

Social Rights and Special Regimes for Export Promotion: The Case of the Agriculture for Export in Peru

Case study in the Valley of Ica



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Social Rights and Special Regimes for Export Promotion: The case of the Agriculture for Export in Peru

Case Study in the Valley of Ica

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The final responsibility over the contents of this report rests solely with the ICJ.

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Introduction

This report presents the findings, conclusions and recommendations of the Observation Mission on social rights in agriculture for export, in Peru, sent by the International Commission of Jurists (Geneva, Switzerland), between the 29th of April and the 7th of May 2014. The Mission consisted of a visit to Peru, especially to the Valley of Ica (south of Lima), where a large number of agro-export companies are located. The international delegation was made up of two experts on the issue of social rights: the former French Judge Philippe Texier and the Colombian specialist Dr. Alberto L. Gómez, who were accompanied by Dr. Carlos López of the International Secretariat of the International Commission of Jurists in Geneva. The Mission received the support of the Ica Human Rights Commission (CODEH-Ica).

Objective and methodology

The Mission's objective was to observe and verify on the ground the compliance with international standards regarding the protection of economic and social rights (labour, health and related rights) and the responsibility of the companies with respect to human rights, in the context of the operations of agro-export companies in the Valley of Ica.

The Observation Mission arrived in Lima between the 28th and 29th of April, where it held consultations and meetings with trade unions and human rights organizations, researchers and academics. In Lima, it attended the discussions that took place at a meeting called by the National Coordinator of Human Rights in its institutional premises. The Mission then went to the Valley of Ica on the 1st of May, where for several days it held meetings with authorities on work, health, human rights, workers and their trade union organisations, women, children and their organisations. Although business people and business organizations were invited, the Mission did not have the opportunity to meet up with them. In Ica, CODEH-Ica held collective work meetings with local authorities, trade unions and workers, and a press conference was also held. After this, the members of the Observation Mission returned to Lima for additional meetings one of which consisted of the presentation of its preliminary conclusions in a special hearing before the Commission on Work and Social Security of the Congress of the Republic. During the entire time the Observation Mission collected information, documents and testimonies regarding respect for the regulations on social and work issues in agro-export activities in the Valley of Ica.

The Observation Mission was organised by the International Commission of Jurists, with the support of the Ica Human Rights Commission (CODEH-Ica).

The Observation Mission's visit to Peru forms part of a research and action project of the International Commission of Jurists. This project focuses on the identification, analysis and dissemination of the impacts that the establishment of special regimes to promote investment and business activities have on the observance of the economic, social and cultural rights of the workers and the population as a whole. These special regimes establish laws and other measures with the objective of encouraging and facilitating investment, import or export, or other economic activities, in a specific geographical area (for example, a free trade zone or one that has a special status) or in a sector or branch of economic activity (for example, the import of manufactured products or the activity of production of agricultural products for export). Many of these regimes are limited to tax incentives, but others, as in the case of Peru, also establish a regime that affects the exercise of labour rights. Moreover, these regimes can have a negative impact on the living conditions of the workers' families and the surrounding environment.

The International Commission of Jurists' project is at present focused on two countries: Morocco and Peru. These two countries have very different positions and situations but they have in common the implementation of policies and legislation to promote investment in economic activities. This report on Peru is accompanied by a parallel report focusing on the situation in Morocco. The choice of both countries is not a chance occurrence but corresponds to a process of work and monitoring in both countries. In the case of Peru, the situation of social rights in the Valley of Ica was identified as a problem in the context of the face-to-face workshop convened by the International Commission of Jurists and the Legal Defence Institute in Lima, on the 29th and 30th of November 2012, in the context of drawing up the report on *Access to Justice: Human Rights Abuses Involving Corporations*. The problems with the legal regime applicable to workers in agriculture for export were later also addressed in the same report¹.

This report is essentially a mission report and principally contains the findings of the experts during their visit to the country, and in addition to this, information that has been collected from secondary sources. During their visit, the experts held meetings with a large number of people, from whom they obtained testimonies and written information. Likewise, they visited homes, offices and other relevant places that enabled them to verify the facts. This report presents that information, identifies the factors that impede respect for, and full realization of, social rights and reaches conclusions regarding the causes as well as recommendations directed at all the relevant actors.

The report starts with an explanation of the social, economic and legal context which functions as a framework in which social rights and activities related to agriculture for export take place. In the main chapter it then goes on to analyse the obstacles to the full realization of specific social rights which arise from the law, its application or the inadequate way in which international regulations are applied in this field. The third part provides conclusions and recommendations for the relevant actors: State, civil society, companies and the international community.

1. Context

1.1 The international regulatory framework

Peru has ratified the most important international human rights treaties. These include, with regard to social rights, *the International Covenant on Economic, Social and Cultural Rights*, *the International Covenant on Civil and Political Rights*, *the Convention on the Rights of the Child*, *the American Convention on Human Rights* and *the Additional Protocol in the Area of Economic, Social and Cultural Rights* ("Protocol of San Salvador"). Peru has likewise ratified a number of international conventions concluded in the International Labour Organization (ILO) including *Convention 29 on Forced Labour* (1930), *Convention 87 on Freedom of Association and Protection of the Right to Organise* (1948), *Convention 111 on Discrimination (Employment and Occupation)* (1958), *Convention 98 on the Right to Organise and Collective Bargaining* (1949), *Convention on Minimum Age* (1973) and *Convention 182 on the Worst Forms of Child Labour* (1999). Other ILO conventions that are equally important for this report are *Convention 81 on Labour Inspection* (1947),

¹ International Commission of Jurists & IDL, *Access to Justice: Corporate Complicity in Human Rights Abuses in Peru*, Lima and Geneva, 2013, p. 30. Available on <http://www.icj.org/access-to-justice-new-icj-report-on-business-and-human-rights-abuses-in-peru/>. The report on Morocco can be seen on: Commission Internationale de Juristes, Accès à la justice- Les recours contre les violations des droits sociaux au Maroc, Octobre 2013, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/02/MOROCCO-DESC-REPORT-ELEC.pdf>

Convention 11 on the Right of Association (Agriculture) (1921) and *Convention 12 on Workmen's Compensation (Agriculture)* (1921), among others².

The contents of the internationally recognised economic, social and cultural rights have been developed through the ILO recommendations and, especially, the General Comments adopted by the Committee on Economic, Social and Cultural Rights (CESCR). The Committee is the body that monitors and promotes the implementation of the *International Covenant on Economic, Social and Cultural Rights* and over the years has adopted a number of General Comments on specific rights such as health, work, food, housing and water, among others. The definitions provided in these documents form part of the international regulatory framework in the present document.

1.2 National regulatory framework: Constitution, Laws and Regulations

The Constitution of the Republic of Peru³ adopted in 1993, contains in Articles 22 to 29, norms concerning the right to work and the fundamental rights of workers. In Article 22, the Constitution recognises work as a right and a duty as it constitutes the base of social welfare and the realisation of the person. Immediately after this, Article 23 of the Constitution establishes that it is the State's obligation to promote social conditions for social and economic progress, especially through policies that promote employment and education for work. In the same vein, it establishes that no labour relation may limit the exercise of constitutional rights nor fail to recognise the worker's dignity.

Likewise, the subsequent Articles in the Constitution recognise the right to an equitable remuneration, the length of the workday and compulsory rest, the principle of the inability to renounce labour rights and of interpretation favourable to the worker in cases of doubt about the meaning of a legal norm and the right to form labour unions, to participate in collective bargaining and to strike.

However, besides the constitutional framework, Peru has at least 12 differentiated labour law regimes in the private sector, and approximately 15 in the public sector⁴. This variety of labour regimes not only permits differentiated treatment, but also means that workers face situations that affect the full exercise of their rights and jeopardise their employment relationships.

Since 1991, Peru has implemented a process of regulatory reform regarding labour issues, whose principal characteristic has been a substantial increase in flexibility in the hiring and dismissal of workers, as well as an increase in the powers of the employer in the administration of the work process. In 1997 Legislative Decree No. 728⁵ was approved replacing the Employment Promotion Law, and at present regulates the components of employment contracts in current labour relations in the private sector. Even though this Decree should be sufficient to regulate the different forms of contract, in 2000, Regulations for the Promotion of the Agriculture Sector were passed with the stated objective of promoting private investment in the development of a modern agricultural model which would increase profitability and

² See International Labour Organization, NORMLEX www.ilo.org/dyn/normlex

³ Political Constitution of Peru, enacted on 23 December 1993, in force as from 31 December 1993. Digital version (Spanish): <http://www2.congreso.gob.pe/sicr/RelatAgenda/constitucion.nsf/constitucion>, access 28 January 2014.

⁴ International Commission of Jurists & IDL, *Access to Justice: business and human rights violations in Peru*, Lima and Geneva, 2013, p. 30. Available on <http://www.icj.org/access-to-justice-new-icj-report-on-business-and-human-rights-abuses-in-peru/>

⁵ Law on Productivity and Labour Competitiveness, Legislative Decree No. 728, 21 March 1997. Digital version (Spanish): http://www.mintra.gob.pe/archivos/file/normasLegales/DS_003_1997_TR.pdf, access: 20 January 2014.

attract capital investment in agriculture for export to meet the demands of foreign markets⁶.

It is important to consider the previous Law for the Promotion of Non-Traditional Exports (Law No. 22342)⁷, which since 1978 had established a special regime for temporary contracts for the production and export of non-traditional goods, which range from agricultural and textile to chemical and steel products. As has already been mentioned, in 2000, towards the end of Alberto Fujimori's government, Law No. 27360, Law for the Promotion of the Agriculture Sector, was passed, radically changing the labour regime applicable to workers in the agriculture sector. Although some regulations that precede Law No. 27360, recognise the distinctive features of the agriculture sector, in terms of labour issues, none of them had questioned the application of the general labour regime: they do not modify the work conditions of agricultural workers in relation to the rights of the rest of the workers in the country. The promotion mechanisms used by the agriculture sector in the last two decades – with the issuance of Law No. 26564⁸ – focused on the application of tax regulations⁹.

In short, the current regulatory framework for the agriculture sector in Peru is based on Article 88 of the Constitution of the Republic¹⁰, which recognises preferential support for the agriculture sector, as well as other regulations such as the Law for the Promotion of the Agriculture Sector (Law No. 27360) and its Regulations passed by Supreme Decree No. 049-2002-AG; the Amended Text of Legislative Decree No. 728 (Law on Productivity and Labour Competitiveness, Supreme Decree No. 003-97-TR) for workers in the agriculture sector subject to the general labour regime; and the Law on Safety and Health at Work (Law No. 29783)¹¹. The issue of collective labour relations is governed by Decree Law No. 25593 and its regulation Supreme Decree No. 011-92-TR and its amendments which govern collective labour relations.

Recently, Law No. 29783 recognises the principle of prevention of employers and establishes that employers are under the obligation to guarantee that the workplaces or wherever work activities are carried out, have the necessary facilities and conditions to protect the workers' life, health and welfare (Art. 1). It likewise establishes that the State has the duty to fiscalise and creates the labour inspectorates for safety and health, indicating that their main function is to monitor the compliance with safety and health regulations at work and also insist on the appropriate administrative responsibilities (Art. 95) which include compensation for damage to workers' health. After the ICJ Observation Mission's visit to Peru, in July 2014, Law No. 30222 was passed with the objective of eliminating labour cost overruns and promoting formality. This law simplifies the registration procedures that

⁶ Peruvian Network for Globalization with Equity, "Urgent Need for Reforms to Redistribute the Profits of the Agro-export Boom among the Workers", Alerta Urgente No. 9, March 2012. Digital Version (Spanish): http://www.redge.org.pe/sites/default/files/alerta_urgente_9_derechos%20laborales%20FINAL_0.pdf, access: 21 January 2014.

⁷ Law for the Promotion of Non-Traditional Exports, Decree Law No. 22342, 21 November 1978. Digital version (Spanish): http://www.mintra.gob.pe/archivos/file/SNIL/normas/1978-11-22_22342_17.pdf, access: 22 January 2014.

⁸ Law No. 26654, enacted on 15 August 1996, incorporated as a chapter a preliminary title to the Amended Text of the Law on General Regulations of Administrative Procedures approved by Supreme Decree No. 02-94-JUS.

⁹ Gamero, Julio and Echevarría Gianina, "Agrarian Labour Regime: Regulatory Framework and Situation of the Workers Labour Programme for Development (PLADES)", September 2012. Digital Version (Spanish): http://www.plades.org.pe/publicaciones/estudios/70107_ROBLE_ROJO_REGIMEN_LABORAL_AGRARIO_16_10_12.pdf, access: 22 January 2014, p. 13

¹⁰ Political Constitution of Peru, Article 88: "The State preferably supports agricultural development. It guarantees the rights to ownership of the land, whether private, community or in any other form of partnership. The law may define the boundaries and size of the land based on the features of each zone. According to legal provision, abandoned lands revert to State ownership and may be sold".

¹¹ Law on Safety and Health at Work, Law No. 29783, el Peruano official gazette, 20 August 2011. Digital version (Spanish): <http://www.congreso.gob.pe/ntley/Imagenes/Leyes/29783.pdf>, access: 22 January 2014.

must be carried out by the employer, reduces the frequency of medical exams that workers have to undergo and reduces the penalties for the employers, who, by their own actions or omissions are responsible for serious accidents at work or even the death of a worker¹².

The economic and social context in which the Law for the Promotion of the Agriculture Sector was enacted in 2000, responded to the need to encourage private investment in the agriculture sector, with the objective of increasing the export of agricultural products and ensuring formal employment in the sector. In this way, the law was conceived as a temporary measure for a period of ten years. However, in 2006, the temporary period of the regulation was extended to 2021¹³.

It could be said that the economic objectives set out in the regulation were achieved during the first 10 years of its implementation. Agriculture and farming exports were 8 and 6 times greater, respectively than the amounts exported in 2000. From exporting 248.9 million dollars in agricultural products and 394 million dollars in farming products in 2000, exports rose to 974.6 and 2,190 million dollars respectively in 2010¹⁴.

These achievements were made possible as a result of tax and labour incentives with respect to the general regulatory regime. On the one hand, income tax for agro-exporting businesses was reduced from 30% to 15%, and on the other, in the employment sphere there were benefits due to the decrease in labour costs.¹⁵

Impact of the contractual regime on the agriculture sector regarding the full exercise of labour rights

The regulations that govern the contracting process in the agriculture sector are not different from those already referred to in Article 80 of the Law on Productivity and Labour Competitiveness (Supreme Decree No. 003-97-TR)¹⁶, or in the Law for the Promotion of Non-Traditional Exports (Law No. 22342), as both regulations promote labour flexibilisation through the granting of temporary work contracts, known as contracts subject to specific arrangements.

The Law on Productivity and Labour Competitiveness establishes nine types of contracts subject to specific arrangements, which include piecework, fixed-term or temporary contracts or those for a specific project or service. Article 122 establishes that all the workers hired under this arrangement are entitled to receive the same benefits as those required by law for workers with indefinite contracts, which includes limits on the working hours per day and overtime pay.

In the case of the contractual regime in the agriculture sector, workers that carry out agricultural activities are treated differently from the rest of the workers that carry out other types of activities in agro-export companies. In 2011, it was noted that

¹² http://www.rpp.com.pe/2014-07-11-publican-cambios-a-ley-de-seguridad-y-salud-en-el-trabajo-noticia_707211.html

¹³ Law that extends the duration of Law No. 27360, Law No. 28810, 21 July 2006. Digital Version (Spanish): <http://faolex.fao.org/docs/pdf/per65733.pdf>, access: 22 January 2014.

¹⁴ Draft law No. 141/11-CR, Law that Amends Law No. 27360 Ley that Approves the Regulations for the Promotion of the Agriculture Sector, Statement of Reasons, 5 September 2011, p. 4. Digital Version (Spanish):

[http://www2.congreso.gob.pe/Sicr/TraDocEstProc/Contdoc01_2011.nsf/d99575da99ebf305256f2e006d1cf0/53a54537bf16a7e1052578ff006e24e0/\\$FILE/PL00141020911.pdf](http://www2.congreso.gob.pe/Sicr/TraDocEstProc/Contdoc01_2011.nsf/d99575da99ebf305256f2e006d1cf0/53a54537bf16a7e1052578ff006e24e0/$FILE/PL00141020911.pdf), access: 22 January 2014.

¹⁵ Gamero Requena, Julio, *A 10 años de su implementación: Impacto de la Ley de Promoción Agraria 27360*, Asociación Aurora Vivar, Septiembre 2011, p. 45. Digital Version (Spanish):

<http://www.comunicandes.org/pdf/Impacto%20LPA%2027360%20peru.pdf>, access: 22 January 2014.

¹⁶ Supreme Decree No. 003-97-TR, Article 80: "The employment contracts under the regime of export of non-traditional products, which Decree Law No. 22342 refers to, are regulated by their own norms. However, the norms established on the approval of contracts in that Law are applicable to it. It is sufficient for the industry to be included in Decree Law No. 22342 for the hiring of personnel to occur under the afore-mentioned regime".

only 7.7% of employees registered on the electronic payroll corresponded to the agricultural labour regime¹⁷. Similarly, 2 out of 3 contracts in the agriculture sector correspond to temporary contracts, which is above the average for other sectors of the economy. In 2011, 69.1% of the workers in the agriculture sector were subject to temporary work contracts.

Law No. 27360 establishes incentives for the agro-industrial sector as it lowers the total costs of labour and thereby increases profits in agro-industry. Workers, trade unions and human rights groups have repeatedly stated that profits in the agro-industry are obtained to the detriment of the rights and interests of the workers, who are paid less, receive fewer bonuses, lower compensation for sudden or arbitrary dismissals, lower compulsory rest periods (holidays) and lower contributions to the health service than those established in the general labour regime.

	COMMON REGIME	LAW No. 27360 (OCT. 2000)
General features	Common regime	Labour regime, of a temporary and special nature applicable to both natural and legal persons dedicated to agriculture and/or animal husbandry in rural areas (with exception of the forestry industry), as well as natural or legal persons engaged in agro-industrial activities.
Working day	Maximum 8 hours a day or 48 a week.	Cumulative working day, overtime is only paid when it exceeds on average the maximum limits permitted by law.
Remunerations	Salary not lower than the Legal Minimum Remuneration. Also Employee Severance Indemnities (CTS) and Bonuses.	Remuneration not lower than the Legal Minimum Remuneration but including legal Bonuses and Employee Severance Indemnities.
Holidays	Remunerated holidays of thirty (30) calendar days for each year of service.	Remunerated holidays of fifteen (15) calendar days for each year of service.
Legal bonuses	Two bonuses a year: one in July and the other in December, in each case of an amount equivalent to the monthly remuneration the worker receives at the time of the bonus.	Both bonuses are included in the worker's daily wage.
Employee severance indemnities	Employers deposit as many twelfths of the calculated remuneration received by the worker as complete months he/she has worked.	It is subsumed into the daily wage. -+5
Indemnity for arbitrary dismissal	Payment of 45 days (1½ remunerations for each year of effective service) up to a maximum of 360 days.	Only 15 days (1/2 a remuneration) paid for each year of effective service up to a maximum of 180 days.
Health insurance	9%	4%

¹⁷ Gamero and Echevarría, Op. Cit., see footnote 9.

Table taken from PLADES, Agriculture Labour Regime, Lima, 2012.

The constitutionality of the Law for the Promotion of the Agriculture Sector

On 30th October 2006, the Bar Association of Ica filed a claim of unconstitutionality of Art. 7 of the Law for the Promotion of the Agriculture Sector, arguing that the law was “manifestly contrary to the principle of equality before the law and Non-Discrimination enshrined in Article 2, section 2, of the Political Constitution of Peru”.

Among other arguments, the plaintiffs observed that Art. 7 of the law in question created a differentiated labour regime without objective and reasonable justification. They also indicated that these measures did not respond to differentiated treatment on the basis of affirmative action and that contrary to this, the measures - such as the cumulative working day, remuneration that includes employee severance indemnities (CTS) and bonuses - led to remunerations that were lower than those of the general labour regime.

In essence, the plaintiffs stated that the benefits granted to the agro-export industry could not be granted to the detriment of the rights of the workers, and that furthermore, in employer-worker relations the workers are in the weaker position, and that their rights therefore require greater protection.

In its ruling on this claim of unconstitutionality, the Constitutional Tribunal applied what it considers an “Equality Test (Reasonableness or Proportionality)”, which is divided into three “sub-principles”: i) suitability or appropriateness, ii) need and iii) proportionality *stricto sensu*¹⁸.

Firstly, the Tribunal observed that State intervention in the principle of equality is less and that the Constitution allows it to legislate in a particular and exceptional way when the nature of things thus requires it (Art. 103 of the Constitution). In that sense, the Tribunal considered that “the particularities of the labour market in the agriculture sector, which is characterized by temporality, randomness, mobility, seasonality, informality and difficulty in the access to employment”¹⁹, justifies special and differentiated treatment and that therefore the nature of the legislative regulation in question is not constitutionally proscribed.

Secondly, the Tribunal assessed the suitability and appropriateness of the legislative measure, analysing whether the regulation set out in the agriculture regime seeks to achieve a constitutionally legitimate objective. The Tribunal concluded that the aim was legitimate, in so far as the State has the obligation to adopt “a role in encouraging and promoting productive employment as part of the social and economic progress it has been entrusted with; that is, to promote access to a job (*as part of the essential content of the right to work*), also recognizing the need for preferential state support for the agriculture sector for its development”²⁰.

Finally, the Tribunal examined the suitability of the measure adopted through the special regime for contracts in the agriculture sector, and in relation to this considered that both the special nature of work in this sector, as well as the constitutional provision for the State’s role in promoting employment, entailed the existence of special and exceptional legislation that should recognise:

¹⁸ Constitutional Tribunal of Peru, Ruling No. 00027-2006-AI, 21 November 2007. Digital Version (Spanish): <http://www.tc.gob.pe/jurisprudencia/2008/00027-2006-AI.html>, access: 31 January 2014. par. 70 to 73

¹⁹ *Ibid.* para. 75.

²⁰ *Ibid.* para. 77.

"...the issuance of a regulation that should represent a concrete and different situation, that should consider that in the agriculture sector contracts are temporary par excellence, and also seasonal; that it is not common that a worker should work for the same employer for more than one consecutive year, and that mobility is relevant"²¹.

Thus, the Constitutional Tribunal considered that, for the agriculture sector, a labour legislation that was special and differentiated from the general labour regime would be the ideal means to promote and encourage employment in this sector of the economy.

The Tribunal also concluded that the legislative intervention that established a special labour regime in the agriculture sector is not only legitimate, to the extent that it is permitted by Art. 103 of the Constitution, but is also a necessary means to achieve this objective. In its brief analysis the Tribunal left out the plaintiffs' arguments in the sense that tax-related measures would be less burdensome than the measure in question, and assumed that Law No. 27360 is the less burdensome measure. Finally, with regard to the test of proportionality, the Tribunal declared that the level of optimisation of constitutional aims, which includes the promotion and encouragement of access to employment in the agriculture sector, is more important²² than the interest of preserving formally equal rights, and that therefore the measure is justified.

Although it is not its objective to focus on a detailed analysis of the ruling of the Constitutional Tribunal of Peru, the Observation Mission considers that both the standards on non-discrimination and the right to equality in international human rights law, which the Constitutional Tribunal should have included in its analysis (Article 55 of the Constitution), call for a deeper assessment of the effects of the measure in question on the effective enjoyment of human rights by the workers in the agro-export sector.

The prohibition of discriminatory treatment contained in international treaties ratified by Peru proscribe differential treatment which "lacks objective and reasonable justification" and which has the intention or the effect of nullifying or impairing the enjoyment of their human rights by certain people or groups. This standard, developed at a regional and international level, has been adopted by the Inter-American Court of Human Rights in its Advisory Opinion No. 4²³. As will be seen later in this report, even though the text of the law was *prima facie* compatible with the precepts of equality in human rights law, the effects of its implementation, in practice, may infringe certain social and labour rights.

1.3 The agro-export industry in Peru

The expansion of the agro-export industry has become one of the factors driving the rapid economic growth of the Peruvian economy in the last decade. Both in terms of investment as well as in the creation of employment and modernisation, the agro-export industry is viewed as playing a key role in the development model aimed at export and insertion into international markets. Although the majority of Peruvian exports are still related to traditional sectors such as mining, fishing and cotton, the non-traditional sector represents almost 25% of exports (especially textiles and agro-export). Agro-export in particular, has undergone significant and sustained growth. For example, in 2008, a year before the global crisis, 74% of the total value of agricultural exports corresponded to non-traditional products²⁴. In spite of the

²¹ *Ibid.* para. 78.

²² *Ibid.* para. 80.

²³ Inter-American Court, Advisory Opinion OC-4/84 January 19, 1984.

²⁴ León Castillo, Janina, *Agro-exportación, empleo y género en el Perú*, Consorcio de Investigación Económico Social, Lima, 2010. Digital Version (Spanish): <http://www.iadb.org/intal/intalcdi/PE/2010/04779.pdf>, access: 31 January 2014, page 21

positive value of the sector in economic terms, opinions are very different with respect to the social impact.

The development of agriculture for export has created a significant number of jobs but there is little concrete and reliable information regarding this. Most of the figures available are based on estimates. *Prima facie*, it can be seen that the large majority of jobs created do not comply with the minimum criteria of dignified and decent work, as required by international standards²⁵. The Regional Labour Office in Ica was unable to provide the Observation Mission with figures relating to the number of workers connected to the agro-export industry in the region. The analyses coincide in indicating a profound transformation of the system of agricultural landholding and production in the region of Ica, as well as of work patterns in the agriculture sector which had previously been characterized by self-employment and family employment. The so-called boom in agriculture for export has attracted migration and promoted the urban concentration of salaried-workers and appears to have created a system of permanent work rotation for thousands of workers.

Thus, the Federation of Women of Ica (FEPROMU), in its 2007 study, estimates that there are approximately 70,000 workers connected to agro-export activities, of which approximately 65% would be women.²⁶ More recently, Gamero puts the number at 211,078 workers in the private agriculture sector governed by Law No. 27360, of which approximately 32,127 would be in the department of Ica²⁷ (it is therefore presumed that there would be more in the whole region of Ica).

Business structure and agro-export production in Ica

The farms and businesses whose activities are related to agro-export are of different sizes. The majority of farms and businesses (small and medium-size in terms of the area of land) specialize only in the initial stage of the chain of production: planting and harvesting. The larger farms and businesses, as well as planting and harvesting, have facilities for processing and exporting the product in question (asparagus, avocados and paprika etc.). The latter work requires, as well as additional and more modern installations that enable packaging, freezing when necessary (as in the case of asparagus) and preservation. The larger businesses have access to greater amounts of capital and commercial and financial links which allows them to devote themselves to export.

Information also suggests that a large number of small and medium-size farms form part of the production chain as suppliers to large businesses. Many of the large businesses have several farms or productive units in different parts of the Valley of Ica.

For example, in the area of asparagus production, some businesses are devoted to the production and processing of asparagus while others are devoted to only one of these activities. There are businesses that have a processing factory – some specialise only in selling fresh asparagus (fresh-produce factories) while others process them and sell them in canned form (canning factories). Some also have land where asparagus is produced and in addition to this they buy from other small producers. According to a study done in 2005, in Ica there are storage centres, which are places where a number of small producers sell their products to intermediaries

²⁵ ILO Declaration on Social Justice for a Fair Globalization on 10 June 2008, available on: http://ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_099766.pdf

²⁶ Federación de Mujeres de Ica, *La otra cara de la agroindustria en Ica: Los efectos en la salud de las trabajadoras*, Ica, 2007, page. 13.

²⁷ Gamero and Echevarria, Op. Cit., footnote 9, page 2012.

who then sell it to the processing factories. The working conditions, particularly for women, are different at each of these points in the production chain²⁸.

Agro-export companies and their social responsibility policies

The *Guiding Principles on Business and Human Rights* endorsed by the United Nations Human Rights Council in June 2011²⁹, stipulate that all companies have the responsibility to respect all human rights. To this end, businesses should conduct a due diligence process aimed at the identification, mitigation and remedy of their impacts on human rights³⁰. These principles establish a set of codes of conduct that every responsible business should follow as part of a globalised economy. The Global Compact, an initiative of the UN Secretary-General which establishes a series of 10 principles that participating businesses must follow, came into existence in 1999³¹. Two of these principles ask businesses to respect human rights and not be accomplices to violations of these rights, while principles 3 to 6 ask businesses to respect core labour standards, including the right to freedom of association and collective bargaining.

The Observation Mission was unable to talk to any business people or owners of farms connected to agro-export due to their refusal to accept an invitation made by CODEH-Ica for a meeting. It therefore did not receive any information with respect to practices of social responsibility on the part of these businesses or their policies regarding respect for human rights.

In 2007, FEPROMU-Ica indicated that one of the demands the market made on agro-export businesses was to develop "Good Labour Practices", facilitating decent work. However, a study made in 2012 on the asparagus agro-industry, concluded that in "most cases these are only followed in the large Agricultural Units but not in the smaller ones that provision them"³². This study indicates that the problem "lies in the fact that the supervision of the large businesses of the smaller ones focuses on the quality of the product rather than labour conditions."³³

The small and medium-size businesses devoted to agriculture sell their production to the larger ones and in this way form part of the agro-export chain. However, a large number of farms employ workers on an "informal" basis, that is to say, without a formal work contract and without complying with the formalities prescribed by law. In this situation it is very difficult to verify a business programme of social responsibility with respect to the workers, even if this programme exists. The social responsibility declared by the business and its lack of correspondence with what actually occurs has been criticized in the context of the 2008/2009 economic and financial crisis. In a context in which international demand for agro-export products decreased, the reaction of the agro-export business was to resort to massive redundancies³⁴.

²⁸ ISAT/ OXFAM, *Condiciones de Trabajo y Salud de las mujeres trabajadoras de la agroindustria del espárrago*, Región Ica, Lima, 2005, page 19. Digital version (Spanish):

http://www.redge.org.pe/sites/default/files/libro_agroexportadores.pdf, access: 29 January 2014.

²⁹ Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie, Document A/HRC/17/31 of 21 March 2011, A/HRC/17/31, 2011

³⁰ Ibid. See especially Principles 11, 17 and 18

³¹ www.globalcompact.org

³² Ruiz Bravo, Patricia y Castro, Maria del Rosario, "Empleo temporal femenino en la agricultura de exportación de espárragos: El caso del Perú", Lima, September 2012, manuscript, p. 31.

³³ Ibid.

³⁴ Asociación Aurora Vivar, *La agroindustria de la exportación no tradicional en el Perú frente a la crisis mundial: Rentabilidad empresarial, responsabilidad social empresarial y derechos laborales*, Lima, 2009, p. 57 y 62. The Aurora Vivar Association concludes that "it could be asserted that at present companies are

Another study concluded that although agro-exporters understand the concept of corporate social responsibility, it has not been fully developed and “does not question the heart of the model of currently existing labour relations”³⁵. On the other hand, representative business associations, such as the Association of Agricultural Producers of Peru (AGPA), do not appear to have adopted human rights standards or policies that their members must respect although its institutional web page states that AGPA provides services related to corporate social responsibility to its members³⁶.

It would seem that some businesses have social responsibility projects in the form of public works that benefit the community such as sports facilities or the construction of housing. There are no known examples of business policies regarding human rights as prescribed by the *Guiding Principles on Business and Human Rights*.

1.4 The textile industry

Although this report and the Observation Mission that it is based on focus on the social conditions in agriculture for export, this sector together with the textile industry sector are subject to very similar labour regulations. Thus, a reference to the textile industry is highly relevant not only in terms of the context but also to compare and contrast the arguments used to justify a special regime for agriculture for export.

Decree Law No. 22342, in force since 1978, allows businesses to temporarily hire the number of workers they need for the length of time required. According to what was stated by the National Federation of Textile Workers in a meeting with members of the Observation Mission, this regulation has led to a tendency to reduce the duration of contracts to one month. Workers do not accept their rightful social benefits, including maternity benefit, out of fear that their contract will not be renewed at the end of the month. Most salaries (90%) are below the minimum wage level.

The law would only provide limited protection in this context. There have been cases in which companies change their business name during judicial proceedings in lawsuits brought against them for violation of workers’ rights. An example given by representatives of the workers is the case of San Sebastián textiles: in an unjustified dismissal, the court order to reinstate the worker was late and not executed as the business no longer legally existed. In practice, the company continued to operate but under a different legal name. Protective measures have been ineffective. The regulation that establishes that labour obligations are preferential is not applied in practice. Some businesses resort to the National Institute for the Defence of Competition and Intellectual Property – INDECOPI, in order to carry out an orderly liquidation.

The labour regime established in Decree Law No. 22342 has caused concern among large multinational companies in the textile industry. Thus, on 3rd March 2013, 47 brand-name companies, including Life is Good Company, New Balance, Nike, PVH Corp., and VF Corporation, sent a letter to the President of Peru, Ollanta Humala, expressing their concern with respect to the enforcement and application of the above-mentioned regulation, also stating that the application of this law “encourages and tolerates violations to labour rights and therefore constitutes an obstacle to the proper application of their codes of conduct.”³⁷.

not acting with solidarity, with a sense of social responsibility, departing from the principles of corporate social responsibility which several of them say they follow” pp 57 and 62.

³⁵ PLADES, *El trabajo decente en la agroexportación: El caso de Ica*, Lima, 2007, page 69.

³⁶ <http://www.agapperu.org/Main.asp?T=3084>

³⁷ Letter to the President of Peru Ollanta Humala Tasso, 4 March 2013. Digital Version: <http://www.industrial->

In the textile sector, union membership is approximately 5%, and there are very few indefinite-term contracts. In 2009, the Ministry of Labour verified the lack of compliance with approximately 5,000 export work contracts in 12 companies, without any of them having fulfilled their duties of providing stability for their workers³⁸. Since 2012, the Peruvian Congress has initiated a debate regarding the repeal of Articles 32 and 33 of Decree Law No. 22342³⁹, without their being a definite result to date.

2. Human Rights in agriculture for export in the Valley of Ica

This chapter is dedicated to the presentation of the impact on the enjoyment of human rights (especially social) that the Mission observed during its visit. The first section deals with the rights of the workers and their families, and the second focuses on the rights of the people that live in Ica.

2.1 Rights of the workers and their families

2.1.1 Labour rights: freedom of association, health and sanitation, adequate working conditions

In general terms, the Observation Mission found that there do not seem to be enough studies and information on the number of workers, the companies devoted to agro-export, incidents related to health and safety at work and other related issues. The requests for information and studies made by the Observation Mission to the authorities with which it held meetings were not attended to immediately and general references were almost always made to information “available” somewhere but not accessible at the moment.

For example, there are no official statistics regarding the number of companies that operate in the agro-export business (partial or total), nor on the number of workers hired each year or their health situation. A recent exception is a study on the incidence of skin cancer, which is said to have increased. Ica would be the third highest region in the country in terms of the number of cases. When the Observation Mission visited Ica, the Regional Government was preparing a Regional Ordinance on cancer prevention on the basis of that study. There is no general report on health in the region, only a study on cancer linked to the above-mentioned Ordinance. It appears that neither is there a study or report on the incidence of fatal malformation or other possible effects linked to the use of agrochemicals. Existing reports do not specify the causes. There is only anecdotal information.

Disincentives and obstacles to unionisation and collective bargaining

The right to form trade unions is enshrined in the International Covenant on Economic, Social and Cultural Rights (Article 8⁴⁰), the International Covenant on Civil

union.org/sites/default/files/uploads/documents/Peru/joint_letter_to_president_ollanta_humala_-_march_4_2013.pdf, access: 22 January 2014.

³⁸ La República newspaper, “The largest trade union in the world questions labour abuses in Peruvian textile companies” 7th April 2013. Digital Version (Spanish) <http://www.larepublica.pe/07-04-2013/el-mayor-sindicato-del-mundo-cuestiona-abusos-laborales-de-textileras-peruanas>, access: 22 January 2014.

³⁹ National Congress of Peru, Draft Law 761/2011-CR, 20 January 2012. Digital Version (Spanish): <http://www2.congreso.gob.pe/Sicr/TraDocEstProc/CLProLey2011.nsf>, access: 22 January 2014. Article 32 establishes the possibility of making temporary work contracts in the industry of non-traditional exports. Article 33 of the Law stipulates that remunerative ceilings and ordinary compensations do not have to be applied to the regime established by the Law.

⁴⁰ “Article 8:

1. The States Parties to the present Covenant undertake to ensure:

and *Political Rights* (Article 22), as well as in the ILO Conventions, particularly Convention 87 on the freedom of association and protection of the right to organise (1948) and Convention 98 on the right to organise and collective bargaining (1949), both ratified by Peru in addition to being a fundamental principle of the ILO Constitution. The right to form trade unions is closely linked to collective bargaining.

Trade union freedom and collective bargaining are recognised in Article 28 of the Political Constitution of Peru. Subsection 2 of this Article stipulates that the State should encourage "collective bargaining". Moreover, Supreme Decree No. 010-2003-TR regulates collective labour relations and particularly, the right to form trade unions without prior authorisation (Article 2), the prohibition of State and employer interference and coercion (Article 4), and the protection of trade union rights for founders, members of the board of directors, delegates, candidates to leadership positions and delegates of the trade union and members of a bargaining commission of a list of demands (Article 30), among others.

Unionisation and the processes of collective bargaining, taken together, are necessary requirements for the establishment of social dialogue that may set up mechanisms for the protection and guarantee of workers' rights. Workers' groups do not only function as a mechanism to balance relations between employers and wage earners, but also encourage mechanisms of integration and social dialogue that benefit the production processes of the economy.

The full guarantee of the rights to freedom of association are an essential feature of democracy. This is recognised by the Inter-American Charter to which Peru is signatory.⁴¹

For the agriculture sector in Peru, Law No. 27360 promotes the agro-industry business by permitting highly flexible contract systems that favour investment but at the same time promote precarious employment and discourage the formation of trade unions. Studies carried out in the agriculture sector have demonstrated that the level of unionisation in this sector is very low. In 2011, of the 108,000 unionised workers in the country, only 2,594 workers belonged to the agriculture sector⁴², and until 2009 there had only been 6 instances of collective bargaining in the sector⁴³.

For the Observation Mission, it is evident that the low rate of unionisation in general terms responds to the intermittent nature of the contracts, as although over 80% of the workers are employed in companies that have more than 20 workers, a requirement for forming a trade union, most workers do not have the necessary stability that would enable them to join trade unions.

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

⁴¹ Inter-American Democratic Charter (Adopted at the first plenary session, held on 11 September 2001), Article 10: "The promotion and strengthening of democracy requires the full and effective exercise of workers' rights and the application of core labor standards, as recognized in the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work, and its Follow-up, adopted in 1998, as well as other related fundamental ILO conventions. Democracy is strengthened by improving standards in the workplace and enhancing the quality of life for workers in the Hemisphere."

⁴² Gamero and Echevarria, *Op. Cit.*, footnote 9, p. 37.

⁴³ *Ibid.* p. 38.

In Ica, the Observation Mission met up with several leaders and workers who explained the difficulties they have in exercising their right to association. They explained that, in general, trade unions are not viewed positively and that unionised workers are stigmatised. Many of them are harassed through dismissals or allocated unsuitable or extremely difficult duties or schedules. Many of them also stated that there are “black lists”: trade unionists that are dismissed from a company have great difficulty in getting a job in another company. The companies’ retaliations and the fear of dismissal for participating in trade union processes is thus a very important factor that impedes the formation of trade unions.

On the other hand, studies focusing on this problem have established that almost 80% of wage earners are unaware of the possibility of forming worker collectives, or that their lack of interest is based on the fear of coercion by the business owner. “If this is true, it would indicate an institutional framework that is “unfriendly” to trade union organisation.”⁴⁴

For example, there have been complaints about the non-renewal of contracts due to workers’ participation in trade union activities. The Trade Union of Agricultural Workers of Peru denounced that, in January 2013, a subsidiary of the Camposol company in Huangala, Piura, threatened a group of workers, whose contracts were about to expire, that they would not be renewed if they continued in the trade union. The contracts were not renewed and when the process was presented to the authority at the Ministry of Labour, the latter indicated that they had no proof that Camposol was infringing the workers’ right to free association⁴⁵.

Length of the workday and the right to holidays

Article 7(d) of the *International Covenant on Economic, Social and Cultural Rights* recognises the right to rest in terms of the “enjoyment of rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays”. Article 25 of the Constitution of Peru establishes a maximum of 8 working hours a day or 48 hours a week, and furthermore establishes these maximum hourly limits as part of cumulative or atypical workdays. However, Article 7 of the Law for the Promotion of the Agriculture Sector permits cumulative workdays as long as they do not exceed the limits specified therein, and indicates that overtime pay is only applicable when the hours established by law are exceeded. In effect, while the general labour regime stipulates that the limit of weekly working hours cannot surpass 48 hours a week, including 8 hours overtime, in the case of the agriculture sector there can be up to 60 working hours a week.⁴⁶, of which only 12 hours overtime are recognised, as the first 8 hours are included in the legal overtime limit⁴⁷.

With regard to this, it is important to remember that Convention No. 184 of the International Labour Organisation on Safety and Health in Agriculture⁴⁸ establishes in Article 20 that hours of work, night work and rest periods for workers in agriculture shall be in accordance with national laws and regulations or collective agreements.

⁴⁴ Gamero Requena, Julio H., Op. Cit. footnote 15, p. 44.

⁴⁵ Oxfam, *Mangos with Blemishes*, Oxfam – Deutschland, June 2013. Digital Version: http://www.oxfam.de/sites/www.oxfam.de/files/130705_oxfam_mangostudie_englisch_web_0.pdf, access 23 January 2014, p. 13.

⁴⁶ *Ibid*, p. 40.

⁴⁷ *Ibid*.

⁴⁸ International Labour Organisation, Convention No. 184 on Safety and Health in Agriculture, 20 September 2003. Digital Version: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312329 access: 23 January 2014.

Although the possible accumulation of hours of work is recognised as valid in Law No. 27360, the type of contract established in the agriculture regime not only allows long workdays, but also establishes the possibility of not recognising remuneration for this overtime when the weekly working hours do not exceed the 48 hours established by law, for work or service, which leads to a precarious labour system to the detriment of the workers' rights.

In the same way, the holiday regimes – both weekly as well as annual – are regulated by Law No. 713, which reinforces the legislation on remunerated rest days of workers in the private sector⁴⁹. This legislation stipulates that workers in the private sector have the right to 30 calendar days of holiday for each year they have worked⁵⁰.

However, the law that regulates the labour regime in the agriculture sector stipulates that the workers' annual rest period is 15 calendar days for each year worked, that is to say, half the time given to workers in the normal regime. To this is added the fact that the majority of contracts in the sector are temporary and very few workers are able to accumulate a full year of work which would give them the right to enjoy holidays. In other words, the regime permits long working days and fewer rest periods for these workers.

The Observation Mission met up in Ica with several male and female workers whose work contracts – when they had one – were for only three months, one month or even days or weeks. Many of them never had the chance to exercise their rights regarding social security, holidays or others. This is largely due to the irregular or inconsistent way – or the pure and simple omission – in which hired workers are registered in the registries of the authority in charge. The brevity – sometimes extreme – of the work contracts permits the employer to evade labour obligations and/or deprives the worker of the opportunity to exercise his or her rights.

On the other hand, the Regional Labour Office informed the Observation Mission about the regulated existence of businesses that offered third-party services but not of the classic informal recruiters (a person that informally recruits or hires workers for another person in exchange for payment or commission on the part of the worker or the employer), which are prohibited. Service companies (or "Services") are hired to carry out a specific job or task and provide the necessary work tools. Through the labour exchange promoted by the Office, "local leaders" have been identified that are responsible for hiring and looking for other workers for the farms or companies when the demand arises. It is known that there are informal recruiters in spite of being prohibited. The complaints against the system of informal recruiters are investigated but often without much success as the victims themselves prefer not to provide the names or other information of the supposed informal recruiter. There are promoters that help recruit workers (and receive a salary for doing so), but they should not form part of the work contract itself or receive any benefits.

Safety and health at work

Article 7 of the *International Covenant on Economic, Social and Cultural Rights* also recognises the right "to the enjoyment of just and favourable conditions of work which ensure, in particular: [...] b) Safe and healthy working conditions". Likewise, Article 7 of the Protocol of San Salvador in the area of *Economic, Social and Cultural*

⁴⁹ Legislative Decree No. 713, Consolidation of legislation on remunerated rests of workers subject to the labour regime in the private sector, 7 November 1991. Digital Version (Spanish): <http://www.mintra.gob.pe/contenidos/archivos/prodlab/D.Leg.%20713%20-%2008-11-91.pdf>, access: 29 January 2014.

⁵⁰ *Ibid.* Art. 10

Rights also ratified by Peru, establishes the obligation to guarantee safety and hygiene at work.

Law No. 29783 on Safety and Health at Work promotes a culture of prevention of **labour** risks in all the economic and service sectors at a national level. The law recognises the employers' duty of prevention and the supervisory role of the State. Likewise, it recognises the obligations of the workers, their trade unions and the employers to create opportunities for social dialogue to promote compliance with these standards.

Law No. 29783 establishes the basic standards, which implies that employers can improve the conditions specified in the law at any time and by their own accord. The law also specifies that the Ministry of Labour and Promotion of Employment should supervise the measures adopted for the compliance with these standards.

In addition, Article 21 establishes the responsibilities of the employer in the creation of measures for the protection and prevention of **labour** risks, which include mechanisms to remove risks in their origination or transmission; the adoption of technical and administrative measures to control dangers and risks; progressively replace procedures, techniques, means, substances or dangerous products by others which are less risky for the workers or do not pose any danger at all; and facilitate protection equipment as a last resort.

Article 49 also establishes that one of the employer's obligations entails ensuring that medical examinations are carried out on workers before, during and at the end of the employment relationship, in accordance with the risks of the job.

The Observation Mission was able to meet up in Ica with health and labour authorities including officials from the regional health and labour offices, who were willing to provide information. From these meetings it is clear that the authorities have known about a number of situations and incidents that affect the workers' health and safety on the agriculture farms in the region.

According to the authorities, standards have been established regarding public health and there are guarantees that occupational health establishments are duly accredited. This endeavour started three years ago and this year there are 8 accredited establishments while in the first year there were only 4. The process of accreditation is based on the infrastructure, the support services and the healthcare protocols.

Regarding the issue of accidents at work, the health authority is inactive in its supervisory duties. Health establishments have the obligation to regularly report (each month) the number of patients seen because of work accidents. This applies to all workers, whatever their status may be. Companies provide 65% of these reports. Health centres and individual incidents account for the rest of the reports. The hospitals, which are under the direct authority of the Ministry of Health (MINSA) do not have the obligation to report accidents, which means they do not consistently do so.

In 2013, the occupational health authorities received 1800 reports of cases linked to occupational health: 40% were related to intoxication due to chlorinated and phosphorous products, that is, agrochemicals; 30% corresponded to different types of injuries and falls; and the rest involved cuts and wounds. A small percentage, 2 per cent, corresponded to public health problems: tuberculosis, hepatitis B and HIV. The occupational health committees established under the new law are helping in prevention-related work. As noticed by the Mission in the meetings with workers and organisations, the workers are not provided with basic information on the health risks entailed in agro-industry work. It was not possible to verify the provision of protection equipment nor the supervision of their quality and use.

The Observation Mission has noted with concern that in the agro-export industry a wide range of chemical products are used, many of them organochlorinates and/or organophosphorates, with a high rate of intoxication, according to information received in Ica from researchers on the subject. It was not possible to verify the existence of monitoring systems regarding the compliance with the permissible limits established, or the existence of a period of adequate safety following international standards for the workers' return to the fields.

Likewise, the Mission took note that the application of these products implies a degree of dispersal in the areas that surround the farms, caused by the winds, which gives reason to believe that other sectors of the population are affected.

In terms of supervision and control, the authorities make visits to a percentage of companies and verify that they have committees, a health professional and a safety and hygiene engineer. They also verify that the company has a manual of internal procedures, proceedings, records of accidents and contingency measures for accidents (measures taken so that the accident does not happen again – this is still not frequent).

Access to occupational insurance assistance, however, is also inadequate as a result of the implementation of Law No. 27360. The Law establishes that only 4% of a worker's wages must go towards the social security and health system. The Observation Mission was told that agro-export businesses only contribute 45 new soles for each worker (equivalent to approximately 10 euros). But the real cost of a priority regular medical check-up is 180 new soles, which would not be covered by the contribution of the agro-export businesses. This situation has a perverse effect on other businesses in other industrial sectors which used to contribute greater amounts to the occupational health establishments. These other companies now tend to contribute smaller amounts.

The Regional Health Office reported that they carry out palliative measures, such as, for example, reaching an agreement with businesses or employers that use insecticide/pest-control chemical products to prioritise certain exams – the most important for this type of labour activity – every 90 days. Plant workers, not directly involved in the application of agrochemical products, receive an annual check-up. In this way, the best use is made of the agro-exporters' small contribution to the system.

In this context, some workers remarked that although medical exams are carried out, especially blood tests, they do not receive the results nor are they told about their health status⁵¹. The authorities do not act in other cases of complaints. The Mission received information about a case in which workers that had been intoxicated due to the use of agro-chemicals were seen at a health centre in Santiago Santa Margarita, which apparently is located inside one of the farms. In order to gain access to it the workers had to pass through a guard post set up by the farm owners.

The Observation Mission also received information about other sectors, such as mining or civil construction, where there are problems regarding accident prevention at work. The Shougan Hierro Perú S.A. mine, owned by a Chinese corporation (Shougang Corporation), is particularly notorious as supervising and monitoring authorities are not allowed access to the company premises and nearly always have to request the assistance of the Prosecutor or local authority in order to enter. Due to

⁵¹ Gamero Requena, Julio, "Situación económica y laboral de los trabajadores del complejo de la palma aceitera en el Perú", Red Andina de Comunicación en la Agroindustria (COMUNICANDES), 22 October 2011. Digital Version (Spanish): http://comunicandes.org/pdf/111022%20Informe_estudio%20palma%20aceitera%20Peru_Gamero.pdf, access: 29 January 2014.

this, the accidents in this mine are only rarely known about. An indirect assessment is made. Thus, for example, the increasing number of cases of progressive loss of hearing may be related to working conditions with machines without proper protection. In addition to this, a third of mining activities are informal, which makes supervision difficult. The situation is similar in civil construction. There is no access to civil construction works and many of these ventures are informal, or are in the hands of artisans. The health system sees 50% of civil construction workers' consultations, where there is an increase in silicosis, and due to the use of prefabricated materials (i.e. drywall) in inappropriate conditions.

It is estimated that there are approximately 600 companies dedicated to the agro-export business, but some of them are only producers or packing companies, or process the product or commercialise it. Only 5 or 8% of the companies have operations in all these sectors of the production chain. Coincidentally, the greatest number of accidents reported to the authorities occurs in 10 of these large companies in the agro-export sector.

The major failures in the occupational health system go hand in hand with the workers' negligence or fear and the result is that many pregnant women work without undergoing medical check-ups. Some women hide their pregnancy because they need to work and in order not to be dismissed. This situation affects not only the health of such women but also that of the foetuses. The same thing happens with diseases such as tuberculosis.

The health authority does not apply sanctions after visiting the farms. After the intervention they can draw up a report for the prosecutor's office, attaching proceedings and recommendations. The supervisory process takes place in several stages: after the first visit, a second one is scheduled within 8 days and then another within 30 days. The Mission was told that fewer than half the companies and farms follow the health authorities' recommendations.

Remunerations and indemnity for sudden dismissal

Article 7 of the *International Covenant on Economic, Social and Cultural Rights* also recognises the right to "Remuneration which provides all workers, as a minimum, with: i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; [...]".

Law No. 27360 creates disparities between the monthly remuneration received by workers in the agriculture sector and those subject to the common labour regime. These differences are due to the so-called consolidated agriculture remuneration⁵², which includes daily remuneration of not less than 29.26 new soles⁵³, (on the condition that more than an average of 4 hours a day are spent on work), employee severance indemnities and annual bonuses (extraordinary wages) for the country's national holidays and Christmas.

⁵² Gamero Requena, Julio, "Derechos laborales y empleo en la agro-exportación", Red Peruana por una Globalización con Equidad (RedGE) y Centro Peruano de Estudios Sociales (CEPES), 2012, p. 16. Digital Version (Spanish):

http://www.redge.org.pe/sites/default/files/estudio_derechos%20laborales_Gamero.pdf, access: 28 January 2014.

⁵³ Gamero and Echevarría, *Op. Cit.*, footnote 9, p. 18, Table No. 3.

In the general regime, the minimum remuneration stipulated by Supreme Decree No. 007-2012-TR⁵⁴ is 750 new soles plus family allowances, annual bonuses and employee severance indemnities. In May 2012, the difference between the minimum agriculture remuneration and the remuneration in the general regime was 2,218.70 new soles a year.⁵⁵

In the case of the indemnities established in the law with respect to sudden dismissal, Law No. 27360 stipulates that employers have to pay 15 days' remuneration per year worked, as long as it does not exceed 180 days of remuneration. In the case of the general regime, arbitrary dismissal is regulated by Article 38 of Legislative Decree No. 728, which establishes the payment of 45 days' remuneration per year worked, with a maximum of 540 monthly remunerations.

The Observation Mission received several testimonies of workers and leaders regarding cases of dismissal or harassment for trade union activities. Apparently some workers had been dismissed or harassed for attempting to form a trade union or organise meetings. The dismissal decisions had been presented to the labour and judicial authorities. However, in some cases judicial orders for reinstatement have not been executed or harassment has continued through the allocation of more difficult tasks during unsuitable schedules or in adverse conditions.

For example, the Mission was informed that the company IQF del Perú S.A. had dismissed unionised workers. The Regional Labour Office acted to solve the case and carried out an inspection. In all its actions, the inspection has to zealously respect the procedural rules so as not to risk calls for annulment. This factor, together with the small number of inspectors and the lack of economic resources means that the actions are not as frequent as they should be or that some may be liable to annulment due to procedural flaws. All the decisions taken by the administrative authority have to state the reasons on which they are based.

In this way the difference established in the agricultural regime has a negative impact on the workers enjoyment of the right to fair remuneration and protection against sudden dismissal.

Workers' access to social security and the right to health

Article 9 of the *International Covenant on Economic, Social and Cultural Rights* recognises the right of everyone "to social security, including social insurance". General Comment No. 19 of the Committee on Economic, Social and Cultural Rights has indicated that this right includes the right "not to be subject to arbitrary and unreasonable restrictions of existing social security coverage, [...] as well as the right to equal enjoyment of adequate protection from social risks and contingencies"⁵⁶. The Committee also indicates that the social security system should provide coverage for: health care, sickness, old age, unemployment, employment injury, employment benefits, family and child support, maternity, disability and survivors and orphans⁵⁷. Steps must be taken by States parties to the maximum of their available resources to ensure that the social security systems cover workers inadequately protected by social security, including part-time workers or casual workers⁵⁸.

⁵⁴ Supreme Decree No. 007-2012-TR, Increases Minimum Remuneration of workers subject to the labour regime of the private sector as from 1 June 2012, 17 May 2012. Digital Version (Spanish): http://www.drtpeica.gob.pe/documentos/D_S_007_2012.pdf, access: 29 January 2014.

⁵⁵ Gamero and Echevarría, *Op. Cit.*, footnote 9, p. 35, Table No. 5.

⁵⁶ "General Comment N° 19, The right to social security (article 9)", E/C.12/GC/19, para. 9

⁵⁷ *Ibid.* paras. 12 to 21.

⁵⁸ *Ibid.* para. 33.

The health system applicable in the case of workers in the agro-export sector is governed by Article 9 of Law No. 27360. It is important to indicate that this law reduces the employer's monthly contribution to 4% of each worker's monthly remuneration. In the case of the common regime, social security is regulated by Law No. 26790⁵⁹, which establishes that employers must contribute 9% of the monthly remuneration to the social security system.

The fact that employers contribute less to the health system decreases the overall remuneration of workers in the agriculture sector and also restricts workers' access to the health system. According to the above-mentioned law, workers can join the health system once they have worked for the same employer for 3 consecutive months or 4 non-consecutive months within a 12-month period. Further, in the agriculture sector, affiliation to social security is not compulsory but optional for the workers.

Taking into account the intermittent character of the contracts awarded in the sector and the very nature of agricultural work, these requirements are difficult to fulfil as the contracts are often for less than 3 consecutive months, or the employer avoids hiring the same workers for more than 4 months in the same area of work in any one year. Thus, for example, it has been reported that in mango production, contracts during the growing season are not for more than 3 months⁶⁰. Likewise, in the case of the cultivation of palms, contracts are for 3 to 4 months⁶¹. The situation is similar in asparagus cultivation, in which temporary employment is for 6 months or less, and in general the contracts are not for longer than 3 months, which represents an obstacle to access the health and social security system⁶².

It must also be taken into consideration that affiliation to social security is optional for agro-industry workers and not compulsory as it is in the other private sector activities. Affiliation therefore to a large extent depends on the workers' awareness and decision. To this must be added the contribution the worker has to make, which reduces his/her already low remuneration. This means that sometimes workers decide not to affiliate to the social security system and avoid having to pay the contribution. However, several workers have stated that these contributions are deducted from their salaries although they cannot make use of the benefit because they have short-term labour contracts⁶³.

The fact that the social security system lacks adequate coverage is particularly serious if one considers that the long working days, the weather conditions, the inadequate working postures, the continuous exposure to pesticides and other agrochemicals without the use of proper protection, among other factors, affect the health of the workers in the agro-export sector⁶⁴.

Within this framework, a joint press release of the International Labour Organisation and the World Health Organisation published in 2005⁶⁵, presents the serious situation of agricultural workers in Peru. This press release indicates that of the 1,565 fatal accidents that occur annually in Peru, 744 correspond to agriculture, that is, approximately 50 per cent of the full number. According to the ILO, each year 170,000 workers of the agriculture sector die in the world due to accidents as a result

⁵⁹ Law No. 26790, Law for the Modernization of Social Security in Health, 15 May 1997. Digital Version (Spanish): [ftp://ftp.minsa.gob.pe/intranet/leyes/L-26790_LMSS.pdf](http://ftp.minsa.gob.pe/intranet/leyes/L-26790_LMSS.pdf), access: 29 January 2014.

⁶⁰ Oxfam, *op. Cit.*, footnote 45, p. 10.

⁶¹ Gamero, Julio *Op. Cit.*, footnote 51, p. 29.

⁶² ISAT/OXFAM, *Op. Cit.*, footnote 28, p. 6.

⁶³ *Ibid.* p. 21.

⁶⁴ *Ibid.*, p. 6.

⁶⁵ *Ibid.* P. 24, ILO/WHO Press release, "Number of Work related Accidents and Illnesses Continues to Increase", 28 April 2005.

of handling machinery or intoxication from pesticides or other chemical products used in agriculture⁶⁶.

In fact, in 2012 and 2013, workers in agricultural businesses suffered incidents of intoxication on a massive scale due to exposure to the insecticides and herbicides used in the fields. For example, it was reported that on 6th July 2013, 34 workers from the Bustamante farm, located in the district of Pachacutec, in Ica, were intoxicated on inhaling methidation, an organophosphate that had recently been used for fumigation in the area where the workers were supposed to do their jobs⁶⁷.

In the same region of Ica, in 2012 two incidents of intoxication due to agro-industry chemicals were reported⁶⁸. On 20th September 2012, 12 workers at Beta farm, located in the district of Santiago, Ica, were intoxicated after inhaling insecticides that had been dispersed the previous day in the open field where they worked; and on 16th October the same year, 394 workers on the same farm were also intoxicated due to the inhalation of insecticides. However, in this case, Beta company did not take responsibility for the incident and alleged that the product had been dispersed on the premises of IQF Company, next to Beta.

The workers exposed to these types of risks are governed by the law for the Promotion of the Agriculture Sector and therefore many do not have access to the public health system. Similarly, the agriculture sector is not included among the high-risk activities under the responsibility of the Centre for Risk Prevention at Work, which means that this institution cannot carry out inspections on the work situation of the labourers⁶⁹.

The Regional Work Director indicated that many companies obstruct the inspection work carried out by the Ministry of Labour, which impedes the proper functioning of the safety and health protocol at work and puts at risk the health of agro-export workers as they are exposed to the use of insecticides, pesticides and other chemical products⁷⁰.

Conditions of women workers

The growth of export agriculture in Peru, and particularly in Ica, has encouraged the incorporation of an increasing number of women into the labour market. It is said that the agro-export workforce is strongly feminised. A large number of these women are migrants from the Peruvian highlands or rain-forest. The Observation Mission met up with some of them at their homes or at meetings.

Female labour force is especially required at harvest time, during which it represents between 50 and 55% of the labour force on the farms. The reason for this is that women are skilled with their hands, which are finer and they pay more attention to detail at work. Male labour, on the other hand, prevails during planting time when the work calls for greater strength and resistance. The predominance of a female labour force also occurs in different sectors or lines of activity within each company. In the factories, the work of selection and storing is normally given to women. No significant

⁶⁶ *Ibid.*

⁶⁷ El Comercio, Perú, "Ica: más de 40 trabajadores de un fundo se intoxicaron con insecticida", 6 July 2013. Digital Version (Spanish): <http://elcomercio.pe/peru/lima/ica-mas-40-trabajadores-fundo-se-intoxicaron-insecticida-noticia-1600263>, access: 29 January 2014.

⁶⁸ Human Rights Commission of Ica (CODEHICA), "El caso BETA", 2012. Digital Version (Spanish): <http://www.codehica.org.pe/actualidad/el-caso-beta>, access: 29 January 2014.

⁶⁹ ISAT/OXFAM, Op. Cit., footnote 28, p. 7.

⁷⁰ Human Rights Commission of Ica (CODEHICA), "Empresas agro exportadoras que obstruyan inspección laboral deben ser sancionadas", 7 August 2013. Digital Version (Spanish): <http://www.codehica.org.pe/destacadas/video-empresas-agro-exportadoras-que-obstruyan-inspeccion-laboral-deben-ser-sancionadas>, access: 30 January 2014.

differences have been found between the wages of men and women, but greater negative impacts can be seen on the health of women as a result of the working conditions.

The Mission received information regarding cases of women that work without a contract, others that have been recruited by intermediaries (for example in Los Alamos, which the Mission was able to visit). A representative of the association "Casas de la Salud" (Health Houses)⁷¹ presented to the Mission the particular case of migrant women workers, who come from far away to seek work and, due to lack of guidance, knowledge and social support, are subjected to situations of labour exploitation. Many women have problems with their eyes and lose their sight due to chronic illnesses, possibly as a result of work with onions and insecticides. This has not been investigated. The recurrence of urinary diseases in women due to rigid working schedules has also been observed. The study published by OXFAM and ISAT in 2005 on working conditions in the asparagus industry gives an account of the impacts and serious health risks to women as a result of the prevailing work methods and conditions. The study indicates that of the total number of women interviewed, a very high percentage (80% in the fields and 96% in the factories) complained of discomfort or pain in some part of the body during the year⁷². The study concludes that working conditions in the asparagus agro-industry are precarious. On the farms female workers do not have a contract, or a few have a temporary contract, and they do not have social security, a pension, prenatal or postnatal benefits, or employee severance indemnities. In the factories, although most of them have a temporary contract and social security, in practice the workers cannot benefit from social security as their contracts are not for a long enough period or the employer has not made the respective contributions⁷³.

The majority of women that work in the agro-export industry have children and family responsibilities even when not married as there is a large number of single mothers. Due to the long working days permitted by law – they often begin at 5am to go to the farm and return home between 6 and 7pm – many women with small children have to leave them in the care of other people. The Mission met up with several women, who, when they could not leave their young children at the municipal childcare centre or in the care of neighbours, had to leave them alone in the house, under the care of older brothers and sisters. This situation implies a serious risk for the health and safety of the young children, who spend long hours during the day without the protection or care of adults. Accidents have been known to occur to children in these circumstances. In other cases, some women decide to take their young children to work on the farm, where they are exposed to other types of dangers due to the lack of care.

The Mission received information regarding pregnant women continuing to work. They receive no medical check-ups because they hide their pregnancy or due to the lack of regular occupational health screenings. The exposure of pregnant women to hard work and the manipulation of agrochemical substances could be causing foetus malformation and especially, Down syndrome. Although, many of the people interviewed seem to establish this relation, the health authorities have not carried out studies on this matter. A study recently published in the United States would indicate that there is a relation between the use of insecticides and pesticides and autism⁷⁴.

⁷¹ The Health Houses Association "In Defence of Life" is a non-profit institution that works in the prevention and promotion of health among the population of Ica.

⁷² ISAT/OXFAM, Op. Cit. footnote 28, p. 28.

⁷³ *Ibid.* p. 54

⁷⁴ « Les pesticides pourraient avoir un lien avec la survenue de l'autisme », *Le Monde*, 23 juin 2014, http://www.lemonde.fr/planete/article/2014/06/23/les-pesticides-pourraient-avoir-un-lien-avec-la-survenue-de-l-autisme_4443252_3244.html

2.1.2 *Rights of children, education and child labour*

The *Convention on the Rights of the Child*, ratified by Peru in 1990, establishes the obligation of the State to provide assistance to the physically or mentally disabled child so that he/she may enjoy a full and decent life (Article 23) as well as the right of the child to the enjoyment of the highest attainable standard of health (Article 24); to benefit from social security (Article 26); to a standard of living adequate for the child's physical, mental, spiritual, moral and social development (Article 27); to education (Article 28); to rest and leisure, to engage in play and recreational activities appropriate to the age of the child (Article 31); and to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development (Articles 32 and 36).

In General Comment No. 16 on business activities and the rights of the child, the Committee of the Rights of the Child has emphasised the importance of State protection against possible abuses by private business actors against children or their parents. The Committee calls to mind that it is necessary for States to have adequate legal and institutional frameworks to respect, protect and fulfil children's rights, and to provide remedies in case of violations in the context of business activities and operations⁷⁵.

The Mission was able to interview groups of school-age children in Villacurí who do casual work in agriculture for export. Most of them stated that they work at the weekends and some do so during the school holidays. The main reason is the need to supplement family income and contribute towards the purchase of school materials, clothes and shoes. The Mission was told that adolescents, especially migrants from other parts of the country, are employed on several farms in the region.

The type of work children carry out varies depending on their age and gender. Many children do the same types of tasks as adults during harvest time but they do less work and for a shorter period of time. Some children told the Mission that they accompany their mothers to work and that to do so they have to get up very early and return home very late. For example, an 8-year-old boy said that to accompany his mother they had to leave the house at 4:30am. The children that accompanied their mothers also work. One of them said he "helped" his mother, that is to say, he didn't do a different or autonomous job, and for this he received a simple tip (of, for example, 5 new soles a day).

Other children go to the farms to work on their own. To do this they speak to the chief (engineer or foreman) or the person in charge of recruiting workers. Others pretend to be older by using the identity document of another child or of a young adult, or their more adult appearance simply convinces the foreman. Adolescents are allowed to work and are assigned the most difficult tasks. The remuneration children receive is lower than what an adult worker would receive. An adolescent of 17 told the Mission that he earned 200 new soles per working week, with work days that start at 6am and finish at 5 in the afternoon. The same boy said that he is in 5th grade primary at school. The Mission was later informed that this level of studies normally corresponds to 11-year-old children.

⁷⁵ Committee on the Rights of the Child, "General Comment N° 16 On State obligations regarding the impact of business on children's rights", CRC/C/GC/16, 17 April 2013, para. 4.

The working conditions for children that work are the same or worse than those for adults. Several child workers told the Mission that the work is difficult and generally requires them to be bending over, except for the grape harvest. Paprika harvest is difficult. Some children receive gloves – that are not their size – but prefer not to use them in order to work more quickly, injuring their hands. The children, like the adult workers are not given hats or other protection from the sun, which is usually very strong, and there is no drinking water available nor a canteen service for breakfast or lunch. The children say that “killing the asparagus” – the task of turning the base of the asparagus with a spade or hoe – is especially hard. The protection they receive and the social security coverage are non-existent. The accidents at work that occur to children and that were described to the Mission include one in which a cart broke a child’s foot and another in which a child vomited as a result of inhaling the strong smell of the plants immediately after fumigation. In no cases were the injured or ill children able to benefit from social security or proper medical care. The officials on the farm gave them some pills from the company’s first-aid kit.

The children that do not accompany their parents to work or do not themselves work in the fields stay at home with an older brother or sister or their grandmother, or alone. They go to school and come back home, where they eat whatever they find. One of the young girls that stays at home looking after her younger brother told the Mission that she cooks the food, and accompanies her younger brother to take the bus or lorry to school – which takes between 30 and 40 minutes to reach the educational centre. In other cases, mothers leave the food already cooked and the young boy or girl has to heat it and serve it.

The children interviewed in Villacurí told the Mission that the nearest school is a 15 or 20-minute bus ride away, which usually really takes more than 30 minutes. The school day finishes at midday or 1pm, allowing some children to seek work on the farms, which some of them do until 6 in the evening. Homework is done at night, if there is enough time and if the children still have some energy left.

In the context of children’s work, and to a certain extent, also in adults’ work, there are a number of racist or sexist abuses. This usually occurs against the young migrants from the highlands who go to work during the holiday period and also against young girls on the buses or lorries that take them to the farm, and also while they work in the field. For example, the foremen or chiefs often hurl insults or use denigrating expressions to refer to people who come from the highlands; and women are victims of harassment or unwelcome sexual advances at work or on the bus. Some women are treated better in certain aspects with the expectation that they have to return these favours.

The Regional Labour Office reported that the eradication of child labour is a priority and is carried out in conjunction with other ministries. They remarked that it is often the mothers that take the children to work because they have no other option due to the lack of alternative ways of looking after young children during the day, but at the same time they expose them to other risks.

The Regional Labour Office told us about the policy of applying sanctions on establishments where children are discovered working, which occurs infrequently. The companies used to disguise and/or hide the children when the labour inspector arrived. But now there is the obligation to register the worker through the internet within 24 hours of hiring or dismissing him or her. The inspector has the authority to check, requesting to see the national identity document of all the workers. Some workers refuse to show their documents out of fear of losing their job. The inspector can ask to see the work register, which the employer is under the obligation to keep, and compare it with the number of workers he sees on the premises.

However, the labourers who work on a daily basis or for a very short period would escape this system, as inspection visits are not made very often, and when they are made, the inspectors are frequently not allowed access to the workplaces and are not shown the documents they need. The task of inspection in the fields is also not very effective when large areas of land are involved.

The situation of children with special needs

The Observation Mission is extremely concerned about the lack of available education services for the children and infants of working mothers. The evidence gathered indicates that there is an enormous shortage of education services, especially for children with autism or Down syndrome. The working mother also often has to take care of these children herself at home after completing a long day of work. Some mothers have stopped working to attend to their children with special needs, which deprives them of an income which is often essential. The younger members of the family have to replace the mother as providers of the family income.

2.1.3 Right to information

The Observation Mission received information about workers and trade union leaders whose employers confiscate their mobile phones and leave them without any means of communication with the outside world during the working day. The workers indicated that in some cases they have not been allowed to use the phone in the office, even in the case of an emergency. This practice not only makes the work of trade union members difficult, but also cuts off all communication between working mothers and their children who may have stayed at home.

2.1.4 The role of labour inspection and the judicial protection of rights

According to international human rights law, the Peruvian State has the obligation to respect, protect and comply with human rights, including economic and social rights. To this end, the State must use all appropriate means including the adoption of legislative, institutional and financial measures⁷⁶.

The Labour Inspection Office, attached to the Ministry of Labour, is in charge of monitoring and enforcing compliance with labour regulations. With the stated aim to improve this duty, provide a better service to the worker and adopt uniform and standardised criteria, the National Superintendence for Labour Fiscalisation – SUNAFIL has recently been created (Law No. 29981)⁷⁷. Its functions include supervising and monitoring compliance with labour regulations, the imposition of sanctions for non-compliance and the coercive execution of these sanctions. SUNAFIL is the main body of the system of labour inspection in Peru.

According to the explanation that the Regional Labour Office gave the Mission, the work of enforcement is a complicated process, in which several steps are involved: actions are carried out every 15 days, but there is only one labour inspector for the whole region and 4 or 5 assistant inspectors. In the case of serious emergencies – such as for example, massive intoxication of workers – the Ministry of Labour sends experts from Lima. The 4 or 5 assistant inspectors are especially located in the provinces. Although they are Ministry of Labour staff and supervised from Lima, the

⁷⁶ “General Comment N° 3 (1990) The nature of State parties’ obligations _ (Article 2 of the International Covenant on Economic, Social and Cultural Rights)”.

⁷⁷ The law that creates the National Superintendence for Labour Fiscalisation (SUNAFIL), amends Law 28806, General Labour Inspection Law, and Law 27867, Organic Regional Governments Law, published in *El Peruano*, Legal Norms 486206, 15 January 2013.

regional authority has operational command over them. When the Observation Mission was visiting the Valley of Ica an agreement was being negotiated between the Regional Labour Office and the Ministry of Labour to leave the work of enforcement in the hands of the Regional Office until SUNAFIL is fully established.

Regarding the number of labour inspections, the Office reported that there is an annual operational plan and the statistics are sent monthly to the Ministry, which publishes them on the internet, broken down by regions. A quick review of the information published on the internet by the Ministry of Labour – General Labour Inspection Office shows information available only for 2007, 2008 and 2009. In more recent years, the number of inspections has increased but few fines have been imposed.

Inspections carried out and fines imposed in 2007, 2008 and 2009 respectively			
Inspections	1,940	1,896	1,805
Fines	63	160	92

Prepared by the author

Source: General Labour Inspection Office⁷⁸

The sanctioning of infringements is carried out through an administrative procedure, and they can be challenged in court through a contentious-administrative procedure, which usually takes a long time and reduces the effectiveness of the aim to sanction the infringements that have been detected. The most recent available statistics are for 2010, and in that year only two sanctions imposed on companies in the region were firm and consented (accepted)⁷⁹. The Regional Government has an office of coercive collection, but it has not been very effective as a result of which collections have begun to be carried out through an agreement with INFOCORP (a private banking system providing information on debtors and defaulters). Fines currently reach up to 1,200,000 new soles.

During the inspection process, a number of documents are requested and a week later a meeting is held for the employer to present them and the degree of compliance with the regulation is assessed. A sanction is imposed for each instance of non-compliance, and the total fine is based on the sum of all the occurrences of non-compliance. Such fines can be very difficult for a small company (of approximately 10 workers) to bear, for example, a small private school which could face a fine of 60,000 new soles.

In the case of complaints of dismissal of unionised workers, the Regional Office attempts to solve the case. It carries out on-site inspections respecting the procedural rules in force, to prevent the proceedings from being annulled. The proceedings are public and the reasoned decisions are published in Lima.

In order to decide on the number of inspections per year, a sample is created related to the number of companies by size: there are some 350 companies which are requested to give monthly information. It is estimated that, at a regional level, there

⁷⁸ <http://www.mintra.gob.pe/archivos/file/dnit>

⁷⁹ General Labour Inspection Office, http://www.mintra.gob.pe/archivos/file/dnit/actuaciones_inspectivas/resultado_inspecciones_trabajo_28_01_2010.pdf (access 19 September 2014)

are more than 3,000 companies, which are smaller. Only those that have more than 10 workers form part of the sample.

The inspectors automatically impose a fine on the companies that obstruct or impede them from entering. If the offense is repeated and it is a big company, the fine can be very severe and reach hundreds of thousands of new soles. The employer often blames the guard, the security service or others for the lack of cooperation, but this does not impede the sanction from being applied. The cases of obstruction of fiscalising actions are also sanctioned. Some offenses can be remedied but others cannot. For example, if the worker has been out of the health insurance system for six months, although the omission is later rectified, the offense cannot be remedied (exposure to risk has already occurred) and is sanctioned.

There are very few inspectors at a national level and they have a heavy workload. Each one has almost 70 cases in the Ica Region. According to the rules, when an inspector starts a process he cannot be replaced or delegate his functions to another inspector. This means that sometimes the process is slowed down when the principal inspector cannot continue for some reason. In view of this, two inspectors are now assigned to each inspection; to avoid the process from coming to a standstill when one of them cannot carry on.

The judicial protection of labour rights

An independent and impartial judiciary in accordance with international standards on the matter is a key component in the system for the protection of human rights. The guarantee of legal protection of the rights is enshrined in Articles 2 (3) and 14 of the *International Covenant on Civil and Political rights* and Articles 8 and 25 of the *American Convention on Human Rights*.

Unfortunately, the Observation Mission was not able to visit the Judicial Power nor interview judges on labour matters as during its visit the Judicial Power workers were on strike and the offices were closed. This meant that the Mission could not obtain direct information on the capacity and the work performed by the judges and magistrates. It did, however, have the opportunity to speak to one of the members of the Superior Court of Ica.

However, based on the information collected by CODEH-Ica (see table below), it can be deduced that the capacity of the Judicial Power in labour matters is limited in relation to the potential demand of at least 100,000 workers in the industry. It has also been noted that the immense majority of cases are related to arbitrary dismissals, most probably due to trade union activities. By contrast, it is important to note that few cases related to direct anti-union harassment. The workers possibly prefer to complain directly of arbitrary dismissal as a legal strategy.

Labour courts and cases: Since their establishment until 30th June 2014

1	No. of labour courts in the Ica Region	8	
2	No. of labour judges in the Ica Region	8	
3	No. of cases related to agro-export workers that have been presented	For arbitrary dismissal	114
		For anti-union harassment	4
		For discrimination	2
		Others (specify)	-
4	No. of cases related to agro-export workers that have been Resolved IN FAVOUR of the workers	For arbitrary dismissal	62
		For anti-union harassment	2
		For discrimination	1
		Others (specify)	-
5	No. of cases related to agro-export workers that have been Resolved AGAINST the workers	For arbitrary dismissal	27
		For anti-union harassment	1
		For discrimination	
		Others (specify)	

Source: CODEH-Ica

2.2 The human rights of the population, women and children

The conditions in which the agro-export industry is developed also affect a number of human rights of the population in Ica. As the Observation Mission is mainly focused on the principal social rights in the industry, this section will refer solely to two aspects that seem particularly serious and deserve closer attention.

Right to water

The human right to water is the right of everyone to have sufficient, clean, acceptable, accessible and affordable water for personal and domestic use⁸⁰. The right to water is implicitly protected in the right to an adequate standard of living and in the right to enjoy the highest attainable standard of health, both recognised in the *International Covenant on Economic, Social and Cultural Rights* (Articles 11 and 12). As with all rights, the right to water requires the State to assure the quality and accessibility of water for everyone.

The Observation Mission received information on the intensive use of underground water by companies dedicated to agro-export. It is said that many companies or farms have illegally made wells for extracting water. This appears to be causing a general shortage of water, which especially affects some geographical sectors, and the deterioration of the water reserves in the region. This information is corroborated by a study carried out by the Globalisation and Equity Network⁸¹.

The new technologies and the prevailing irrigation practices have contributed to the creation of this problem. Drip irrigation, practised on many asparagus-producing farms in particular, and the excavation of an increasing number of wells are the main factors in the over-exploitation of the aquifer and the resulting shortage of water for human consumption. Fresh asparagus for export in particular, consumes

⁸⁰General Comment No. 15, The right to water (Articles 11 and 12 of the International covenant on Economic, Social and Cultural Rights)".

⁸¹ Cancino, Ignacio, "La agroexportación y el acceso al agua para consumo humano en Ica", Globalización y Equidad, Lima, undated.

approximately 35 per cent of the water in the Valley of Ica⁸². Although the shortage of water affects everyone, the larger companies have the capacity to drill more wells, even though they do not register them, to buy the rights to existing wells, or simply “relocate” licences for wells from one place to another. The national and local water authorities can do little to deal with this practice, which some consider illegal. The few inspectors of the local water authority are not able to do an effective job.

According to the official 2007 census figures, while most of the urban sector has access to water services, the contrary is true in the rural sector.

Daily water service			
Area	Service	No service	Total
Urban	82.76%	17.24%	100.00%
Rural	19.13%	80.87%	100.00%
TOTAL	79.77%	20.23%	100.00%

Source: Globalisation with Equity

However, a more detailed analysis shows that if the distribution per district, the number of houses and the number of hours of water service are taken into account, the outlook is far more alarming. Thus, in the majority of houses in the 12 districts that have water every day, the supply is restricted to three hours or less a day. The situation is worse in the houses that do not receive water every day (1 out of every 5 houses in Ica). In this case, they only have water three days a week and the days they do have water, it is only for three hours or less, often at inappropriate times (such as midnight or dawn). Although these figures are from the 2007 census, the situation in 2011 does not seem to have changed significantly⁸³.

The Observation Mission considers that the availability and suitability of water for broad sectors of the population of Ica, especially for the poor rural sector, shows an important and alarming shortage that puts at risk the minimum requirements, which must be assured. The Mission did not have access to updated information and analyses for 2014, but it was able to verify in several places, especially the shanty towns it visited, that the few water points that exist are closed during most of the day.

Right to health and a healthy environment

The right to enjoy the highest attainable standard of health is also enshrined in the *International Covenant on Economic, Social and Cultural Rights* (Article 12). The Mission likewise received information about the intensive use of agrochemicals to deal with insects and plagues. In many cases this intensive use would be at unsuitable times or very close to population centres where the whole population may be exposed to inhaling these products. In fact, the Mission visited some of these populated areas which are very close to cultivation areas. Some of the inhabitants said that they suffered from headaches and vomited on the days when agrochemicals were applied in the neighbouring farms.

In a more general way, it is evident that the low contributions agro-export businesses make to the health system leads to significant pressure on its resources, its

⁸² *Ibid*, p. 20. According to information provided in 1985 there were 1059 registered wells, while in 2007 there were 1550: that is, a 46 % increase.

⁸³ *Ibid*. p. 27-28.

effectiveness and availability for the rest of the population. Although the Mission does not have figures to support this, it can be deduced that to a large extent, the public health system finances health costs to which the companies should contribute but do not do so. In addition to this, there is a greater incidence of certain diseases such as skin cancer which cannot be properly attended to.

3. Conclusions and recommendations

3. 1. Conclusions

Peru is experiencing one of the highest rates of economic growth in the Latin American region. This growth is partly due to the dynamism of certain sectors of the economy which, like agro-export, have made significant investments and brought about transformations. However, after its field visit, the Observation Mission was able to confirm much of the information available in studies carried out by third parties or in versions provided by civil society groups regarding the situation of social rights and other human rights in the Ica Region. The Mission also has evidence that in respect of some key issues, such as, for example, occupational healthcare, social security and access to water, the situation discovered on the ground seems to be much more serious than was expected and needs to be dealt with urgently.

The working conditions in agriculture for export in the Valley of Ica are deplorable and clearly constitute an example of precarious work which is not in accordance with international standards regarding the rights of workers and other social rights. Many of these situations can represent serious human rights violations. The Mission reached this conclusion after having listened to a large number of male and female workers, children, trade union leaders, labour experts, state officials and others, and after having analysed the information that it was provided with or that it could collect independently.

For the Mission it is evident that the aim of the regime established by Law No. 27360, Law for the Promotion of the Agriculture Sector, is to encourage investment and promote the growth of the agro-export economic activity. To this end, it establishes a legal labour regime that reduces the levels of protection in comparison with those enjoyed by workers subject to the general labour regime in Peru. According to the Constitutional Tribunal of Peru, Law No. 27360 is necessary in view of the particular and special nature of the agriculture sector in which “contracts are temporary par excellence, even seasonal; that it is not common for a labourer to work for the same employer for more than one consecutive year and that mobility is important.”⁸⁴ That is to say, if the agro-export activity is to develop, it is necessary to establish an exceptional labour regime that may be suited to the reality of agriculture, even at the expense of prejudicing the workers’ rights.

In this way, the law is used not to protect the rights of the workers against the prevailing practices and the realities of the economic movement, but to subject the worker to the dynamic and logic of the economy of agriculture for export. With this, the authorities have lost sight of the fundamental objective of labour legislation and the key role that the State must play at a national level in the implementation of international labour and human rights standards.

In order to carry out a proper assessment of this labour regime in terms of non-discrimination and equality, the Mission considers that the legislative measure in question has a clear direct and indirect effect: to impede agro-export workers from the exercise and enjoyment of their labour, social and human rights in general. There is little unionisation in this line of activity and there is evidence of severe harassment of unionised workers or of those that attempt to join a union; arbitrary dismissals; a lack of, or alarming deficiency in, access to occupational healthcare and the benefits of social security, among others. A measure with these effects cannot be recognised as either necessary or proportional.

⁸⁴ Constitutional Tribunal Ruling, Op. Cit. footnote 18, para. 78.

Nevertheless, these conclusions should be taken with caution due to the chronic lack of studies and statistics in all the areas that may permit a more detailed and exact assessment. It is possible that the relevant information exists, but the authorities may not have been able to or wanted to share it with the Mission. In any case, the conclusions are merited in the circumstances and in the light of the information made available to the Mission. Methodologically, these conclusions are supported by a strong correlation between the testimonies received and the analyses and publications the Mission knew about beforehand.

In view of all this, efforts should be made towards the collection and systematisation of information about the workers, their working conditions and access to health insurance benefits. Likewise, analytical studies need to be made on the effects of the prevailing practices in the sector on the health and welfare of the workers and their families as well as the general population. The Mission is particularly concerned that the lack of data and information may hide an even more serious reality than that which it was able to observe during its visit.

With respect to the particular aim of this report, with a special focus on the non-state business actors, it must be concluded that the companies in the sector in general, be they large or small, lack a true understanding of corporate social responsibility (CSR) and human rights. The Mission has not been able to observe or gather information on any business policy or mechanism for the prevention of risks that affect workers' rights, or on mitigation or remedy plans. The principal local actors in human rights policy and CSR do not seem to have a full understanding of the issue or concrete plans in this regard either.

Concerning the social rights of the general population, the Mission must also conclude that at least in relation to water, sanitation, health and the environment, there are significant risks due to the over-exploitation of the underground aquifer, the widespread use of agrochemicals and the lack of prevention and protection of the population from these risks.

3.2. Recommendations

Taking into account the considerations put forward in this report, the Mission recommends the following to the Peruvian State, the companies dedicated to agro-export and other local and international actors:

To the Peruvian State (including the Executive, Legislative and Judicial Powers)

- The repeal or amendment of Law No. 27360 and the re-establishment of the general labour regime in the agriculture sector through a law passed by the Congress of the Republic. Currently, there are opinions on proposals that only await the final decision in Congress, which must act without further delay.
- The adoption of legislative measures and other measures aimed at promoting investment in the agriculture for export sector, including tax incentives, but without detriment to the basic rights of the workers.
- The prompt establishment and functioning of the National Superintendence for Labour Fiscalisation - SUNAFIL and its effective fiscalising work in the Region of Ica and other regions in the north of Peru, where the agro-export industry is important. The number of inspectors must be enough to cover the needs for fiscalisation in a region where tens of thousands of labourers work.

- In the meantime, while SUNAFIL is organised and starts functioning, an agreement must be reached between SUNAFIL and the Regional Labour Office so that work inspection activities do not stop, but rather, are increased.
- It is necessary to establish, either attached to SUNAFIL or the Regional Labour Offices, suitable technical teams that are appropriately equipped with the technical instruments necessary to verify health conditions, including prevention, on the farms. They must have the competence to carry out measurements of concentrations of agrochemicals in the environment, taking as reference the permissible levels in accordance with internationally recognised standards, the timely provision of prevention instruments and the provision of drinking water to the workers during their work.
- These teams must be given authority to access workplaces, even in the face of opposition from business owners' representatives, and be able to count on, if necessary in order to achieve their task, the support of the public security forces. In all cases, they should respect due process and make note of the declarations made by the companies' representatives.
- The adoption of more severe measures, including far more effective and expeditious complaint procedures, in the face of anti-union actions and situations. Due to the insidious nature in which anti-union actions take place in this context, the mechanisms for detection or early warning should be renewed.
- The dedication of special resources and efforts to an adequate gathering and maintenance of information on work contracts as well as renewed monitoring of the employer's obligation to inform the competent authority of all the information related to the contract including its duration and conditions, among others.
- The dedication of adequate resources and the adoption of measures to carry out health studies of the population of Ica, particularly in relation to the possible impact that the contamination of the water and the air with agrochemicals could be having on the health of the population.
- A study on the situation and tendencies of occupational diseases and occupational healthcare in the Region of Ica.
- Adopt legal regulations that make it compulsory for companies to guarantee that female workers have childcare facilities for infants and schools for school-age children, at least during their primary school years. These childcare facilities and schools must be suitably protected from the effects of agrochemicals in the neighbouring areas.
- Introduce a legal regulation, or clarify its application if one already exists, that establishes the obligation to affiliate workers to the social security system, regardless of the period of time they have worked and as from the first day of their contract, in any form (written, verbal, indefinite-term, fixed-term or for the duration of the work or task). Likewise, this reform must specify the accumulation of contributions made at any time

Companies

- The adoption of internal policies and procedures geared at assuring that the company's operations respect human rights, including the labour rights of the workers in accordance with international standards.

- The publication or socialisation on the internet of the internal measures adopted to remedy serious failures to comply with international standards for the protection of workers.
- Likewise, the Mission urges companies to develop programmes to improve the standard of living in the communities that the majority of workers come from, and concentrate particularly on housing and essential public services.

Trade unions and civil society

- It is recommended that trade union federations and confederations make a greater effort to promote unrestricted unionisation of the workers and provide training and advice to trade union leaders, in a democratic spirit that is open to other actors. A more active coordination with international organisations and trade unions is also recommended in order to promote more effective action.
- Likewise, it is recommended that trade union organisations, particularly the Federations and Confederations, as well as Human Rights NGOs make use of the bodies established by International Systems for Protecting Human Rights.

In this sense, the following is specifically suggested:

- Present complaints to the Administrative Council of the International Labour Office based on Article 24 of the Constitution of the International Labour Organisation, in relation to the violation of Conventions which Peru is Party to.
 - Request the Inter-American Commission on Human Rights to hold a thematic hearing on the situation of the infringement of the rights of the workers in the Agro-food and Agro-export Industries in Peru.
- Human rights NGOs as well as those dedicated to the study and promotion of development pay little attention to the problems related to workers' rights. It is important that more attention and resources be devoted to this issue.

International organisations

- The Mission recommends the European Union, as international organisation and trading partner of Peru, to take note of this report and its conclusions, and consider appropriate measures in order to ensure that the regulations and procedures, as well as the international commitments assumed by the EU on the issue of corporate social responsibility, are not infringed through the importation of agricultural products from Peru, produced in uncontrolled conditions which do not respect basic labour rights.
- The Mission recommends the International Labour Organisation to take note of the conclusions presented in this report and consider a discussion focused on how to improve respect for labour standards in the context of agriculture for export around the world.
- The Mission recommends that the States that have signed FTAs with Peru take note of the observations presented in this report as well as the conclusions in order to require the Peruvian Government to fulfil the international commitments undertaken by Peru and introduce the necessary regulations to ensure that the rights of the workers in the agro-industry are effectively protected and upheld.

Inter-American System

- It is recommended that the Inter-American Commission on Human Rights, the Rapporteurs on the Rights of Women and on the Rights of the Child, as well as the Unit on Economic, Social and Cultural Rights, pay due attention to this report and take the corresponding actions within the framework of their mandates.

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