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HTUR/JS

9 September 2009

ILO Committee of Experts on the Application of Conventions and Recommendations

Dear Mr. Director-General,

I have the honour of sending you our comments concerning compliance by **Hong Kong SAR (China)** with the following conventions:

Convention No. 87 on Freedom of Association and Protection of the Right to Organise, 1948 (notified in 1997), and Convention No. 98 on Right to Organise and Collective Bargaining, 1949 (notified in 1997).

Freedom of Association and the Right to Collective Bargaining : Background

Both of the ILO core conventions on the protection of trade union rights apply to Hong Kong. The Chinese government in Beijing notified the ILO in 1997 that both ILO Convention No. 87 (1948), the Freedom of Association and Protection of the Right to Organise Convention and ILO Convention No. 98 (1949), the Right to Organise and Collective Bargaining Convention would be applicable to the Hong Kong Special Administrative Region (HKSAR). Prior to 1997, these ILO conventions had been applicable to Hong Kong since 1975.

The Basic Law, promulgated by China in 1990 as the constitution of Hong Kong, provides for, among other things, freedom of association, of assembly and of demonstration; the right and freedom to form and join trade unions; and the right to strike. However, both before and after the hand-over, Hong Kong law has not implemented these conventions in full.

Freedom of Association

In 2002, a Government proposal to implement article 23 of the Basic Law was introduced. The proposal sought to introduce into the HKSAR national security legislation the banning of any act of treason, secession, subversion and sedition against the central government in Beijing. It included extended power for the Secretary for Security to proscribe groups in Hong Kong which he 'believed' to be committing or

seeking to commit these offences, for instance by aiding such groups. In view of the fact that independent trade unions are banned and classified as threats to security in the mainland, trade unions in Hong Kong supporting such unions could potentially be affected by this proposal.

Due to massive protests in July 2003, organised in part by the Hong Kong Confederation of Trade Unions (HKCTU – one of the ITUC's local affiliates) HKCTU, several substantive changes to the text of article 23 were made, but according to the HKCTU many serious concerns remain in the draft legislation. The Government has postponed enactment of the Bill and no new timetable has so far been announced. However the recent adoption of similar legislation in the Macau Special Administrative Region in early 2009 has raised fears that a new bill will be proposed before the next Legco elections.

Anti-union discrimination

Legal protection against anti-union discrimination provides for employers to be fined and workers compensated, but not for reinstatement. The latter is subject to mutual consent between the employer and the employee. The maximum fine for violation of the provisions against anti-union discrimination is HK \$ 100,000 (US \$ 12,800), and the maximum amount of compensation is HK \$ 150,000 (US \$ 19,230). These fines have not been sufficient to dissuade employers from widespread anti-union discrimination.

Since 2001, the Government of Hong Kong has consistently stated that an amendment Bill that would empower the Labour Tribunal to make an order of reinstatement in cases of unreasonable and unlawful dismissal without the need to secure the employer's consent was under way. To date, however, the Government has not reported progress in this respect, nor has it indicated a specific date for the completion of the Bill. The HKCTU has moreover claimed that the Government had not made legal provisions for civil remedies for other acts of anti-union discrimination, such as transfer, relocation, demotion or denial of promotion, and restrictions of all kinds on remuneration and benefits.

Owing to the inadequacy of the protection of the labour law against discrimination, there have only been few successful lawsuits till date. Even the case concerning pilots mentioned below was not brought to court due to the amount of evidence required. In 2006 were there two cases of successful prosecution under the Employment Ordinance providing criminal sanctions against the employer, namely regarding British Airways and the Wai Hong Cleaning Services Company Ltd., Under the civil remedy provisions of the law there is also no job protection.

Union recognition and collective bargaining

There is no institutional framework for the recognition of unions and collective bargaining. Hence employers generally refuse to recognise unions as well as refuse to implement agreements that have been negotiated. Although almost 25 per cent of the workforce is unionised, it is difficult to get management to engage in collective bargaining. Thus, less than one per cent of workers are covered by collective agreements, and those that exist are not legally binding. Without legal protection to guarantee these rights, workers are subject to the arbitrary and unilateral actions of employers. This limits the effect of trade unions in the country, and means that they are often forced to serve mainly as pressure groups and advisers of workers. While just above one fifth of the workforce are members of a trade union, collective agreements cover less than one

percent of workers and are not legally binding. The lack of legal protection for collective bargaining is a clear obstacle to effective trade union representation in Hong Kong.

The Hong Kong Confederation of Trade Unions (HKCTU) is consistently excluded from the LAB, the tripartite consultative body established by the government, including only federations with a less independent policy. This exclusion means that the HKCTU is denied the right to participate in tripartite negotiations on labour laws and policy and excluded from bodies such as the Committee on the Implementation of International Standards, which reports to the ILO.

The Committee has on several occasions requested the Government to give serious consideration to the adoption of legislative provisions which would promote voluntary negotiations between employers' and workers' organisations with a view to regulating the terms and conditions of employment by means of collective agreements. The Government has reiterated its commitment to promote such negotiations, but has not yet taken concrete steps to actively promote collective bargaining.

The Legislative Council, Hong Kong's legislative branch, has voted down motions calling for the enactment of legislation on collective bargaining on three occasions; in December 1998, in April 1999 and in December 2002.

Nevertheless, a few collective agreements have been concluded in certain sectors, and reportedly they are quite common in sectors such as printing, construction, public and air transport, as well as in ship maintenance and the goods loading and unloading industries.

The Government's policies have focused on promoting tripartite dialogue through tripartite committees. At the industry level, the tripartite committees have sought to foster an environment conducive to a certain type of collective bargaining and have assisted the Government in producing sample employment contracts and reference guides. Yet, tripartite committees do not constitute negotiating bodies in the meaning of Article 4 of Convention No. 98 since these committees include government representatives in addition to employers' and workers' organisations. The effective communication and tripartite dialogue could not function as a substitute for bipartite negotiations, although they may be a useful tool for ensuring a positive industrial relations climate.

According to the HKCTU, the tripartite committees that the Government has established in some sectors have been ineffective and sometimes harmful, because they have done damage to employment conditions of individual workers. In 2001, a senior representative of the Hong Kong Container Truck Drivers' Trade Union represented his union on one such committee. His employer was on the same committee and sacked the official after the meeting as punishment for his membership in the union, reports the ILO. Despite the clear case of anti-union discrimination as the motivation for the dismissal, the worker lost his case in the country's Labour Tribunal.

All employees in the public sector are deprived of the right to engage in collective bargaining. The Government has repeatedly declared that there had been no need for collective bargaining in the public sector, on the grounds that well-established and effective machinery for consultation concerning the conditions and terms of employment of civil servants was in place.

Restrictions for Civil servants

However, civil service reforms since 2002, involving transfers, reductions in wages and benefits, retrenchment and contracting-out to the private sector have demonstrated very clearly that the government has been free to act unilaterally without consulting the affected civil servants. This saw civil service unions launching the largest-ever protest against pay cut legislation in July 2002. Upon a complaint lodged by the HKCTU, the ILO Committee on Freedom of Association ruled in June 2004 that the Government's unilateral reduction of civil service pay was not in line with the ILO Convention Nr 98, but no remedial actions have been taken by the Government, according to HKCTU.

The Government's policy of encouraging outsourcing of public services to the private sector and early retirement schemes in the civil service has further undermined bargaining rights. The employees of the Pacific Century CyberWorks Ltd. (PCCW), for example, have been deprived of representation by the PCCW Staff Association in 2003 via the contracting-out of the network service department to a subsidiary company. Some 3,000 employees were rehired after having been laid off in November 2002. However, since they were employed by a subcontractor, they had lost their employee status and incurred wage cuts of between 15 to 20 percent.

The Employment and Labour Relations Ordinance (ELRO), includes provisions to protect workers against dismissal for trade union activities but does not offer any remedies for individuals who have been subjected to other forms of anti-union discrimination.

Lack of protection for strikers

The right to strike is permitted by law. According to the Public Order Ordinance, a "notice of no objection" is required from the police seven days in advance (24 hours for emergencies) in order to stage an assembly or protest. It also authorises the use of force to break up strike pickets and demonstrations. Employers can also seek an Injunction Order to suppress workers protests, and have done so for example against the Hong Kong Confederation of Trade Unions for leading a protest against lay-offs by a major supermarket.

Strikers have little protection. Although the Basic Law provides for the right to strike, in practice this right is limited by clauses in employment contracts stipulating that absence from work is a breach of contract which may lead to dismissals. In April 2001, the government introduced amendments to the Employment Ordinance that ostensibly increased the protection of workers against dismissal for participating in strikes. However, the amendments only ensure that, were a worker to be dismissed for strike action, he or she would have the right to sue the employer for compensation. There is still no legal entitlement to reinstatement, even if a worker is found to have been unfairly dismissed for participating in a strike. The Labour Advisory Board (LAB) had agreed in principle to laws giving the Labour Tribunal the power to order the reinstatement of unfairly dismissed workers without the consent of the employer. However, the government has taken no further action on this and no time frame for implementation has been stipulated.

As a result, strikes as a means of enforcing workers' rights rarely occur in Hong Kong although there has been a year on year increase in their frequency and the summer of 2008 saw several major disputes and the longest strike action for many decades took place in 2007.

Various other obstacles have also restricted the free exercise of trade union rights. The ELRO, for example, bans the use of union funds for political purposes. And the approval of the Chief Executive, the head of Government in Hong Kong, is required before unions can contribute funds to any trade union outside the HKSAR. Prior consent of the public authority is also required in cases of mergers between trade unions. Moreover, the ELRO restricts the appointment of persons from outside the enterprise or sector to union executive committees.

Restrictions contrary to Convention No. 87 and *Violations of Trade Union Rights*

Violations in practice occur and some examples are given below:

1. The *Annual Survey of Violation of Trade Union Rights 2006*, published by the ICFTU (now the ITUC), for example, reports that more than 200 ambulance workers and civil servant union members felt the right to freedom and speech violated. They marched through central Hong Kong to the Central Government Offices, protesting against disciplinary proceedings against Wat Kei On, a spokesperson for the ambulance worker's union, following his speech on WTO issues.

2. Fifty-two pilots were sacked in 2001 after they took industrial action in a dispute over pay and working hours. One pilot was subsequently reinstated. Among the 51 that were not re-instated, there were eight trade union committee members and four union negotiators. A deal was brokered in 2005 that enabled 19 pilots to apply for new jobs at the bottom of the seniority list with vastly reduced pay; only 12 were offered jobs. A further 19 continued legal actions with one being successful in the UK in 2006 and the remainder still awaiting court proceedings in HK at the end of 2008. After a long standing campaign by local unions and supporters, Cathay Pacific agreed in July 2008 to immediately align the retirement age for all its current Hong Kong-based cabin crew to the standard age of 55. The new retirement age will affect around 5,000 Hong Kong-based cabin crew who joined after 1 July 1993, whose retirement age is 45. The retirement age for cabin crew who joined before 1 July 1993 is 55. Under this new arrangement, cabin crew who joined after 1993 will be able to choose to retire at any time between 45 and 55 while all new staff will retire at 55.

However, as a sign of continuing problems at Cathay Pacific, the Cathay Pacific Airways Flight Attendants' Union estimates that between 6,800 and 7,000 flight attendants have been underpaid over the past six years - amounting to an estimated HK\$274 million - as a result of non-payment for statutory holidays which management claim are rest days and therefore not paid. A test case is currently being processed by the labour tribunal. The case has received backing from the HKCTU and the Hong Kong Flight Attendants' Alliance which includes unions from Cathay Pacific Airways, Dragonair, British Airways and United Airlines.

(See also ILO Complaint no. 2186 regarding the Cathay Pacific case)

3. On 11 July 2008 around 200 employees of Vitasoy International went on strike calling for a 6 percent salary increase as well as improved communication with management. The strike included drivers, warehouse workers and sales representatives. Strikers also called for the rehiring of a driver who had earlier been sacked. The driver had reportedly been complaining to management about poor salaries and other issues and the company had fired him for being a 'trouble maker'. The dismissal sparked the

subsequent strike. The workers were finally able to obtain a 4.5 wage increase after the labour bureau intervened. The management also agreed to improved communication mechanisms and monthly meetings with workers starting in August. Vitasoy also publicly clarified that the sacked worker was innocent of any alleged wrongdoing. Workers from Watson's water also went on strike for similar demands in mid July. A week or so later on 28 July 2008, several hundred delivery workers, drivers and sales representatives from Nestle went on strike over low pay and commissions.

4. **University forced staff to sign a new contract:** The Hong Kong Baptist University ignored collective bargaining rights and even consultation with the union, obliging staff to sign a new contract which introduced a performance-based pay and reward structure. Two former Baptist University administrators who refused to accept new terms and conditions of employment were sacked on 10 January 2006. Six long-serving academic staff refused to sign and a special committee was set up by the university to consider whether they should be terminated. To Yiu-ming, the chair of the university staff union, was one of the six. The union says the move breaches their contracts which state that no change to benefits for permanent staff "shall come into effect unless and until the appointee has given his consent thereto in writing". Later the university backed down because of the pressure from past and present students.

5. **Union members threatened for taking part in strike:** The HKCTU affiliate, Hong Kong Horse Racing (Local) Association, called for its members (riders) to obtain race meeting allowances set at the same level as grooms. During negotiations between the union and the Jockey Club management, the Jockey Club unilaterally sent a new (and unequal) allowance scale notice to all individual riders. The company also threatened to discipline or dismiss any work riders taking part in strike. On 13 January 2007, some 80 union members joined a sit-in on an access road at one of the club's racecourse. One protestor was reportedly injured during a scuffle with security staff. Management eventually agreed to continue negotiations.

6. **Metal Construction workers on strike - government refuses to negotiate except with government friendly union:** Around 2,000 bar benders working on various construction sites in Hong Kong went on strike on 6 August 2007 in protest against low wages and long working hours. More than two decades ago, workers, in order to avoid competition amongst themselves, agreed to set a standard wage for their trade. However, employers wanted to ensure a stable supply of workers and agreed with the small Hong Kong Construction Industry Bar-bending Workers' Union (BWU) to hold annual wage negotiations. Daily wages have, however, dropped from HKD 1,300 in 1997 to the present rate of HKD 800, and many workers were employed on rates of only 500 HKD a day. The BWU, an affiliate of the pro-government Hong Kong Federation of Trade Unions that has avoided pushing for wage increases and increased benefits, postponed the annual negotiations, and this triggered a strike amongst fears of continued salary stagnation or reductions. The strike lasted over 36 days - one of the longest ever in recent Hong Kong history - and garnered massive public support. It also revealed very publicly the differences between the pro-government Federation of Trade Unions and the Confederation of Trade Unions. The BWU criticized the workers for striking and initially refused to support them, so the HKCTU stepped in to negotiate. However, the government refused to negotiate with the HKCTU and the elected worker representatives. This led to a protest from the ITUC calling for the government to negotiate. Eventually, the BWU was allowed to negotiate alongside the HKCTU, and a pay deal was reached that was only a modest success in terms of the pay demands but crucially gave the

workers their shorter eight hour day - a long-term demand. The settlement is the first genuinely negotiated industry-wide collective agreement in Hong Kong.

7. **In August 2007**, three unionists were arrested on 10 August 2007 after helping metal workers in their fight for a pay rise. The arrested included a staff member of the HKCTU. Police told them they were suspected of instigating an illegal assembly. They were later released and no charges were laid.

8. **Cleaner sacked after giving evidence to sue employer:** A cleaner employed by Cheung Kee Environmental Limited Company was dismissed in November 2006 after giving evidence to sue the employer for not granting statutory holidays. The Cleaning Service Industry Workers Union, a HKCTU affiliate, helped the worker file a complaint to the Labour Department. The department then filed a lawsuit prosecuting the company for unfair dismissal. On 4 October 2007 the Magistrate gave a ruling that the company was acquitted of the charges, as the prosecution had failed to prove that the sacking of the cleaner was a result of him assisting in an investigation. The Labour Department refused to file an appeal to higher court.

9. In 2005, the first official case of discrimination against union members involved the government contractor Wai Hong Cleaning and Pest Control which was found guilty of discriminating against its employees - Amy Shum, Wan Hang-ying and Fan Ah-tai - because they were members of the Hong Kong Confederation of Trade Unions (HKCTU). Company management tried to bribe its employees to quit HKCTU by offering them better positions or transferring them to better cleaning sites. When they refused, their contracts were terminated in December 2004. Only one worker admitted to voluntarily resignation. The company claims the other three also resigned voluntarily, but the magistrate found that they were dismissed and the company was trying to eliminate their influence on other employees. In handing down a fine of HK\$234,000, (including HK\$150,000 fine for the union discrimination charge), Magistrate Ernest Lin commented Hong Kong labour laws "were behind other countries."

10. In September 2005, British Airways was fined HK\$5,000 for breaching the labour rights of the head of its Hong Kong cabin crew union, Carol Ng Man-ye, in the first successful prosecution of its kind in the city.

11. Andrew So Tsz-koon, a committee member of the Hong Kong Productivity Council Employees Association, was sacked in June 2005 after nearly six years of service, first as an editor and later also as a training coordinator. Mr So believes his sacking was in retaliation for a labour dispute earlier this year and a feud with the council, as the dismissal letter offered no reason and was signed by only his deputy divisional head.

12. Also in 2005, a union secretary, Chan Chun-sheng, complained at the Labour Department and Labour Tribunal that Worldwide Flight Services sacked him after giving him wrong working instructions. He believes the dismissal is directly related to his involvement in union activities.

13. Trade union and labour groups in Hong Kong, including the Hong Kong Confederation of Trade Unions (HKCTU), continue to face legal action in retaliation for their campaign to support workers suffering from cadmium poisoning. The workers were involved in the production of batteries for Gold Peak Industries at factories in mainland China. Other poisoning cases have also been reported in Hong Kong production facilities.

. In June 2006, Gold Peak, through its lawyers, wrote to the groups who had signed and supported a postcard campaign calling for adequate compensation and treatment, threatening them with legal action unless they made an official apology and an immediate payment of HKD 500,000 damages. Gold Peak followed up with a summons to three groups involved: the HKCTU, Globalisation Monitor and the Neighbourhood and Workers' Service Centre. The case against the three groups is still active today but Gold Peak has made no further arrangement to fix a date for a formal court hearing since September 2007 - the last exchange of legal documents between the two sides.

Yours sincerely,



General Secretary