

FINAL ASSESSMENT REPORT ON
SPECIFIC INSTANCE FILED BY 197 FORMER EMPLOYEES
FOR ALLEGED NON-COMPLIANCE WITH GUIDELINES
BY AVIANCA PERU S.A. UNDER LIQUIDATION AND
AVIANCA HOLDINGS S.A.

This document constitutes the Final Assessment Report regarding the Specific Instance filed by 197 former employees of the company Avianca Peru S.A. under Liquidation (hereinafter the FORMER EMPLOYEES), for the alleged non-compliance with the Guidelines of the Organisation for Economic Cooperation and Development - OECD for Multinational Enterprises¹ (hereinafter, GUIDELINES) by Avianca Peru S.A. under Liquidation and Avianca Holdings S.A. in detriment of the claimants.

- **GENERAL ISSUES**
- ***Background***
- On July 24, 2020, the National Contact Point for the OECD in Peru (hereinafter NCP PERU) received the Specific Instance signed by the attorney Christian Sánchez Reyes, representing 197 FORMER EMPLOYEES.
- On 19 April 2021, the National Contact Point for the OECD in Peru issued the Initial Assessment Report concluding that the Specific Instance merits further assessment for complying with the criteria set out in subparagraph 25 of the Comment on the GUIDELINES implementation procedures.
- ***Procedure followed and NCP Peru Scope of action***
- The purpose of this Final Assessment process is to determine whether the issues raised by the FORMER EMPLOYEES constitute a breach of the GUIDELINES. Accordingly, it shall be determined whether or not Avianca Peru S.A. under Liquidation and Avianca Holdings S.A. have acted in accordance with the GUIDELINES.
- According to the GUIDELINES, they contain “*non-binding principles and standards for responsible business conduct in the global context, in accordance with applicable laws and internationally recognized standards.*”
- These principles are referred to by the Specific Instance in the case presented by the FORMER EMPLOYEES. However, it should be noted that the GUIDELINES themselves state that they do not substitute the

¹ <https://www.oecd.org/daf/inv/mne/MNEguidelinesESPAÑOL.pdf>

national legislation in force, nor should they be considered to prevail over the latter.

- NCP Peru considers that its participation as a facilitator of dialogue between the two parties and the offer of its good offices cannot cause serious damage to any of the parties involved in other proceedings, or result in a situation of contempt of court.

- **ON THE REQUEST OF SPECIFIC INSTANCE SUBMITTED BY THE FORMER EMPLOYEES**

- ***Approach of the FORMER EMPLOYEES***

- The FORMER EMPLOYEES state that as a result of the decisions adopted by Avianca Peru S.A. under Liquidation and its parent company Avianca Holdings S.A. in relation to the beginning of the liquidation process of Avianca S.A. under Liquidation, the human rights and employment and labor relations of the FORMER EMPLOYEES have been violated.
 - Thus, they indicate that the right to work, the right to protection against unemployment and the right to labor stability were affected, generating damage, which translates into a loss of economic income, produced as a consequence of the abuse of the right of the enterprises; damaging various aspects of the GUIDELINES.

 - They also state that they have been affected by the concealment of information on the decision making related to the liquidation of the subsidiary in Peru; and that, as a result of the concealment, they have been unable to previously propose protection mechanisms against an imminent unemployment situation.

- The FORMER EMPLOYEES seek, through the intervention of the NPC Peru, the application of an alternative dispute resolution mechanism (either through good offices, mediation and/or conciliation) in order to obtain reparation for the damages caused by Avianca Peru S.A. under Liquidation and Avianca Holdings S.A.

- This, inasmuch as the FORMER EMPLOYEES consider that the enterprises acted abusing the law, according to the Constitution and the laws of the Republic of Peru; and at the same time failing to comply with the GUIDELINES. Likewise, the FORMER EMPLOYEES consider that such breaches have caused damage to their rights enshrined in the Constitution, the laws of the Republic of Peru and in international human rights instruments.

- ***Approach of Avianca Peru S.A. under Liquidation and Avianca Holdings S.A.***
- On the other hand, in relation to the liquidation of its subsidiary Avianca Peru S.A., Avianca Holdings S.A. indicated that the General Shareholders' Meeting followed the provisions of the General Corporations Law, and according to this is how the process of liquidation and dissolution of the enterprise is being carried out. Furthermore, they indicate that the right of the shareholders to liquidate Avianca Peru S.A. is internationally and locally recognized, in Article 16 of the American Convention on Human Rights and in Article 59 of the Political Constitution of Peru.
- In this regard, they point out that the liquidation of a legal entity is a lawful and legitimate act, not subject to prior authorization, validation or state approval. In addition, they point out that Avianca Peru S.A. under Liquidation has informed that, in each step of the proceedings of liquidation and dismissal of its employees, it complied with local legislation²,
- For its part, Avianca Peru S.A. under Liquidation states in its defense that, due to a series of factors, among which are the difficult conditions of commercial competition in the region and others inherent to our country, Avianca Peru S.A. under Liquidation became loss-making during the last ten (10) years. This meant that the expansion described above could not continue and that, on the contrary, the enterprise had to gradually close a series of routes, which in turn had an impact on the personnel requirements of the operation. In May 2018, Avianca Peru S.A. under Liquidation employed 1,519 workers, but as of May 2020, a total of 906 remained.
- It also mentions that, as a result of the pandemic, on April 18, 2020, it communicated to the Ministry of Labor and Employment Promotion its acceptance to the special complete labor suspension regulated by Emergency Decree No. 038-2020, which was not approved by the Directorate General of Labor, however, they mention having filed a request for reconsideration, which as of the date of presentation of the depositions was still pending a decision.

² [Avianca Holdings S.A. refers to the fact that i\) April 18, 2020, Avianca Peru S.A. under Liquidation communicated to the Ministry of Labor and Employment Promotion \(MTPE, for its acronym in Spanish\) its acceptance to the special complete labor suspension regulated by Emergency Decree No. 038-2020; ii\) On May 15, 17 and 21, Avianca Peru S.A. under Liquidation informed its employees that they would be laid off as a result of the employer's liquidation. This fact was communicated to the MTPE. In this regard, they state that Avianca Peru S.A. under Liquidation respected the notice period provided for in Peruvian law and the employees were laid off 10 days after receiving the corresponding notices; and within 48 hours of the dismissal, Avianca Peru S.A. under Liquidation complied with the payment of social benefits for all laid-off employees.](#)

- It also states that on May 10, 2020, after 10 years of losses and almost two months with virtually no revenues, Avianca decided to liquidate under the provisions of the General Corporations Law.
- In this respect thereof, it points out that voluntary liquidation is regulated by the General Corporations Law and that it is one of the ways in which the right to freedom of association and freedom of enterprise is exercised. In relation to the above, it points out that freedom of association is enshrined in Article 16 of the American Convention on Human Rights in the following terms: *“Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.”* In addition, it indicates that Peruvian labor law recognizes that liquidation - as a lawful and legitimate act - is a valid cause for termination of the employment relation. Consequently, it points out that if an event is a just cause for termination of the labor relation, it does not constitute an unlawful act and, therefore, no indemnity is generated.
- Finally, Avianca Peru S.A. under Liquidation indicates that voluntary liquidation is one of the forms of exercising the right of association and that termination by liquidation does not qualify as an unjustified termination and, even less so, under the international instruments of the ILO, if it is a country in which there is unemployment insurance, an old age and disability pension and similar protection mechanisms. Therefore, they indicate, termination by liquidation in Peru is expressly recognized as a just cause for termination of the labor relation, and consequently, the termination by liquidation carried out in compliance with the provisions of the Law on Labor Productivity and Competitiveness has not affected human rights.
- The facts in chronological order are those set out in Item II (Chronology of the Specific Instance) of the Initial Report³.
- ***Provisions of the Guidelines cited in the Specific Instance and other violated standards***
- Regarding the general principles established in the GUIDELINES, the FORMER EMPLOYEES point out that the recommendations mentioned in Section A, subparagraph 2 (respect for human rights⁴)

³ https://www.investinperu.pe/RepositorioAPS/0/0/JER/DIRECTRICES_OCDE/Informe-de-evaluacion-inicial-Instancia-especifica-con-AVIANCA-abril-2021.pdf

⁴ In the specific case, the FORMER EMPLOYEES point out that they refer to human rights of an economic and social nature. Specifically, to Article 23.1⁴ of the Universal Declaration of Human Rights referring to the right to work and protection against unemployment. They point out that this obligation to respect human rights is distinguished from and exceeds the obligation to respect national laws, which cannot be invoked as a limit or excuse for the violation of those rights.

and in subparagraph 11 (avoidance of generating or contributing to negative impacts) have not been complied with.

- Regarding the GUIDELINES referred to in the Chapter of Human Rights, the FORMER EMPLOYEES consider that there has been a failure to comply with subparagraph 1 (respect for human rights), subparagraph 2 (avoidance of causing negative impacts on human rights), subparagraph 3 (exercise of due diligence) and subparagraph 4 (establishment of remediation mechanisms.)
- Regarding the GUIDELINES referred to in the Chapter on Employment and Labor Relations, the FORMER EMPLOYEES consider that paragraph c) of subparagraph 2 (communication of accurate and correct information about the enterprise), subparagraph 3 (promotion of consultation and cooperation between enterprises and employees and their representatives) and subparagraph 6 (communication to employees and their representatives, in advance, about changes in their activities, including the closure of the entity) have not been complied with.
- On this point, the comments on the GUIDELINES state:
 - *“55. In paragraph 2c) of this chapter, information provided by enterprises to their employees and their representatives is expected to provide a “true and fair view” of performance. It relates to the following: the structure of the enterprise, its economic and financial situation and prospects, employment trends, and expected substantial changes in operations, taking into account legitimate requirements of business confidentiality. Considerations of business confidentiality may mean that information on certain points may not be provided, or may not be provided without safeguards.”*
- **RESPECT TO THE ISSUES RAISED IN THE SPECIFIC INSTANCE AND ITS ASSESSMENT**
- The FORMER EMPLOYEES indicate that Avianca Peru S.A. under Liquidation and Avianca Holdings S.A., have violated the GUIDELINES on Human Rights and on Employment and Labor Relations, mentioned in subparagraphs 2.11, 2.12 and 2.13 of this Report.
- In relation to the affectations to the Chapter of Human Rights of THE GUIDELINES, specifically to the affectation to the right to work, the right to protection against unemployment and the right to labor stability

On the other hand, they invoke labor stability - as a content of the right to work according to the Political Constitution of Peru and the jurisprudence of the Peruvian Constitutional Court - recognized by the Inter-American Court of Human Rights - IACHR - as can be seen in grounds 146 to 150 of the judgment in the Lagos del Campo vs. Peru case, indicating that such jurisprudence is applicable in almost all the territory where Avianca Holdings S.A. carries out its operations.

produced by the beginning of the liquidation process of Avianca Peru S.A. under Liquidation, it must be taken into account that the voluntary liquidation is regulated by the Peruvian legislation (General Corporations Law), therefore, the liquidation of a legal person turns out to be a lawful and legitimate act.

- Thus, as a result of the liquidation process, the FORMER EMPLOYEES were dismissed, a conduct that, according to them, constitutes an abuse of rights by Avianca Peru S.A. under Liquidation and Avianca Holdings S.A.
 - However, it must be considered that termination due to liquidation in Peru is expressly recognized as a just cause for termination of the labor relation by the Law on Productivity and Labor Competitiveness. This also occurs in different countries, such as Spain, Mexico, Argentina, among many others.
- 3.4 In this sense, Avianca Peru S.A. under Liquidation based its decision to initiate the process of liquidation of the enterprise on the procedures established by the special rules for the liquidation and for the termination of the labor relation, showing that there is no contravention of local and international standards, there is no violation of the economic and social rights mentioned by the enterprise, and therefore there has been no violation of the rights to work and the right to protection against unemployment and the right to job stability.
- 3.5 In relation to the affections to the Chapter of GUIDELINES on Employment and Labor Relations, which considers that within the framework of the applicable legal and regulatory provisions and employment and labor relations practices, as well as applicable international labor standards, enterprises must provide information to employees and their representatives which enables them to have a true and fair view of the performance of the entity or, where appropriate, the enterprise.
- In relation to this, one of the questions raised by the FORMER EMPLOYEES is that they did not receive prior communications about the decision of the parent company to liquidate Avianca Peru S.A. Under Liquidation and, on the contrary, they point out that there was concealment of information about the decision making, which led to the employees not knowing about the decision to liquidate the subsidiary in Peru and thus being able to propose protection mechanisms against an imminent unemployment situation.
- 3.7 In this sense, the GUIDELINES recommend that the information provided by enterprises to employees and their representatives should give a “true and fair view” of the performance. This information refers to: the structure of the enterprise, its economic and financial situation and prospects, the evolution of employment and the expected

substantial changes in its activities, taking into account the legal obligations of confidentiality.

- In accordance with subparagraph 55 of the Remarks on the GUIDELINES of Employment and Labor Relations, considerations relating to the business confidentiality imply that information relating to certain aspects may not be provided or may be only provided with safeguards.
- In this regard, from the review of the documentation it is verified that, in effect, the communication of the liquidation is subsequent to the adoption of the corporate resolutions and was carried out within the framework of the provisions of Article 49 of the Law on Labor Productivity and Competitiveness, which indicates that the termination due to liquidation is produced by granting a notice period of ten calendar days.
- Likewise, compliance with the special standard in the liquidation process of Avianca Peru S.A. under Liquidation can be seen. However, the purpose of the analysis at this point is to detail the compliance or non-compliance with the GUIDELINES, which, according to the foregoing, they are recommendations addressed to enterprises for their operations management.
- About this aspect, the practice recommended by the GUIDELINE, in relation to the topic, is to provide information to employees and their representatives to have a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole.
- Regarding this, the FORMER EMPLOYEES point out that Avianca Peru S.A. under Liquidation and Avianca Holdings S.A. have not complied with said recommendation. Thus, they mention that in March 2020, after the state of health emergency was declared, the enterprise proposed to the employees to “voluntarily” take an unpaid leave⁵, arguing the international crisis generated in commercial aviation as a result of the pandemic. Those who did not accept were affected by the complete labor suspension⁶.
- The FORMER EMPLOYEES also argue that Avianca Holdings S.A. and Avianca Peru S.A. did not inform that the Holding Company planned to avail itself of U.S. regulations to restructure its liabilities, nor that Avianca Peru S.A. (today under Liquidation) would be liquidated. On the contrary, by applying the complete labor suspension measure (a measure that suspends the provision of services and remuneration, but maintains the labor relation), it sent an unequivocal message that the activities of Avianca Peru S.A. would be resumed.

⁵ As indicated in Exhibit 6 of the Specific Instance.

⁶ As indicated in Exhibit 7 of the Specific Instance.

- It should be noted that on June 15, 2020, the request for complete labor suspension submitted by Avianca Peru S.A. (today under Liquidation) with registration No. 005386-2020 was rejected by the Ministry of Labor and Employment Promotion and that such decision was appealed by Avianca Peru S.A. (today under Liquidation).
- Likewise, the FORMER EMPLOYEES point out that on May 10, 2020, in the midst of a state of health emergency and in full force and effect of mandatory social isolation, Mr. Anko VAN DER WERFF, President and CEO of Avianca Holdings, sent a communication via email to all employees of the Holding Company to inform that, pursuant to Chapter 11 of the United States Bankruptcy Code, Avianca Holdings S.A. requested the initiation of a reorganization process, among other decisions comprising the reorganization of the corporate group, including the decision to initiate a liquidation process of Avianca Peru S.A. (today under Liquidation).
- On the same date, Mr. Anko Van Der Werff sent a communication via email to the employees of Avianca Peru S.A. to inform them of the beginning of the dissolution and liquidation process of Avianca Peru S.A. under Liquidation and, therefore, of the end of the labor relation between the Holding Company and the employees.
- On the other hand, the FORMER EMPLOYEES indicate that, on May 15, 2020, Carlos Enrique Corbella Espinoza, member of Estratega Consultores S.A.C., the enterprise in charge of the liquidation of Avianca Peru S.A. under Liquidation, sent a communication via e-mail⁷ to the employees informing them of the termination of their functions and basing this on Article 46 c) and Article 49 of the “Single Ordered Text of Legislative Decree No. 728, Law on Labor Productivity and Competitiveness” approved by Supreme Decree No. 003-97- TR.
- It should be noted that, it is evident that the decision-making, as well as the liquidation process of a company itself, in the case of Avianca Peru S.A. under Liquidation; or the restructuring in the case of Avianca Holdings S.A., implies the prior development of a number of events that aim at the planning of the enterprise to face crisis situations. In this regard, the GUIDELINES recommend providing information to employees and their representatives which enables them to have a true and fair view of the performance and the results of the entity or, where appropriate, the enterprise. Also, they establish that when the enterprises anticipate changes in their operations which would have major employment effects, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to employees and their representatives, and, where appropriate, to the relevant governmental authorities, and co-operate with the employee representatives and

⁷ As indicated in Exhibit 9 of the Specific Instance

appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects of this kind of decisions.

- In this regard, from the review of the information provided, it is verified that prior communication by Avianca Peru S.A. under Liquidation and Avianca Holdings S.A. on their perspective of being benefit from restructuration or liquidation processes was not found, and that such information is important for employees due to the impact that would lead to the imminent termination of the employment relation.
- On this point, the FORMER EMPLOYEES state that on May 10, 2020, they received an email sent to all the employees of the Holdings enterprise, informing about the reorganization procedure of Avianca Holdings S.A., and the decision of beginning a liquidation process of Avianca Peru S.A., among other decisions comprising the reorganization of the enterprise group.
- In addition, the FORMER EMPLOYEES point out that on the same date, Mr. Anko Van Der Werff sent a communication via email to the employees of Avianca Peru S.A. (today under Liquidation) to inform them of the beginning of the dissolution and liquidation process of Avianca Peru S.A. (today under Liquidation) and, therefore, of the end of the labor relation between the Holding Company and the employees.
- In the same way, the FORMER EMPLOYEES indicate that, on May 15, 2020, the Liquidator of Avianca Peru S.A. sent a communication via e-mail to the employees informing them of the termination of their functions and basing this on Article 46 c) and Article 49 of the “Single Ordered Text of Legislative Decree No. 728, Law on Labor Productivity and Competitiveness” approved by Supreme Decree No. 003-97-TR.
- The above means that the communication of the relevant facts on the future of the company and the labor relation with the FORMER EMPLOYEES was on May 10 and 15, 2020. That is to say, the decision to liquidate the enterprise was not informed in advance to the employees and they were not able to seek protection mechanisms against an imminent unemployment situation.
- In such sense, according to the previous paragraph, it may be pointed out that there is a breach to the GUIDELINES in relation to the Chapter of Employment and Labor Relations (subparagraphs 4 and 6).
- On the other hand, the FORMER EMPLOYEES request the reparation of damages caused by the acts of Avianca Peru S.A. under Liquidation in the Specific Instant Request. In this request point, Section II of the Implementation Procedures of GUIDELINES, subparagraph 44, states that the National Contact Point does not act as a judicial or quasi-judicial authority.

- Thus, NCP Peru does not have jurisdictional power, nor competence or functions that allow to determine the existence of civil responsibilities or obligations, as of an indemnity on behalf of the FORMER EMPLOYEES; but only to evaluate if the conduct reported by the requestors represents or nor a breach to the GUIDELINES.
- From the review of the submitted Specific Instance and their exhibits, as well as the defenses by the parties, NCP Peru, according to the statement hereto, considers that the non-compliance of Avianca Peru S.A. under Liquidation and Avianca Holdings S.A. in relation to the GUIDELINES Chapter IV of Human Rights has not been proved. However, it has been identified that within their acts, the enterprises have not considered the recommendations established in Chapter V of Employment and Labor Relations, paragraph c) of the subparagraph 2.
- In respect of the offering of NCP Peru to facilitate the dialogue between the parties, NCP Peru sent the Initial Assessment Report analysis to Avianca Peru S.A. under Liquidation and Avianca Holdings S.A on May 25, 2021. However, we have not received any communication by them regarding the document, as of the submission date of this report.
- In that way, considering the time passed since the communication of the Initial Assessment Report, NCP Peru considers that its efforts on this Specific Instance should be concluded.
- It should be noted that, in accordance with the established in subparagraph 36 of the Implementation Procedures of GUIDELINES, as well as in subparagraph 7.3.3 of the Directive No. 003-2015-PROINVERSION - Attention to Specific Instances related to the Implementation of the OECD Guidelines, the draft of the Final Assessment Report was sent to the parties to be reviewed and to check whether the facts included are accurate.
- In addition, on October 14 and 27, 2021, the representative of the Requestors and the representative of Avianca Peru S.A. under Liquidation sent replies to the comments request about the facts included in this Report. Avianca Holdings S.A. did not send replies to the submitted communication.

- **CONCLUSIONS**

NCP Peru considers that it is important to have a space for dialogue that allow the involved parties to solve relevant issues through National Contact Point good offices.

About the claim for indemnity requested by the FORMER EMPLOYEES, it is not NCP Peru's competence to decide on said request.

Regarding the breach of the GUIDELINES on Chapter of Human Rights, NCP Peru considers that the non-compliance of Avianca Peru S.A. under Liquidation and Avianca Holdings S.A. has not been proved. However, regarding the GUIDELINES on Chapter of Employment and Labor Relations, NCP Peru considers that the prior miscommunication by Avianca Peru S.A. under Liquidation and Avianca Holdings S.A. about the enterprises situation and the eventual liquidation or restructuration proves the non-compliance with the recommendations established in paragraph c) of subparagraphs 2 and 6 of said Chapter.

In the framework of the Directive No. 003-2015-PROINVERSION, NCP Peru considers important to issue this Final Assessment Report which was also submitted to the involved parties to review whether the facts hereto are accurate, according to the information provided to NCP Peru.

Similarly, in accordance with said Directive, this Report will be published in the NCP Peru website.

Finally, NCP Peru reaffirms its willingness to constitute a forum for discussion and dialogue between the business sector and the non-governmental organizations, including employees' organizations, that may pretend to solve specific instances, according to the applicable law and the GUIDELINES.

Lima, November 09, 2021

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