

Final Statement of the specific instance with Glencore/Perubar S.A. and Central Única de Trabajadores del Perú (CUT).

- 1. Background**
- 2. Specific Instances – Arguments set forth by Central Unitaria de Trabajadores del Perú (Peru’s Central Workers Federation, CUT)**
- 3. PERUBAR S.A. arguments (PERUBAR)**
- 4. Peruvian National Contact Point (NCP) proceedings and scope of actions**
- 5. NCP’s considerations regarding the instance**
- 6. Conclusions**

1. Backgrounds

- 1.1. Since July 26, 2008, Peru is an adherent country of the Organisation for Economic Co-operation and Development’s (OECD) Declaration on International Investment and Multinational Enterprises and participates in the activities of OECD’s Investments Committee.
- 1.2. Pursuant to the agreement reached by PROINVERSION’s Steering Council on July 1 2009, Peru’s Private Investment Promotion Agency (PROINVERSION) was appointed as National Contact Point for the OECD in Peru (Peru NCP) in order to spread and implement the OECD Guidelines for Multinational Enterprises.
- 1.3. On April 21, 2009, Central Unitaria de Trabajadores del Perú (CUT) filed a complaint for an alleged breach of OECD’s Guidelines for Multinational Enterprises by PERUBAR S.A. mining company (PERUBAR), a subsidiary of Swiss multinational enterprise GLENCORE MINERA A.G. (GLENCORE). Subsequently, the complaint was presented at a supplementary meeting between representatives of Peru’s NCP and CUT.
- 1.4. Report N° 368-2009-OAJ-AR, dated June 18, 2009, included a recommendation by PROINVERSION’s Legal Department to take into account the Implementation Procedures of the OECD Guidelines for Multinational Enterprises. Furthermore, to the extent there were certain issues pending adjudication both the administrative and judicial fora, it was advised to follow up the corresponding proceedings.
- 1.5. On June 30, 2009, through Official Letter N° 179-2009-DFPI/PROINVERSION, this decision was reported to CUT.
- 1.6. Nevertheless, Peru NCP met separately with both parties to examine more in depth details of the specific instance and establish an appropriate setting for further discussion with both parties. Subsequently, PERUBAR was requested to issue a document formally stating its position in this matter.

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- 1.7. On December 2, 2009, PERUBAR sent the requested documents setting forth its position on the alleged non-compliance reported by CUT.
- 1.8. By the end of 2009 and mid-2010, NCP Peru contacted via electronic mail the Swiss NCP (Ms. Anne Schick) in order to explain that Peru NCP was not in a position to stand as a parallel instance because when the specific instance was filed before PROINVERSION, the issue was subject to a court proceeding in the Peruvian Judiciary. Additionally, it was reported that despite such circumstances, Peru NCP had contacted both parties to explain the procedure to be followed and offered its good offices to facilitate a dialogue between the parties.
- 1.9. In Official Letter N° 58-2010-JTICI-DFPI/PROINVERSION, dated May 12, 2010, PERUBAR was requested to confirm its willingness to establish dialogue with CUT. PERUBAR answered that they were willing to dialogue at any of the individual conciliation and proceedings hearings scheduled during the court proceedings initiated against PERUBAR. This was reported to CUT by electronic mail on May 20, 2010.
- 1.10. On February 12, 2014, the Peru NCP received an electronic mail from CUT the first instance decision regarding the PERUBAR case,¹ with a decision favoring PERUBAR. Additionally, CUT mentioned that they considered this judgement could be revoked in higher instances. Due to this fact, they requested PROINVERSION, as the Peru NCP, to sponsor a meeting with PERUBAR to reach an amicable solution to the specific instance at hand.
- 1.11. On February 19, 2014, Peru NCP met CUT to clarify the latter's position.
- 1.12. On February 24, 2014, CUT sent a communication to Peru NCP reiterating its request to have Peru NCP mediate with PERUBAR and negotiate a final solution to the specific instance at hand.
- 1.13. In Official Letter N° 82-2014/PROINVERSION/DE, dated March 13, 2014, Peru NCP invited PERUBAR to a coordination meeting responding to CUT's request.
- 1.14. On March 20, 2014, a meeting was held with PERUBAR at which the latter refused to meet with CUT because they argued that it might damage their interests in the court proceedings underway. Afterwards, this reply was reported to CUT.
- 1.15. On March 26, 2014, PERUBAR sent information both in Spanish and English languages explaining their position with respect to the specific instance filed by CUT.

¹ We are aware of three dockets with claims filed against PERUBAR. The above adjudication appears in Docket N° 00091-2009-0-1801-JR-LA-01.

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1.16. On December 04, 2015, pursuant to Executive Directorate's Resolution N° 161-2015, PROINVERSION approved the Directive on Attention to Specific Instances Concerning the Implementation of the OECD Guidelines. It is worthwhile mentioning that, even though the initial and final communications received from the involved parties regarding this specific instance precede the abovementioned Directive, it was considered appropriate to close it following the procedures established in this Directive.

2. The Specific Instance. Arguments by Central Unitaria de Trabajadores del Perú – CUT

2.1 The lead notifier is Central Unitaria de Trabajadores del Perú – CUT) whose affiliates include the former workers of Arbemin S.A.C.; Canchanya Ingenieros S.R.Ltda., Contratistas Asociados Las Cumbres S.A.C. (Contractors) which provided their services at Rosaura Mining Unit (Rosaura), a PERUBAR property. PERUBAR is a GLENCORE subsidiary. According to CUT there were forty-seven (47) former workers affected.

2.2. PERUBAR's main activity is the exploration and exploitation of the mining concessions to which it has title, and the subsequent processing of the mineral ores it extracts to produce zinc and lead concentrates. The Rosaura site developed by this mining company was purchased in 2001. It is located in Huarochiri province, Lima Department (state).

2.3. In Official Letter dated April 21, 2009, CUT asked the Peruvian NCP the following:

- To determine whether GLENCORE, a Swiss company and owner of PERUBAR, abided by the sections of OECD's Guidelines for Multinational Enterprises detailed below:
 - a) Chapter I, paragraph 7: failure to comply with domestic law in force.
 - b) Chapter II, paragraphs 1, 2, 9 and 10: failure to (i) contribute to economic, social and environmental progress with a view to achieving sustainable development; (ii) respect the human rights of those affected by their activities; (iii) refrain from discriminatory action against the workers who make bona fide reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise's policies ; and (iv) encourage their business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.
 - c) Chapter III, paragraphs 1 and 2: failure to (i) ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance; and (ii) apply high quality standards for disclosure, accounting and audit.

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- d) Chapter IV, paragraphs 2b, 2c, 3 and 6: failure to (i) promote consultation and co-operation between employers and employees and their representatives on matters of mutual concern; (ii) provide information to employees and their representatives which enables them to obtain a true and fair view of the performance of the entity; (iii) provide reasonable notice of changes in their operations which would have major effects upon the livelihood of their employees, in particular in the case of the closure of an entity involving collective lay-offs or dismissals.
- e) Chapter X, first paragraph: failure to contribute to the public finances of host countries by making timely payment of their tax liabilities.
- To Facilitate a solution regarding compliance with domestic labor and industry regulations concerning the interruption of production activities at Rosaura mine; as well as to foster transparency of productive operations and statements about PERUBAR's economic and financial situation.

2.4. CUT provided the following account of events:

- On November 24, 2008, representatives from the Contractors informed to the Sindicato Único de Trabajadores Mineros y Metalúrgicos (Single Union of Mining and Metallurgical Workers) of the Contractors rendering services to PERUBAR at Rosaura mine, that operations at Rosaura mine had concluded by virtue of Contract Termination Agreements by Mutual Dissensus signed between PERUBAR and the Contractors.
- Subsequently, PERUBAR decided to temporarily suspend its Rosaura operations. CUT reported PERUBAR, both directly and indirectly, through its Contractors and union leaders coerced the contractors' employees to sign approximately 400 letters of resignation and out-of-court settlements.
- On November 28, 2008, PERUBAR reported to the National Corporations and Securities Commission (CONASEV)² the unanimous agreement reached at a Board of Directors' meeting to proceed to the temporary suspension of operations at Rosaura.
- When such suspension took place, PERUBAR was already comprised in an inspective procedure by the administrative labor authority, which was requested by the contractors' employees who complained against the misclassification of the outsourcing contracts, and demanded to be incorporated in PERUBAR's payroll. However, the labor administrative authority ruled in favor of PERUBAR.
- Additionally, CUT mentioned the following:
 - a) The temporary suspension of activities at the mine was a masked collective dismissal.
 - b) PERUBAR was not explicitly authorized by the Ministry of Energy and Mines (MINEM) to temporarily suspend its activities.

² Presently the "Superintendencia de Mercado de Valores", SMV. <http://www.smv.gob.pe/>

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- c) PERUBAR has not provided a transparent, grounded and timely explanation of the economic reasons that led it to temporarily suspend its activities.
 - d) PERUBAR has not explicitly communicated the results of its exploration and exploitation, and;
 - e) PERUBAR has declared that having incurred in losses it would be unable to pay income tax nor contribute to the Mining Program for Solidarity with the People (Programa Minero de Solidaridad con el Pueblo).
- 2.5. On February 27, 2014, CUT once again requested Peru NCP to sponsor another mediation initiative regarding its specific instance against GLENCORE (PERUBAR).

3. PERUBAR S.A. Arguments – PERUBAR

3.1. Pursuant to a communication dated December 02, 2009 and a meeting held on October 27, 2009, PERUBAR declared the following:

- Since the beginning of its operations in February 2004, Rosaura organized its activities basically through service outsourcing, in compliance with Peruvian mining industry regulations. Contrary to CUT's statements, the Outsourcing Law and the General Mining Law allow to commission or outsource one or more of a company's activities through a contractual arrangement, and also allow mining rights' owners to hire exploration, development, exploitation and processing operations with specialized companies registered with MINEM's General Directorate of Mining.
- The contracts entered into by PERUBAR and its Contractors are not labor contracts and only create civil liabilities among their parties. Furthermore, those contracts evidence the outsourcing companies are registered with MINEM's General Directorate of Mining.
- Regarding the inspections carried out by the Ministry of Labor and Employment Promotion (MINTRA), Deputy Directorial Resolution N° 536-2008-MTPE/2/12.310, dated March 18, 2008, declared the inspection reports were null and void. Consequently, no sanctions or penalties were imposed against PERUBAR.
- By the end of 2008, PERUBAR decided to temporarily suspend its operations at Rosaura and terminate the outsourcing contracts entered into with the Contractors. Therefore, PERUBAR and the Contractors signed several Contract Termination Agreements by Mutual Dissensus.

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- As a result, 475 workers ceased their relationship with the Contractors who employed them, by means of resignation letters and signed Individual Transaction Agreements. Those agreements were a result of a prior agreement dated November 24, 2008, between the Contractors' representatives and the board of the Sindicato Único de Trabajadores Mineros y Metalúrgicos (Single Union of Mining and Metallurgical Workers), before an advisor sent by the Confederación General de Trabajadores del Perú, CGTP (Peruvian Workers' General Confederation). PERUBAR was not a party to such agreement since no labor relationship binds PERUBAR with the Contractors' employees.
 - The Contractors paid their former employees an extraordinary bonus of three monthly wages, as well as full payment of the legal bonus due on December 2008, in addition to the workers' social benefits package.
 - CUT filed several lawsuits in order to declare null and void the resignation letters and the out-of-court settlements by 47 of the former workers. CUT also demand their job reinstatement at PERUBAR. Nonetheless, the workers would have to be reinstated in their jobs with the Contractors, and not at PERUBAR.
 - PERUBAR mentioned that the Constitutional Court has issued jurisprudence whereby the workers collecting their social benefits package disqualifies them to request reinstatement in their previous job or the annulment of the documents by virtue of which they had ended their labor relationship. (STC0532-2011-AA, 02359-PA, 05381-2006-PA, Decision included in Docket N° 06198-2007-PA/TC).
 - Since 2007, in its annual, financial and material events reports, PERUBAR has consistently reported declining results, as shown on CONASEV's web page and various media.
PERUBAR declared its financial statements showed a downturn in operating revenues (up to September 2008) of 127.3% compared to the same period in 2007, because of the international crisis and falling metal prices.
 - PERUBAR further mentioned that its Mine Closure Plan had been previously approved and that MINEM's authorization concerns environmental and security (mine closure) issues, but not the company's civil and work issues, which are governed by the constitutional principle of freedom of enterprise, for which no specific authorization is needed.
- 3.2. At a meeting on March 20, 2014, PERUBAR declared it would not meet with CUT, as such meeting would have an adverse impact on its interests in ongoing court proceedings. Their reply was communicated to CUT.

4. Procedure followed and Peru NCP scope of action

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- 4.1. The OECD Guidelines for Multinational Enterprises comprise *“non-binding principles and standards for responsible business conduct in a global context, consistent with applicable laws and international recognised standards”*³.
- 4.2. These principles specifically address the case involving CUT. However, the same OECD Guidelines for Multinational Enterprises state they are not substitute for nor should they be applied to override domestic law. When domestic law runs into conflict with the Guidelines’ principles and standards, companies shall try to abide by the latter without violating domestic law.
- 4.3. Peru NCP considers its involvement as a facilitator of a dialogue between the parties and its offer of good offices would not create serious prejudice to either of the involved parties in other proceedings nor lead to contempt of court.
- 4.4. The general principles informing the Guidelines hold *“NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned. NCPs should evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised (...)”*. (Our emphasis)
- 4.5. In CUT’s specific instance, it was determined, as mentioned in Report N° 368-2009-OAJ-AR dated June 18, 2009, administrative and judiciary issues were pending, for which reason it was appropriate for Peru NCP to follow up on the processes underway and take into account the recommendations made in the Implementation Procedures of the OECD Guidelines for Multinational Enterprises.
- 4.6. According to the reasons stated above, Peru NCP considered important to meet with the parties to gain a deeper understanding of their respective positions. This effort is demonstrated in the coordination meetings held with them and other efforts made by Peru NCP, as narrated in paragraphs 1.3, 1.5, 1.6, 1.8, 1.9, 1.11, 1.13 and 1.14 in the Background section above.

5. NCP’s position concerning the specific instance

- 5.1. Peru NCP’s review of the instance at hand shows the issue brought up by CUT was a consequence of the temporary suspension of activities at Rosaura Mining Unit.
- 5.2. In view of the background documentation provided to NCP Peru, at the time CUT filed its specific instance, the following administrative and court proceedings (against PERUBAR) were pending:
 - Request to authorize the temporary suspension of mining operations.
 - Docket N° 00010-2009-0-1801-JR-LA-09 on labor rights.
 - Docket N° 0091-2009-1801-JR-LA-01 – on breach of labor dispositions and regulations.

³ Foreword. OECD Guidelines for Multinational Enterprises.

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5.3. Docket N° 00001-2009-0-1801-JR-LA-17 on labor rights. The present state of such proceedings⁴ is as follows:

- Request to authorize the temporary suspension of mining operations

The Ministry of Energy and Mines made certain objections to PERUBAR's request to suspend operations at Rosaura Mining Unit. On September 27 and on October 04, 2010, PERUBAR lifted the latest objections made.

On December 20, 2010, Los Quenuales S.A. Mining Company, the new titleholder of concessions "Casapalca 7", "Casapalca 9" and "Rosaura Concentration Plant", all of which make up the Rosaura operation, requested to conclude the proceeding initiated by PERUBAR. Up to this date, no decision has been reached.

With respect to the objections to the Closure Plan, Directorial Resolution N° 355-2009-MEM-AAM approved the "Casapalca 7" (Rosaura Mine) Closure Plan.

- Docket N° 00010-2009-0-1801-JR-LA-09 – labor rights

This labor-related proceeding concluded in January 2013. The process ended with resolution dated January 20, 2014, since that decision was not challenged. There was not a decision in favor of the claimant.

- Docket N° 0091-2009-1801-JR-LA-01 – on breach of labor dispositions and regulations

In this court case, the demand was considered as not submitted. There was not a decision in favor of the claimant.

- Docket N° 00001-2009-0-1801-JR-LA-17 on labor rights

This proceeding is currently being heard by the Constitutional Social Courtroom of the Peruvian Supreme Court. In the first instance, the demand filed by the Contractors' former employees was declared without grounds as those workers had already collected the net balance of their social benefits and reached other out-of-court settlements, as well as carried out subsequent acts that confirmed the full validity of their resignation letters and out-of-court settlements. This decision was appealed by the claimants.

In the second instance, the Court invalidated all prior proceedings and declared the complaint without grounds after considering that according to Peruvian law the circumstances in which an alleged dismissal merits constitutional protection (through the workers' reinstatement) are as follows: null dismissal, dismissal without cause and fraudulent dismissal. Therefore, no other causes can be accepted by *analogy or extended interpretation*,⁵ and for that reason the complaint lacks legal grounds. The defendants filed for cassation, which is still pending of a court decision.

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- 5.4. With respect to the request to facilitate a solution concerning the issue of compliance with domestic law, Peru NCP feels it is not its role to determine whether domestic law has been violated, despite the fact that so far the court has ruled in favor of PERUBAR. Peru NCP shall only offer its good offices and contribute to create appropriate conditions for dialogue between the parties.
- 5.5. As mentioned previously, Peru NCP coordinated with the parties. Nonetheless, at a meeting held on March 20, 2014, PERUBAR expressed its refusal to meet with CUT representatives, as it felt that might adversely affect its interests in the ongoing court proceedings. Such reply was communicated to CUT. Consequently, in line with Commentaries to the Guidelines mentioned in paragraph 4.4, NCP Peru thinks its involvement in the present specific instance has concluded.
- 5.6. Additionally, as regards to alleged infractions by GLENCORE and PERUBAR to the OECD Guidelines for Multinational Enterprises, the following observations are appropriate:
- Chapter I, paragraph 7
This issue is presently being evaluated at the corresponding instances, for which reason it is not Peru NCP's role to make any comments in this respect.
 - Chapter II, paragraphs 1, 2, 9 and 10
CUT representatives did not put forward any arguments and/or irrefutable proof that would allow Peru NCP to confirm their arguments and that PERUBAR has not abided by such principles.

PERUBAR mentioned the safe working conditions at its mines have been widely recognized, while CUT representative were unable to identify any human rights breaches or discrimination acts by PERUBAR.

In this respect, it was not possible to certify such principle had been violated.

- Chapter III; paragraphs 1 and 2
CUT mentioned PERUBAR has not explained transparently, nor provided timely grounds for the economic reasons that led to its decision to suspend Rosaura Mining Unit's operations. Likewise, it stated that the suspension of such operations masked a collective dismissal and aimed at preventing complaints for the misclassification of outsourcing contracts.

PERUBAR argued that as a stock exchange listed company, it must publish its annual financial statements and material events reports in the National Securities Commission

⁴ Court proceedings reports are published in the Peruvian Judiciary's web site.
<http://cej.pj.gob.pe/cej/forms/busquedaform.html>

⁵ For example, the annulment of juridical acts by virtue of out-of-court settlement and resignation letters signed by the claimants.

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- CONASEV⁶). Furthermore, it declared that Delloite audits the quality of the information included in its financial statements every year. Additionally, it stated that in the framework of the Extractive Industries Transparency Initiative PERUBAR participated in the first National Conciliation Study to verify, clarify and disclose the magnitude of extractive industries' payments to governments. The study did not find any material discrepancies. Moreover, PERUBAR mentioned the study provides detailed information of all the income tax, royalties and rights currency fees paid.

In this respect, no breach of this principle has been identified. Furthermore, it is not Peru NCP's role to audit the quality of the information provided by PERUBAR to CONASEV (currently SMV), nor to determine if the outsourcing contracts have been misclassified.

- Chapter IV, paragraphs 2b, 2c, 3 and 6

CUT declared PERUBAR has violated the principles set forth in those paragraphs. PERUBAR replied that infringement of those principles cannot be verified with respect to CUT because the workers that were presumably affected do not have and never had a labor relation with PERUBAR but rather with Contractors. PERUBAR's relationship with the Contractors was of a civil nature. No evidence has been provided that the contracts signed with the Contractor were misclassified.

In that sense, it has not been possible to ascertain that such principle was violated. Moreover, Peru NCP is not aware of any administrative and/or court declaration concerning the misclassification of the contracts of the Contractors' former employees.

⁶ PERUBAR publishes a range of information (included its article of incorporation, economic group, financial information, reports, material events, stock quotations and others) at the SMV's website (previously CONASEV)
http://www.smv.gob.pe/Frm_LisDatosGenerales.aspx?data=D4F404D57E3E06AFB379AC470E9F3DC98FB4C691D549B179A933A82093

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- Chapter X, first paragraph

CUT stated PERUBAR declared net losses for the period and that for such reason it would not pay its income tax nor will it contribute to Mining Program of Solidarity with the People. PERUBAR mentioned that indeed, to September 2008, it had incurred significant losses⁷ and therefore, pursuant to applicable law, it had not assessed its income tax for year 2008. Nonetheless, it also stated that in 2008 it made income tax payments on account for a total US \$3.4 million. Additionally, PERUBAR declared it has always met its tax liabilities⁸ and other payments.

Consequently, it was not possible to certify that this principle has been breached.

6. Conclusions

- 6.1 Peru NCP considers it is important to have dialogue fora to allow the parties to address issues of mutual concern, through the good offices of the National Contact Points.
- 6.2 Nonetheless, Peru NCP regards its efforts to create opportunities for dialogue are limited by the parties' decision to decline to engage in such negotiations, because they believe their rights can be prejudiced when parallel proceedings are underway.
- 6.3 In this particular case, Peru NCP considered that since there were issues pending of adjudication in parallel instances, its willingness to provide its good offices to solve the specific instance at hand would not make an additional positive contribution, and therefore it restricted its good offices to building bridges for both parties to engage in dialogue. The resolution of the substantive issues is not within Peru NCP's jurisdiction.
- 6.4 With regard to PERUBAR's alleged breach of the OECD Guidelines for Multinational Enterprises, as claimed by CUT (see paragraph 2.3 above), no evidence was made available to Peru NCP to corroborate such violation.
- 6.5 Finally, NCP Peru confirms its willingness to be a forum for debate and dialogue between the business sector and non-government organizations, including trade unions, willing to address specific instances, pursuant to applicable law and the OECD Guidelines for Multinational Enterprises.

In Lima on May 16th, 2016

Signature

Araceli Ríos Barzola

On behalf of the Representative of National Contact Point in Peru

(Stamp)

⁷ PERUBAR's Profit and Loss statement for 2008 shows a net loss of US\$ 4235 000.

http://www.smv.gob.pe/Frm_DetalleInfoFinanciera.aspx?data=1D8FEEE15B0F0F8C5965BF39B6A13DC05C24A9B1366B0E7863ABBFF055C013A7F995B54B28E9E2D071DF5CF955A5DB66C3B33546C54F235A2EE5D8FF943D370E7362D6C3CE8CB906D616CDF04B069262CC00FD0850803B3CBA8C2097B56E9A026159AE5B7D79B67A939CD2522BE897B31765C0302525E1C967

⁸ A visit to the National Customs and Tax Administration's web page (SUNAT) showed all taxes had been paid to date, and for the last five years. <http://www.sunat.gob.pe/cl-ti-itmrconsruc/jcrS00Alias>

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