that meets several times per year with labor groups in the Western Hemisphere to discuss labor violations and challenges in specific countries – with the Peruvian Government to promote fair employment practices that culminated with a letter to President Humala on March 4, 2013, asking for repeal of Decree 22342. New Balance also submitted a copy of a settlement agreement between the Union and HIALPESA management dated November 6, 2013, whereby union members covered by the aforementioned MTPE resolution would resume work under temporary contracts pending the administrative court’s decision on management’s appeal of the MTPE resolutions.

New Balance also reported that (1) the factory had informed that there was no further movement of machinery; and (2) per the settlement of November 6, all workers who were dismissed were reinstated and paid for lost time. Finally, New Balance reported that its representatives had not been able to view the original employment contracts for 2012 because they were informed by management, at the time of their visit, the original documents were with external counsel as part of the appeal of the MTPE resolutions. New Balance business comprises less than 5% of HIALPESA’s total production capacity.

Assessment by the FLA

On March 14, 2014, HIALPESA management informed the brands – and later, the Union – that it had made the decision to close the spinning mill effective May 15, 2014. The reasons for closing the unit cited by management were low efficiency and lack of profitability. The company reportedly also informed all spinning mill employees – unionized as well as non-unionized – that those who resigned were eligible to receive severance packages negotiated individually between each worker and management. After being informed of the pending closure, New Balance engaged in regular communication with factory management and requested documentation showing that any retrenchment was being conducted according to Peruvian Labor law and following NB and FLA standards.

The Union communicated with the FLA and asked that the Third Party Complaint be expanded to include this alleged anti-union action of closing the spinning mill as it would eliminate the jobs of the vast majority of unionized workers. The FLA agreed to the request and expanded the scope of the complaint to include the allegation of violation of freedom of association embodied in the decision to close the spinning mill. The FLA also moved the case to Step 3 of the Third Party Complaint process.²

² Step 3: Assessing of the Complaint by FLA--The Association will determine whether to proceed with further assessment through use of either an expert or a Monitor. ... The Participating Company or College or University Licensee will ensure that the assessor has access to any and all information the assessor feels is necessary. The assessor will perform the work in a timely manner and, where applicable, in accordance with FLA monitoring guide guidelines. The assessor will prepare a report describing the work and any findings.

FLA engaged Comisión para la Verificación de Códigos de Conducta (COVERCO) to conduct an independent investigation at HIALPESA. COVERCO's investigation team conducted field research from May 5 to May 8, 2014. The methodology of the investigation consisted of desk research and documents review combined with interviews of management representatives, active workers in the spinning mill and in other units of the company, and meetings with representatives of the Union, the National Federation of Peruvian Textile Workers (Federación Nacional de Trabajadores Textiles del Perú, FNTTP), PLADES (Programa Laboral del Desarrollo), a CSO in Peru that has been advising the Union, and of the local office of the American Center for International Labor Solidarity (Solidarity Center).³

COVERCO found that HIALPESA discriminated against the Union by: (1) not notifying the Union in advance of the closure of the spinning mill; (2) negotiating severance agreements with workers who were members of the Union without the presence of a Union official; and (3) failing to offer affected Union members the opportunity to transfer to another job within the company. COVERCO noted that the closure of the spinning mill would severely affect the Union as it would lose a significant number of affiliates who worked in the spinning mill.

COVERCO's recommendations included:

1. FLA and affiliated companies sourcing from HIALPESA should request that HIALPESA postpone the closure of the spinning mill for at least 3 months. Should the postponement materialize, COVERCO recommended the establishment of a dialogue table, led by a facilitator experienced in resolution and mediation of labor disputes, with an agenda limited to topics related to the closure of the spinning mill.
2. While the closure is suspended, HIALPESA should also suspend individual negotiations with workers on termination packages and the transfer of machinery.
3. HIALPESA management and the Union should enter into negotiations to resolve, in a sustainable manner and without involving the courts, the issues raised by the resolutions of the MTPE regarding nullification of employment contracts. It is COVERCO's view that resolution of the dispute through the judicial process would be very lengthy and would adversely affect the stability of HIALPESA workers.
4. There should be a review of cases of termination of fixed-term contracts of workers in other units within HIALPESA who have stated that their terminations were retaliatory because of their affinity for the union.
5. HIALPESA should develop an effective training program for management and workers on fundamental workers' rights, principally freedom to create unions, collective bargaining, non-discrimination, and a prohibition on forced labor.

³ COVERCO's final report was not available at the time of publication of the FLA final report on the Third Party Complaint. The citations in this document are from the June 20, 2014 version of COVERCO's report. COVERCO's report will be published when a final version is provided to the FLA.

6. HIALPESA should enhance and/or update its policies and procedures regarding workers' rights.

Actions After the Independent Investigation

On May 15, 2014, shortly after the field visit by COVERCO, HIALPESA management sent a letter to the Union indicating that the company had decided to postpone the closure of the spinning mill until June 30, 2014, with the expectation that during this period "the potential involvement of a third party in our labor relations" would result in "healthy alternatives." HIALPESA management expressed a willingness to meet with union and further stated that it sought "labor peace with respect to all of its workers."

Consistent with COVERCO's recommendation and management's invitation, FLA identified a highly qualified local facilitator/mediator who stood ready to support the anticipated dialogue between management and the Union. However, as time went by and the June 30 deadline for closure of the mill approached, and despite New Balance urging management to proceed with mediation, management chose not to commence the dialogue with the participation of the facilitator/mediator.

To facilitate communications and seek to launch the dialogue, an FLA official travelled to Lima from June 23 to June 26. He held separate meetings to identify priorities and common ground with (1) the leadership of the Union as well as with representatives of the FNTTP, PLADES and the Solidarity Center; and (2) HIALPESA's Manager of Human Resources. HIALPESA agreed to:

- maintain the spinning mill in operation. All current employees of the mill -- whether affiliated to the Union or not -- would keep their jobs;
- offer new short-term contracts (the customary form of contracts for most workers in the mill) to all affected employees by June 30; and
- invite the Union to commence a dialogue effective either June 27 or June 30. However, HIALPESA proposed direct dialogue between the Union and management, without the participation of a third party facilitator/mediator.

An issue complicating matters that arose between the time of the May 15 letter from the Manager of Human Resources to the Union and the visit from the FLA official was the dismissal of the Secretary General of the Union effective June 18. HIALPESA claims the dismissal with just cause, which the Union has contested. While the dismissal itself is the subject of litigation, and it is likely to take an extended period of time to resolve, its immediate impact is on the representation of the Union at the dialogue table: the Union insists it has the right to choose its representatives and has chosen the (dismissed) Secretary General -- who was elected in December 2013 for a two year term and reaffirmed in this post on June 22, 2014 -- to lead its delegation while management takes the position that the former Secretary General can not represent the Union at the dialogue

table as Peruvian law requires being an employee as a prerequisite for being a member of a union and representing a union. This situation remains at an impasse. As a result, the dialogue has not commenced.

Conclusion

In regards to the original complaints, the issue of the movement of machinery and transfer of workers among units for the purpose of violating their associational rights were addressed during New Balance's engagement with the HIALPESA Management. The HIALPESA Management has chosen to appeal the resolutions of the Ministry of Labor on the admissibility of short-terms contract.

The use of temporary contracts on a regular basis for multiple short-term periods, as is authorized by Peruvian legislation for non-traditional export industries (see Annex), does not comply with the FLA Workplace Code of Conduct. The FLA Workplace Code of Conduct adopted in 2011, added a new code element called Employment Relationship.⁴ Compliance Benchmarks under this code element, ER.9, titled "Recruitment and Hiring/Invalid Use of Contract, Contingent or Temporary Workers," states that employers shall not: ER.9.1 use contract/contingent/temporary workers on a regular basis for the long-term or multiple short-terms; ER.9.2 hire contract/contingent/temporary workers as a means to support normal business needs on a continuing basis or a regular employment practice; or ER.9.3 make excessive use of fixed-term contracts or schemes where there is no real intent to impart skills or provide regular employment. FLA standards show a preference for stability in employment and seek to reduce or eliminate precarious employment.⁵ The FLA also notes the concerns raised before ILO supervisory bodies regarding linkages between short-term contracts and violations of freedom of association and other collective labor rights.

The FLA calls on each company sourcing from Peru to:

- (1) engage with Peruvian CSOs and knowledgeable sources at the local/national level on the topic of renewable short-term contracts and participate in the ongoing national debate in Peru regarding the future of Decree 22342, putting forward the position of strong preference for permanent contracts and employment stability.

⁴ The FLA Workplace Code of Conduct and Compliance Benchmarks are at <http://www.fairlabor.org/our-work/labor-standards>.

⁵ In an Independent External Assessment conducted in Peru in 2012 at a factory (not HIALPESA) supplying an affiliated brand, the FLA found the existence of temporary contracts on a regular basis for multiple short-term periods, a practice that is inconsistent with Compliance Benchmarks ER.9.1 ("employers shall not use contract/contingent/ temporary workers on a regular basis for the long-term or multiple short-terms"). The Assessment recommended the end of the practice and the issuance and signature of permanent contracts after completion of the 3-month probation period. For the report, see <http://www.fairlabor.org/transparency/tracking-charts>.

- (2) identify specific strategies, trainings, worker communication channels and remediation actions applicable to production sites that use short-term contracts with the goal of reducing the percentage of short-term contracts;
- (3) seek ways to realize higher degrees of employment stability in the workplaces of its Peruvian suppliers and to spread these practices throughout its supply chain in Peru;
- (4) capture Peruvian supplier performance on short-term v. stable contracts, tracking progress towards reduced use of short-term contracts, and making this a favorable indicator in overall evaluations of suppliers for purposes of future business decisions;
- (5) align planning and purchasing practices with commitments to labor standards, including employment stability; and
- (6) prior to starting to source from Peru, conduct pre-sourcing assessments of suppliers and be aware of the prevalence of short-term contracts.

Given that companies affiliated with the FLA have the right to choose their own suppliers, should New Balance continue to source from HIALPESA, FLA recommends that New Balance work with HIALPESA to identify specific strategies, trainings, worker communication channels and remediation actions to reduce the percentage of short-term contracts offered to workers.

In regards to the additional request by the Union to look into anti-union activities by Management, while the decision by HIALPESA to continue to operate the spinning mill, renew (short-term) contracts with employees of the spinning mill, and invite the Union to start a dialogue are positive steps, management's steadfast position not to accept the involvement of a third party facilitator/mediator and the disagreement over who will represent the Union at the dialogue table are stumbling blocks to progress. They are reflective of a very poor industrial relations climate at the factory and lack of trust between the Union and management, documented by COVERCO.

Despite a very small commercial presence in the factory, New Balance has been very active in investigating the allegations and working with the factory on corrective action. The FLA considers that New Balance has fulfilled its requirements under the Third Party Complaint procedure and the Third Party Complaint complete.

Annex

Peruvian National Law and FLA Standards: Short-Term Employment Contracts

Peruvian Legislation

At the root of the differences between the Union and HIALPESA that surfaced in this Third Party Complaint are the short-term employment contracts authorized by Article 32 of Decree Law No. 22342. In the view of Peruvian trade unions, such contracts create conditions that permit violations of workers' freedom of association and other worker rights.

Enacted in November 1978, Decree Law No. 22342, known as Law for the Promotion of Non-Traditional Exports, had as its objective to attract investment in the industrial sector. In order to be eligible for the special regime set up by the law, companies had to export at least 40% of their annual production of raw materials or of non-traditional manufactured goods. The benefits and incentives provided by the Decree-Law included (Article 32) the ability to hire workers under temporary contracts as needed. To qualify for the benefits of Article 32, there must be a valid purchase order for the non-traditional export and a production schedule; notification of the Ministry of Labor and Employment Promotion is also required.⁶

ILO Jurisprudence

In 2008 the Confederación Nacional de Trabajadores del Perú – the confederation to which the FNTTP and the HIALPESA union are affiliated -- filed a complaint with the Committee on Freedom of Association (CFA) of the International Labor Organization (ILO) alleging “prejudicial consequences of short-term contracts on trade union rights in industrial companies subject to the non-traditional exports scheme.” In June 2010, the CFA issued a report on the case and formally recommended that the Government of Peru “examine, with the most representative workers’ and employers’ organizations, a way to ensuring that the systemic use of short-term temporary contracts in the non-traditional export sector does not become in practice an obstacle to the exercise of trade union rights” and maintain the Committee informed of developments.⁷

In February 2011, the Government of Peru informed the CFA that the labor contract regimes in existence were aimed at “promoting job creation in order to provide Peruvian citizens with employment conditions and benefits in line with the progressive development of the country. Without prejudice to the above, and as a token of the State’s

⁶ Andrea Carolina Sánchez Matos, *Implicancias en la Libertad Sindical del Régimen Laboral Especial del Decreto Ley No. 22342 Ley de Promoción de Exportación no Tradicional*. Lima, PLADES, 2010, pp. 3-4.

⁷ ILO, 357th Report of the Committee on Freedom of Association, Case No. 2675 (Peru), June 2010. http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2911664

interest in further enhancing compliance with the right to freedom of association, the Ministry of Labor and Employment Promotion has been carrying out inspections to monitor compliance with applicable social and labor standards by companies engaged in non-traditional export activities,” and further that “the Congress of the Republic, through draft laws Nos. 2241/2007-CR and 2272/2007-CR, has undertaken the revision of the Act concerning non-traditional exports. The Government reaffirms its commitment to the promotion of collective bargaining and peaceful means of resolving labor disputes; the Government has carried out these actions to create the necessary conditions to allow parties to bargain freely and to allow it to intervene in cases of probably inequality to guarantee opportunities for development and effective collective bargaining.”⁸ The two aforementioned draft bills revising the temporary employment contract regime failed to gain a majority in Congress and therefore were not enacted.

Because its mandate is “confined to verifying that national law and practice respect the exercise of trade union rights embodied in the Conventions on freedom of association and do not include examination of the regime and duration of employment contracts or the level of conditions of work,”⁹ the CFA did not examine the impact of the regime of short-term contracts on other aspects of the employment relationship.

FLA Standards

The FLA Workplace Code of Conduct adopted in 2011 added a new code element called Employment Relationship.¹⁰ The new code element states: “Employers shall adopt and adhere to rules and conditions of employment that respect workers and, at a minimum, safeguard their rights under national law and international labor and social security laws and regulations.” Compliance Benchmarks under this Code element (1) require workplaces to have in place written policies and procedures related to general human resource management and to specific management functions organized along the employment lifecycle, including recruitment and hiring, personnel development, terms and conditions of employment, administration of compensation, hours of work, industrial relations, work rules and discipline, health, safety and environmental management, and termination and retrenchment; (2) place greater emphasis on recruitment and hiring processes, including when employment agencies are used, to ensure better protections for workers; and (3) emphasize employment and workplace protections for precarious workers, particularly migrant, contract, and contingent workers. The Glossary of Terms accompanying the Compliance Benchmarks defines precarious employment as: “Work arrangements where employment security, which is considered one of the principal elements of the labor contract, is lacking. This term encompasses temporary and fixed-term labor contracts, home workers, contract workers, and contingent workers.”

Three of the FLA’s Compliance Benchmarks are particularly relevant to precarious

⁸ http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2911668

⁹ ILO, 357th Report of the Committee on Freedom of Association, Case No. 2675 (Peru), June 2010.

http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2911664

¹⁰ The FLA Workplace Code of Conduct and Compliance Benchmarks are at <http://www.fairlabor.org/our-work/labor-standards>.

employment and excessive/abusive use of short-term contracts:

- Employment Relationship Compliance Benchmark No. 5 (ER.5), titled “Recruitment and Hiring/Employment Agency Recruitment Practices,” which states that FLA suppliers should not use employment agencies that rely on practices such as providing precarious employment.
- Employment Relationship Compliance Benchmark No. 8 (ER.8), titled “Recruitment and Hiring/Conditions of Hiring Contract or Temporary Workers” which sets out that employers may hire contract or temporary workers only when contract or temporary is allowed by national law and one of the following three conditions is met: ER.8.1 the permanent workforce of the enterprise is not sufficient to meet unexpected or unusually large volumes of orders; ER.8.2 exceptional circumstances may result in great financial loss to the supplier if delivery of goods cannot be met on time; or ER.8.3 work that needs to be done and is outside the professional expertise of the permanent workforce.
- Employment Relationship Compliance Benchmark No. 9 (ER.9), titled “Recruitment and Hiring/Invalid Use of Contract, Contingent or Temporary Workers,” which states that employers shall not: ER.9.1 use contract/contingent/temporary workers on a regular basis for the long-term or multiple short-terms; ER.9.2 hire contract/contingent/temporary workers as a means to support normal business needs on a continuing basis or as regular employment practice; or ER.9.3 make excessive use of fixed-term contracts or schemes where there is no real intent to impart skills or provide regular employment.

Thus, ER.5 bans the use of employment agencies that provide precarious employment, while ER.8 and ER.9, taken together, set important limits to the use of short-term contracts. ER.8 sets objective conditions an employer would have to meet in order to be able to hire contract or temporary workers; ER.9 meanwhile sets objective criteria an employer would have to meet to justify employment of contract, contingent or temporary workers, or the renewal of short-term contracts.

The Preamble of the FLA Workplace Code of Conduct is clear on the obligations of FLA affiliates:

Companies affiliated with the FLA are expected to comply with all relevant and applicable laws and regulations of the country in which workers are employed and to implement the Workplace Code in their applicable facilities. When differences or conflicts in standards arise, affiliated companies are expected to apply the highest standard.