

**Public Submission to the Office of Trade and Labor Affairs
Under Chapters 16 (Labor) and 20 (Dispute Settlement) of the
Dominican Republic – Central America Free Trade Agreement**

**Concerning the Failure of the
Government of Costa Rica
To Effectively Enforce its Labor Laws
Under the ILO Declaration on Fundamental
Principles and Rights at Work**

Submitted by:

International Longshore and Warehouse Union, Coast Longshore Division

and

Sindicato de Trabajadores (as) de JAPDEVA

Asociación Nacional de Empleados Públicos y Privados, Costa Rica

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I. Introduction

On October 7, 2007, Costa Rica ratified the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA), which entered into force between the United States and Costa Rica on January 1, 2009. The Coast Longshore Division of the International Longshore and Warehouse Union (ILWU), the Sindicato de Trabajadores (as) de JAPDEVA (SINTRAJAP), and the Asociación Nacional de Empleados Públicos y Privados (ANEP) together file this petition with the Department of Labor's Office of Trade and Labor Affairs (OTLA).

This petition sets forth serious and repeated failures by the government of Costa Rica to effectively enforce its own labor laws, and it outlines ways in which the government is failing to meet its commitment to “respect, promote and realize” core workers’ rights, as outlined in the International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work. The Costa Rican government’s failure to enforce its laws occurred, and continues to occur, after DR-CAFTA entered into force. In fact, as demonstrated herein, labor conditions in Costa Rica have worsened since DR-CAFTA was ratified.

This case involves workers represented by SINTRAJAP in the Atlantic Ports of Limón and Moín through which 80 percent of Costa Rica’s commerce passes daily. The Costa Rican government has implemented a carefully formulated port privatization program, a so called “port reform” effort, in the Ports of Limón and Moín that has as a central objective the complete exclusion and ultimate elimination of SINTRAJAP. The conduct of the Costa Rican government includes a government-run media campaign to discredit the union, removal of the democratically elected leadership of the union and imposition of a government-backed employer-run board of union directors, freezing of the union’s bank accounts, militarization of the ports in the run up to a complete takeover of the union, directing the police to raid and occupy the union’s business office, and entering into an unconstitutional multi-million dollar deal with the government-backed employer-run board of union directors to entice workers to leave the union and accept privatization of the ports.

This case represents just one example of the many labor violations in Costa Rica. Indeed, the Costa Rican government has a history of progressively eliminating union organizations, leaving workers completely unprotected. This claim set forth facts sufficient to establish a recurring course of action on the part of the Costa Rican government. The Costa Rican government’s failure to effectively enforce labor laws in this case, and others, affects trade between the United States and Costa Rica.¹

The petitioners request that the United States government immediately invoke the Cooperative Labor Consultations mechanism under Article 16.6 of DR-CAFTA and require that the government of Costa Rica take all measures necessary and consistent with domestic and international labor law to remedy the claims herein. If the consultations fail to bring about a resolution, the petitioners urge the United States government to invoke the dispute settlement mechanism and proceed forward until such time that the government of Costa Rica effectively

¹ Approximately half of Costa Rica’s international trade is with the United States, making the United States Costa Rica’s main trading partner. See U.S. Department of State at <http://www.state.gov/r/pa/ei/bgn/2019.htm>.

enforces its labor laws and ensures that internationally recognized labor rights are recognized and protected by law. The United States government should also continue to monitor closely the implementation of any commitments made during consultations and/or dispute settlement procedures, taking all such measures necessary to ensure that the claims are fully resolved.

II. History of the Ratification of DR-CAFTA in Costa Rica

DR-CAFTA was ratified in Costa Rica with substantial opposition. Despite the fact that Costa Rica is one of the United States' oldest trading partners in Central America, merely 52 percent of Costa Rican voters favored passage of the trade agreement.² Notably, in the lead up to the passage of DR-CAFTA, the Costa Rican government took steps to weaken existing national labor protections.³ Specifically, in 2004, the government introduced a campaign, which was ultimately unsuccessful, to reform the country's labor code, proposing legislation to modify working hours through a year-long calendar of work shifts and the weekly accumulation of working hours; this was designed to eliminate the standard eight-hour workday that is enshrined in the Constitution.⁴ The government also proposed the elimination of the right to mixed and absolute overtime hours to allow employers to increase work hours at times of high demand and lessen work hours in times of low demand.⁵ The Costa Rican government took the position that flexible working hours and overtime rules were necessary in order to allow Costa Rica to remain competitive with the other Central American countries once DR-CAFTA was ratified.⁶

Today, many Costa Ricans believe that DR-CAFTA has not lived up to its promises. In 2009, instead of increased imports and exports, Costa Rica saw a 15 percent reduction in exports to the United States and a 30 percent reduction in imports from the United States.⁷ This reduction of imports and exports was accompanied by a 2.9 percent rise in unemployment (from 4.9 percent to 7.8 percent).⁸ And, despite DR-CAFTA's promise to improve its signatories' respect for and observance of workers' rights, Costa Rica was charged with being in systematic violation of core international labor standards at the 99th International Labor Convention in Geneva in June 2010.⁹

² See, "Why CAFTA Faces Opposition From Citizens of Central America and the Dominican Republic" at <http://globaledge.msu.edu/resourcedesk/gbr/gbr2-3.pdf>.

³ See, "Testimony Regarding the Central America Free Trade Agreement (CAFTA) Prepared by Bama Athreya, Deputy Director International Labor Rights Fund April 12, 2005," page 3 to 4, at <http://www.laborrights.org/files/TRADECAFTA.pdf>.

⁴ *Id.* See also Article 58 of the Constitution and Articles 135 through 146 of the Labor Code of Costa Rica.

⁵ See, "Testimony Regarding the Central America Free Trade Agreement (CAFTA) Prepared by Bama Athreya, Deputy Director International Labor Rights Fund April 12, 2005," page 3 to 4, at <http://www.laborrights.org/files/TRADECAFTA.pdf>.

⁶ *Id.*

⁷ See "CAFTA Five Years Later: No Panacea, but a Seal of Approval for Democracy and Foreign Direct Investment" at <http://www.wharton.universia.net/index.cfm?fa=viewArticle&id=1850&language=english>.

⁸ *Id.*

⁹ See http://www.ilo.org/global/What_we_do/Officialmeetings/ilc/ILCSessions/99thSession/lang--en/index.htm. Also see, "Costa Rica Will Respond in Geneva: Denounced by Trade Unions at ILO" at <http://www.todanoticia.com/14213/costa-rica-respondera-ginebra-denuncia/?lang=en>; see, "Costa Rica hauled over the coals at ILO" at <http://www.bananalink.org.uk/content/view/491/1/lang.en/>; and see the 2010 Annual Survey of Violation of Trade Union Rights, Costa Rica at <http://survey.ituc-csi.org/+Costa-Rica+.html>.

Finally, since the 2006 implementation of DR-CAFTA, there has been a sharp upsurge of assassinations and violence against trade unionists in Central America as a whole.¹⁰

III. Costa Rican Domestic Law Incorporates the Core Conventions of the ILO

Labor rights in Costa Rica are set forth in the Constitution, the Labor Code, sector-specific legislation, and ratified international conventions. Costa Rica's Labor Code of 1943, which was reformed in 1993 and 1998 with the advice of the ILO, provides for individual and collective labor standards as well as the administration and application of the Labor Code by government agencies and specialized labor and civil courts. The legal framework in Costa Rica gives effect to the core labor principles embodied in the ILO Declaration on Fundamental Principles and Rights at Work. Costa Rica has ratified all eight of the ILO fundamental conventions, including ILO Convention No. 87 (1948), the Freedom of Association and Protection of the Right to Organize Convention, and ILO Convention No. 98 (1949), the Right to Organize and Collective Bargaining Convention. Under the Costa Rican Constitution, the ratified Conventions of the ILO have status in national law not just equal to the protection of the Constitution itself but to the extent that the protection provided by such Conventions is superior to those provided for in the Constitution the ILO Conventions prevail under Costa Rican law.

IV. Statement of DR-CAFTA Provisions Violated by the Government of Costa Rica

The Costa Rican government has violated the following provisions of Chapter 16 of DR-CAFTA:

Article 16.1: Statement of Shared Commitment: “The Parties reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up* (1998) (ILO Declaration). Each Party shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in Article 16.8 are recognized and protected by its law.”¹¹

Article 16.2(1)(a): Enforcement of Labor Laws: “A Party shall not fail to effectively enforce its labor laws, through recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.”¹²

¹⁰ See US Labor Education in the Americas Project (USLEAP) article entitled, “Violence Against Trade Unionists Rises throughout Central America in 2010” at <http://usleap.org/violence-against-trade-unionists-rises-throughout-central-america-2010>.

¹¹ Article 2 of the ILO Declaration provides that “all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labor; (c) the effective abolition of child labor; and (d) the elimination of discrimination in respect of employment and occupation.”

¹² Article 16.8 of DR-CAFTA defines labor laws as “a Party’s statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights: (a) the right of association; (b) the right to organize and bargain collectively; (c) a prohibition on the use of any form of forced or compulsory labor; (d) a minimum age for the employment of children and the prohibition and elimination of the worst forms of child

Article 16.3(1): Procedural Guarantees and Public Awareness: “Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to tribunals for the enforcement of the Party’s labor laws. Such tribunals may include administrative, quasi-judicial, judicial, or labor tribunals, as provided in the Party’s domestic law.”

V. Statement of Jurisdiction

The OTLA has jurisdiction to review this submission as it concerns “any matter arising under this Chapter.”¹³ This submission involves the Costa Rican government’s failure to enforce its domestic laws with regard to freedom of association and the right to organize and bargain collectively without interference. The government has also violated its commitment under Article 16.1(1) to strive to ensure that the principles under the 1998 ILO Declaration are recognized and protected by law. Under Article 16.6(1), the OTLA should immediately request consultations by delivering a written request to its contact point designated under Article 16.4.3.

Should Cooperative Labor Consultations fail to resolve the instant dispute, the United States should request Consultations under Chapter 20 of DR-CAFTA. Article 16.6(6) provides that if a matter “concerns whether a Party is conforming to its obligations under Article 16.2.1(a), and the consulting Parties have failed to resolve the matter within 60 days of a request under [16.6(1)], the complaining Party may request consultations under Article 20.4 (Consultations) or a meeting of the Commission under Article 20.5 (Commission- Good Offices, Conciliation, and Mediation) and, as provided in Chapter Twenty (Dispute Settlement), thereafter have recourse to the other provisions of that Chapter.” If consultations fail, the United States should invoke all further steps under Chapter 20 until this case is fully resolved.

VI. Case

1. Petitioner: SINTRAJAP

a. Facts

It should be noted at the outset that the facts in the case of the Costa Rican government’s progressive elimination of SINTRAJAP in the Atlantic Ports of Limón and Moín are markedly similar to the facts in the case of the Costa Rican government’s systematic elimination of a similar union, el Sindicato de Trabajadores Marítimos Ferroviarios y de Muelles y la Unión Ferroviaria y Portuaria Nacional, in the Pacific Port of Caldera. The Port of Caldera was privatized in 2006. All of the union’s 1,100 members were offered layoff compensations. In the restructuring, only 90 state workers were reemployed. The rest were “free” contracts, out of which 161 workers were accepted back to work at the private companies now running the port. The result of the “port reform” effort in the Port of Caldera has been devastating for workers –

labor; and (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.”

¹³ See Article 16.6(1).

there is higher unemployment in the province resulting in increased poverty, there are precarious working conditions which have resulted in the deaths of 46 workers, salaries have been reduced by two thirds, there are decreased revenues for public services, there has been negligible investment in port infrastructure, and there has been no social investment in the province.

Perhaps one of the most egregious violations in the Port of Caldera has been the failure of the Costa Rican government to ensure that the workers receive the pensions that were promised to them as a component of the privatization of the port. As part of the concession agreement, workers were pensioned out at age 45 (the legal retirement age in Costa Rica is 65). These workers were promised a certain pension depending on their years of service on the waterfront. After this agreement was reached, the pension age was unilaterally moved to age 50. However, even those workers who meet this age requirement are not receiving the promised pension.

From the general public's perspective, one of the worst things to result from the privatization of the Port of Caldera is the illegal usurpation of public money. The company awarded the concession in the port originally paid \$85 million for the concession. However, overtime the company has been permitted to recoup that money through a series of legal maneuvers and public funds have been used to replace this money, which is illegal under Costa Rican law. Notably, the same legal maneuvers are at the foundation of the deal in the Atlantic Ports of Limón and Moín. The crisis in the Port of Caldera has received widespread national media attention in Costa Rica.

In the Atlantic Ports of Limón and Moín there are approximately 1,500 SINTRAJAP-represented workers. The Ports of Limón and Moín handle almost 80 percent of the cargo and vessels in Costa Rican and nearly 15 percent of all containerized cargo in Central America, making the Ports of Limón and Moín the busiest port complex in the region after Panama.¹⁴

The Port Authority, Junta de Administración Portuaria y Desarrollo Económica de la Vertiente Atlántica, is known as JAPDEVA, a public institution that was created approximately 46 years ago by the Costa Rican government with the aim of managing the Ports of Limón and Moín and investing profits generated by the ports in local infrastructure and social works projects. There are several shipping companies, including Maersk, Del Monte, and Dole, that currently operate at the ports. In total, these companies are handling approximately 850,000 TEU's (or Twenty-Foot Equivalent Units) a year. Limón is one of the poorest provinces in Costa Rica, and its small population includes multiple generations of unionized dockworkers and their family members.

Chronology of Events:

The "port reform" effort in the Ports of Limón and Moín began in 2006. Below is the chronology of events that forms the basis for this petition:

¹⁴ See Center for Ecotourism and Sustainable Development, "Analysis of the Cruise Ports on the Pacific Coast of Costa Rica", page 39; at http://www.responsibletravel.org/resources/documents/Coastal-tourism-documents/Analysis_of_the_Cruise_Ports_on_the_Pacific_Coast_of_Costa_Rica.pdf.

- February 27, 2008 – then President Óscar Arias Sánchez signed a loan agreement with the World Bank for \$72.5 million to finance the rehabilitation of the city of Limón and support the modernization of its port.¹⁵ President Arias stated that the World Bank loan would be used to fund The City-Port Limón Project with the ultimate goal of improving the quality of life for Limón’s residents.¹⁶
- January 16, 2009 – the Ronaldo Blear SINTRAJAP leadership was reelected to a second two-year term at a General Assembly. In the period leading up to the election, the Arias administration took sides, supporting the group that opposed Rolando Blear. Specifically, the Arias administration solicited workers through advertisements on the radio up until the day of the election to vote for Blear’s opposition, which was supportive of privatization of the port in exchange for the payment of money. Ultimately, the workers supported Blear, who won the election with 72% of the vote. Approximately 800 workers participated in this election.¹⁷
- February 12, 2009 – the Ministry of Labor and Social Security certified the Ronaldo Blear leadership for a two-year term from January 31, 2009 to January 31, 2011.
- April 2009 – the tender to build/modernize the Ports of Limón and Moín was launched requiring the successful private company bidder to invest \$812 million in the port.
- December 29, 2009 – the Ronaldo Blear leadership called for an ordinary midterm General Assembly to be held on January 8, 2010.¹⁸ The meeting was to be held on the third floor in the SINTRAJAP office building. The agenda included verification of quorum, reading and approval of previous minutes, a report of the Ministry of Finance, a fiscal report by the secretariat, a report on the second privatization offer from the government of Costa Rica, a report of the Secretary General, and several miscellaneous motions.
- January 7, 2010 – the Ministry of Health issued a warrant ordering the union not to convene the ordinary midterm General Assembly on the third floor of the SINTRAJAP office building on January 8, 2010. The Ministry of Health alleged that the union building was not fit for such an assembly. The warrant threatened that default would result in police action on the grounds of civil disobedience.

¹⁵ The World Bank loan agreement can be reviewed at <http://web.worldbank.org/external/projects/main?pagePK=64283627&piPK=73230&theSitePK=295413&menuPK=295446&Projectid=P085539>.

¹⁶ *Id.*

¹⁷ Article 19 of the collective bargaining agreement between SINTRAJAP and JAPDEVA (also known as the SINTRAJAP statutes) specifies that the election of the Board of Directors will be held every two years.

¹⁸ Article 13 of the collective bargaining agreement between SINTRAJAP and JAPDEVA specifies that General Assemblies must be convened at least eight days in advance in accordance with the Labor Code. This requirement of eight days advanced notice also applies in the context of Extraordinary General Assemblies under Article 15 of the collective bargaining agreement.

- January 7, 2010 – the Ronaldo Blear leadership suspended the midterm General Assembly until further notice in compliance with the Ministry of Health’s warrant. The suspension of the meeting was communicated through printed circulars, email, radio ads, and on local news stations.
- January 12, 2010 – to verify that the January 8, 2010 meeting did not take place, the Ministry of Health met personally with union leaders. The Ministry of Health then forced the union to circulate a document indicating that the union was not permitted to hold a midterm General Assembly. Thus, by order of the Ministry of Health, the first call to meeting was suspended and the ordinary midterm General Assembly scheduled for January 8, 2010 never took place.
- Between January 12 and 15, 2010 – through a document circulated to all SINTRAJAP workers and affiliates by Rogelio Williams, there was a purported “second” call to meeting for a midterm General Assembly in the JAPDEVA port facilities on January 15, 2010 with the following agenda: verification of quorum, reading and approval of previous minutes, a report of the Ministry of Finance, a fiscal report by the secretariat, a report on the second privatization offer from the government of Costa Rica, a report of the Secretary General, and motions and other business.
- January 15, 2010 – JAPDEVA held a General Assembly in a company storeroom for workers aligned with the government and its privatization plan. The assembly was attended by only 300 members of SINTRAJAP (just under the 25 percent attendance required for a quorum). On trumped up charges and without affording the Ronaldo Blear leadership the opportunity to be present and defend itself, the assembly approved the removal of the Ronaldo Blear leadership and proceeded to appoint a new set of leaders, the Douglas Brenes leadership, that is agreeable to the Costa Rican government’s privatization scheme. The small group of government-friendly workers then accepted the Costa Rican government’s proposal to pay \$137 million for layoff and pension packages in exchange for the workers’ agreement to renegotiate the collective bargaining agreement to allow for privatization of the ports. The renegotiated agreement also eliminated 11 days of holiday and declared the ports open 24 hours a day 365 days a year. To date, the Ministry of Labor and Social Security continues to refuse to make this renegotiated agreement public.¹⁹ This failure of public disclosure is highly irregular.
- January 29, 2010 – a purported “third” call to meeting was issued by JAPDEVA at 4:00 p.m. in the afternoon when many workers had already gone home for the day. At this General Assembly, JAPDEVA, a self appointed mediator group, which was supported by JAPDEVA, and the Ministry of Labor and Social Security officially dismissed the Ronaldo Blear leadership of SINTRAJAP.
- February 19, 2010 – the Ministry of Labor and Social Security certified the new board (the Douglas Brenes leadership) that was appointed at the January 15, 2010 assembly.

¹⁹ See <http://www.nacion.com/2010-06-02/EIPais/NotaPrincipal/EIPais2393603.aspx>.

- February 27, 2010 – Ronaldo Blear filed an appeal with the Constitutional Court challenging the legality of the Ministry of Labor and Social Security’s ousting of the democratically elected leadership of SINTRAJAP, which was in the middle of a statutory two-year term. The challenge was based on ILO Conventions and the collective bargaining agreement between SINTRAJAP and JAPDEVA.
- March 4, 2010 – Ronaldo Blear leadership held an assembly with approximately 545 workers in attendance. The assembly reviewed the facts surrounding the events that took place at the January 29, 2010 assembly. The assembly unanimously condemned those events and rejected the Costa Rican government’s buyout. The assembly agreed to push for modernization of both ports through public financing.
- March 4, 2010 – the University of Costa Rica published a report in El Semanario Universidad announcing that the University had received internal documents from the Ministry of Labor and Social Security indicating a step-by-step plan to eliminate SINTRAJAP as part of the “port reform” effort in the Ports of Limón and Moín. The documents also revealed the Costa Rican government’s own concern that the compensation package offered to the union is unconstitutional.²⁰
- March 10, 2010 – Congressman José Merino del Río, of the Frente Amplio party, requested an injunction from the Constitutional Court to restore the Ronaldo Blear leadership to office.
- April 29, 2010 – a national day of protest was held by public sector workers, including dockworkers, teachers, students, farmers, and environmentalists, against the Costa Rican government. The protest resulted in the arrest of numerous trade unionists, including former SINTRAJAP leaders.
- May 4, 2010 – the original bidding deadline passed.
- May 7, 2010 – this date became the revised bidding deadline. However, this date too has been extended.
- May 7, 2010 – JAPDEVA signed and formalized the \$137 million deal for port privatization agreed to by the government-appointed SINTRAJAP leadership at the January 15, 2010 assembly.
- May 10, 2010 – The Juanito Mora Porras Social Federation, to which ANEP and other labor and social organizations belong, lodged a criminal complaint against brothers Oscar Arias Sánchez (former President) and Rodrigo Arias Sánchez (former Minister of the President), Álvaro González Alfaro (former Minister of Labor and Social Security), Marco Antonio Vargas Díaz (former Minister of Institutional Coordination and current Minister of the Presidency), and Francisco Jiménez Reyes (former Executive President of

²⁰ The full article can be read at <http://www.semanario.ucr.ac.cr/index.php/mainmenu-pais/2017-revelan-papeles-del-ministro-trabajo-urdio-intervencion-en-sindicato-de-japdeva.html>.

JAPDEVA and current Minister of Public Works and Transportation) based on the belief that the additional severance package offered to JAPDEVA workers as part of the supplemental layoff benefit required by law in exchange for not opposing the privatization of the docks constitutes a crime.

- May 26, 2010 – approximately 60 officers of the Fuerza Pública raided and occupied SINTRAJAP's union building, which until this point had been used by the Ronaldo Blear SINTRAJAP leadership.
- June 1, 2010 – the Ministry of Labor and Social Security ratified the renegotiated collective bargaining agreement that was agreed to at the January 15, 2010 assembly under the government-appointed Douglas Brenes group.
- June 15, 2010 – Congressman José María Villalta Flórez-Estrada, of the Frente Amplio party, filed a court challenge to the constitutionality of the renegotiated collective bargaining agreement and government buyout signed by JAPDEVA and Douglas Brenes leadership.
- June 2010 – Costa Rica was charged with being in systematic violation of core international labor standards at the 99th International Labor Convention in Geneva.

b. Domestic Labor Laws Violated

The Costa Rican government's systematic and progressive policy of interference in SINTRAJAP (including a government-run media campaign to discredit the union, removal of the democratically elected leadership of the union and imposition of a government-backed employer-run board of union directors, freezing of the union's bank accounts, militarization of the ports in the run up to a complete takeover of the union, directing the police to raid and occupy the union's business office, and entering into an unconstitutional multi-million dollar deal with the government-backed employer-run board of union directors to entice workers to leave the union and accept privatization of the ports) is a blatant violation of SINTRAJAP's autonomy and freedom of association, constitutional due process, and constitutes a crime under the Public Official Anti-Corruption Act.

Freedom of Association and Union Autonomy: Costa Rica has ratified ILO Convention No. 87, the Freedom of Association and Protection of the Right to Organize Convention, and ILO Convention No. 98, the Right to Organize and Collective Bargaining Convention. As discussed above, ratified ILO Conventions prevail under Costa Rican law. In addition, the principles embodied in Conventions 87 and 98 are protected under the Costa Rican Constitution, Articles 25, 60, and 62, and in the Costa Rican Labor Code, Articles 332 through 370, and have been further developed through case law in the labor courts and Constitutional Court.

A labor organization's freedom to define its own internal structure, freely elect its representatives, and draft its own bylaws are crucial elements of union autonomy. Once these rules are defined by the General Assembly of a union and by its competent bodies, they become

the concrete actualization of union autonomy and, as such, are unavoidably binding on the labor organization and its members and must be respected by all other external bodies.

The General Assembly of SINTRAJAP exercised this autonomy by drawing up its Bylaws, which set forth the procedures for calling its assemblies and the elections of the Board of Directors, consisting of the following:

- The members of the Board of Directors shall hold office for a term of two years. Article 18 states: “The election of the Board of Directors shall be held **every two years**, on the third Friday of January by vote of the General Assembly, by direct, secret ballot or a voice vote of all those present, in case of a single qualified candidate on the ballot. **Additionally, a mid-term General Assembly shall be held in January every two years, only for the purpose of amending the Regulations, Bylaws and for approval of reports**” (emphasis added).
- The electoral process for designation of the Board of Directors shall be conducted in such a way as to allow all members of the union to “Elect and be elected for any office within the Organization” (Article 7, section (c)). The electoral process is conducted by the Internal Elections Tribunal (Article 11, section (f)), which is elected by the Regular General Assembly (Article 13, section (c)). Each SINTRAJAP candidate on the ballot shall be provided a specified monetary campaign contribution.
- The recall of the Board of Directors is not set forth in the Bylaws, only expulsions from the union for the reasons indicated in Article 8, section (c), or the loss of good standing by a member of the Board of Directors for failure to attend its meetings in accordance with the terms indicated in Article 20, second paragraph.
- The Board of Directors shall call the union’s regular assemblies and post the specific agenda to be discussed and on its own initiative may call a special assembly or upon the request of 25% of the members of the union (Articles 12, 15, and 16) by following the appropriate procedures and setting forth the reasons for such request.
- The only issues to be discussed at a special assembly are those for which the assembly was convened (Article 15).

According to Costa Rican statute, the Department of Social Organizations of the Ministry of Labor and Social Security, whose function is merely relating to registrations, should verify the compliance with all necessary conditions to ensure respect for union autonomy and other fundamental rights and procedures set forth in the law.

In the case that has motivated this complaint, the internal procedure set forth by SINTRAJAP in its Bylaws was breached and the Ministry of Labor disregarded several requirements when it placed the fake Board of Directors on the ballot, specifically:

- No notarial certification of the pertinent resolutions taken from the appropriate minutes of the SINTRAJAP General Assembly was filed, as this agency has ordered on other occasions when there were disputes over the designation of boards of directors of other social organizations.
- No evidence was provided that the fundamental requirements of due process had been met in order to remove the Board of Directors whose legal term of office was to expire on January 11, 2011. It is clear from documentation filed with the Department of Social Organizations that the leadership of SINTRAJAP was summarily removed from office.
- No evidence was provided to the Department of Social Organizations that election requirements and statutory procedures were followed to safeguard the democratic principle on which the designation of a new union board of directors is based, with the participation of a fully informed membership. In fact, those attending were given a ballot containing only one set of candidates on which they immediately voted. In other words, no opportunity was provided to make additional nominations, nor were the members notified prior to that date that the top leadership of the union would be elected under the “miscellaneous” agenda item. The same thing occurred at the January 15 meeting where a provisional board of directors was designated by those who attended. Not only was union autonomy violated by disregarding the procedures the General Assembly had autonomously set forth in its Bylaws, in accordance with Article 3 of the ILO’s Convention 87, but also the right of all members to run for those offices and vote in those elections, as well as due process rights and democratic principles, were violated since the membership was never notified of the recall and replacement of that Board of Directors.
- By order of the Ministry of Health, the first assembly that was convened was never held and so a second or third assembly could not have been called. To the contrary, the first call was explicitly dissolved by order of the health authorities, which was widely published in the media, and accompanied by a warning stating it would be a crime to challenge the order by proceeding in spite of it. The assembly could not be held at the previously designated location, and, in fact, none was held. Thus, if a group of individuals met elsewhere, that meeting could not be considered a duly convened assembly in accordance with SINTRAJAP’s Bylaws.

Based on the foregoing, it is quite clear that the Costa Rican government, through the Department of Social Organizations of the Ministry of Labor and Social Security, violated SINTRAJAP’s autonomy and consequently the right to unionization by appointing a new board of directors to the union in the middle of the Board of Director’s term of office as set forth in its Bylaws, by dismissing the legitimately elected Board of Directors, and by not enforcing the basic rules that actualize SINTRAJAP’s autonomy as a labor organization. In other words, the Department of Social Organizations allowed a labor organization’s self-regulation, as well as democratic principles, to be subverted. By doing this, it actively participated in the replacement of a democratically elected board of directors by procedures that did not comply with even the minimal elements of constitutional due process and allowed a minority of the membership to install by all accounts a fake and illegitimate board of directors by self convening an event

without meeting the minimum notification requirements and while violating the organization's own rules for conducting democratic elections.

The Principle of Due Process: The Costa Rican Constitution, Article 39 states, "No one shall be made to suffer a penalty except for a crime, unintentional tort or misdemeanor punishable by previous law, and in virtue of final judgment entered by a competent authority, after opportunity has been given to the defendant to plead his defense, and upon the necessary proof of guilt. Judicial compulsion in civil or labor matters or detentions ordered in cases of insolvency, bankruptcy or bankruptcy involuntary proceedings are not violations of this article or of the two preceding articles." Article 41 states, "Having recourse to the law, all may find a remedy for the slanderous allegations or damages to them personally, to their property or their public interests. Justice should be done without delay, effectively, without denial and strictly in accordance with the law."

The Constitutional Court through its case law has found that the constitutional principle of due process is derived from these two constitutional articles, which can be synthesized as follows: "a) Notification to the affected party of the nature and purposes of the proceeding; b) the right to be heard and an opportunity for the affected party to present arguments and produce such evidence as said party may deem relevant; c) an opportunity for the subject of an administrative proceeding to present his or her pleadings, which would require access to the information and the administrative record related to the matter at issue; d) the right of the subject of the administrative proceeding to be represented and advised by attorneys, technicians and other skilled individuals; e) proper notice of the determination made by the administration and the reasons on which such is based; and f) the right of the affected party to appeal the determination" (S.C.V 1224-91, June 27, 1991).

Costa Rican case law clearly establishes that these due process rights shall be observed each time a person's legal rights or standing is brought into question, such as in the case of the removal from office of SINTRAJAP's Board of Directors.

As stated above, Article 18 of the collective bargaining agreement between JAPDEVA and SINTRAJAP states that the term of appointment of the Board of Directors of the union is two years: "The election of the Board will be held every two years, the third Friday of January by General Assembly vote, in secret and open voting, or by all present in the case that only one ballot is properly recorded. Also there will be a midterm General Assembly in January every two years, only to reform regulations, statutes, approval of reports."

Ronaldo Blear was appointed Secretary General on January 16, 2009. This appointment was made for a period of two years expiring on January 31, 2011 and was duly registered with the Ministry of Labor and Social Security.

Despite the fact that the Ministry of Health had countermanded the call for the midterm General Assembly scheduled for January 8, 2010, a group of JAPDEVA workers that had common interests with the government held a meeting on January 15, 2010 with the following agenda: verification of quorum, reading and approval of previous minutes, a report of the Ministry of

Finance, a fiscal report by the secretariat, a report on the second privatization offer from the government of Costa Rica, a report of the Secretary General, and motions and other business.

Nothing in the agenda indicated revocation of the appointment of members of the Board of Directors or the initiation of disciplinary proceedings against its members. In fact, the January 15, 2010 meeting was held without the attendance of Ronaldo Blear or other members of the legitimate SINTRAJAP Board, who were not advised of any charges filed against them, nor were they advised of any hearing where they could address such charges and offer arguments and evidence in their own defense. Despite these facts, the Board was removed and a provisional board of directors was designated at that meeting. Subsequently, on January 29, 2010, the removal of the legitimate Board of Directors was ratified, and without proper notification to the membership of the intent to do so, nominations were made and a new Board of Directors was elected by the 377 members who were present, while excluding the remaining 1,147 members of the Union and depriving them of their right to nominate candidates and vote in the election.

The fact that the first call for an assembly did not go forth due to an order issued by the health authorities which included a warning that disobeying said order would be considered a crime means that there was no second or third call. The assembly could not be held at the previously designated location, and in fact none was held. Thus, if a group of individuals met elsewhere, that meeting could not be considered a duly convened assembly in accordance with the Union's Bylaws, and any actions taken at those other alleged meetings at other locations could not affect the rights of the Board of Directors, designated at the January 16, 2009 General Assembly for a term lasting until January 2011, or the rights of the rest of the members.

The fact that the call allegedly made through the institutional network and through the documents sent to the Union's front desk in an attempt to notify the Union's Board of Directors never contained any items on the agenda pertaining to the removal of the Union's Board and the election of a new board is a serious violation of the right of due process in general and of the right of defense in particular. The members of the Board of Directors were never advised, as personal notice was not served on them, nor was the membership notified of the intent to discuss either at a regular or special General Assembly, the initiation of due process against the Board of Directors. These facts constitute a violation of the right of defense before the General Assembly. They also constitute a violation of the rights of the overwhelming majority of the organization's members, who were not notified of such intent nor the existence of said item on the agenda.

The foregoing constitutes a violation of the constitutional guarantees contained in Articles 39 and 41, which provide that prior to the imposition of a penalty that affects a person's rights there shall be due process, including the reasonable opportunity plead a defense.

Principle of No Crime or Punishment Without Prior Law and Deviation From Proper Use of Power: The Costa Rican Constitution, Article 11 states, "Public officials are mere depositaries of authority and cannot usurp powers which the law has not vested in them. They must take an oath to observe and comply with this Constitution and the laws. The action to establish their criminal liability for their acts is public."

Article 11 of the Constitution enshrines the principle of legality, which mandates that the acts and conduct of public officials must be limited to that which the law authorizes, that is to say, they must act in accordance with written policies, including the Constitution and the statutes.

At the same time, Article 49 of the Constitution in turn provides that: “the Judicial Branch shall have jurisdiction over litigation challenging the actions of the central administration, for the purpose of guaranteeing the legality of the Government’s administrative function, as well as that of its institutions and all other public law entities. A deviation from the proper use of power shall result in administrative actions being deemed unlawful. The law shall protect at least the subjective rights and legitimate interests of those subject to administrative actions.”

The deviation from the proper use of power can be defined as the exercise of administrative legal authority for purposes other than those set forth in the codes and regulations; this concept defines a fundamental error in administrative actions and is derived from Articles 49, paragraph 2 of the Constitution, Article 1, paragraph 3 of the Law Regulating Jurisdiction of Administrative Litigation and Article 131, paragraph 3 of the General Law of Public Administration. A deviation from the lawful use of power implies the existence of two elements: a) the exercise of administrative authority; and b) the deliberate and intentional digression from the tacit or explicit purpose for which said authority is exercised, as set forth in the codes and regulations.

Costa Rican codes and regulations state that the function of the Department of Social Organizations of the Ministry of Labor and Social Security is one that merely relates to registration, without the authority to cancel assemblies or internal actions taken by unions. The law authorizes the Department of Social Organizations of the Ministry of Labor and Social Security only to verify the compliance of legal requirements and monitor any matter or irregularity that may arise in the labor context. In this case, the Ministry’s officials overstepped their authority by proceeding to certify a new board of directors for SINTRAJAP midway through the statutory term of the existing board of directors and decertifying the legitimately designated board of directors without following the organization’s internal provisions, resulting in the violation of the principles of No Crime or Punishment Without Prior Law and Proper Use of Power that are established in the Constitution.

Illegal Use of Public Funds: the SINTRAJAP collective bargaining agreement was renegotiated with JAPDEVA once the legitimate Board of Directors was removed and the government of Costa Rica installed officers who supported the government’s interests. As part of the changes that were made, a new chapter of the contract, Chapter XVII, was written entitled, “Removal from the Collective Bargaining Agreement”. This newly negotiated chapter of the collective bargaining agreement provided for a severance payoff in addition to the Supplemental Layoff Benefit required by law. Article 125 states, “Each permanent or provisional worker shall receive, based on seniority, as supplementary severance, the base amount of four million colones exactly (¢4,000,000.00) for every year worked at JAPDEVA, up to a maximum of twenty (20) years, rounded to the nearest year. The relief workers shall receive one million colones (¢1,000,000.00) for every year worked at JAPDEVA, up to a maximum of three years.” This payment is in addition to that provided for in Article 61 of the collective bargaining agreement, which stipulates, “JAPDEVA agrees workers who are employed by this Institution or came from the Public Sector shall be entitled to one additional month of pay for every year worked up to

and including twenty (20) years as supplementary compensation for layoff from their position, either because of dismissal by the employer, or the worker's resignation, retirement or death. For purposes of calculation of this benefit, the procedures and terms set forth in Article 29 of the Labor Code shall apply. The duration of service in the Public Sector shall be recognized in those cases in which there was no break in continuity or payment of benefits."²¹

Based on the text of the new provisions of the collective bargaining agreement, it is clear that, in addition to the existing Supplemental Layoff Benefit in Article 61, an *extra* payoff to workers is proposed – a payoff that is much higher than other public employees receive and one that is not based on any of the accepted standards typically used to calculate such payments.

Article 63 of the Costa Rican Constitution provides that workers fired without just cause shall be entitled to severance when not covered by unemployment insurance. Such severance in Costa Rica, a Supplemental Layoff Benefit, has been developed based on criteria of proportionality and what is reasonable for each individual worker. In general, the severance is proportional to the duration of service and the salary the worker earned.

Until the adoption of the Labor Protection Act (No. 7983), severance was equivalent to a complete salary times the number of years of service. Initially, a limit was set in the Labor Code of eight years of compensable seniority for each worker. However, this 8-year limit has been modified for various reasons, whether by contract, convention, regulation or law, such as for example Article 37, section (f) of the Civil Service Statute, or Article, 18, section (b) of the Mutual Aid Society Act (No. 6970). In all those cases, however, such modifications rely on recognition of the workers' seniority on the job.

Likewise, severance has become a vested right through various contractual, conventional, regulatory or legal mechanisms, such as in the case of the partial transformation of this Supplemental Layoff Benefit in vested right through the creation of a longevity bonus as set forth in Article 3 of the Labor Protection Act or through Article 21, sections (b) and (c) of the aforementioned Mutual Aid Society Act. In this sense, the improvement of this constitutionally derived labor right is compatible with the provisions of Article 74 of the Constitution to the extent they adhere to the parameters set for by our national legislation – seniority on the job and actual salary earned.

The renegotiated collective bargaining agreement between JAPDEVA and the government-installed board sets a supplemental severance equivalent to twenty times a worker's salary. Such a supplemental severance, one in excess of the constitutionally mandated Supplemental Layoff Benefit and in no way related to the salaries actually earned by the workers or the severance normally paid out as additional layoff compensation, clearly represents an unfounded severance, lacking any reasonable parameter or rationale particularly in light of the fact that the universally accepted criteria in Costa Rica for determining a Supplemental Layoff Benefit (seniority and the worker's actual salary) have been completely disregarded.

²¹ It is important to note that just the cost of excluding workers from coverage of the collective bargaining agreement would cost 137 million dollars, much more than the projected required investment in port modernization.

In addition to the creation of an illegal supplemental severance, public funds are in line to cover any financial shortfall. Article 124 of the JAPDEVA collective bargaining agreement states that the supplemental severance “is not a payout of public funds” and will be paid by the licensee or administrator of the docks at the Ports of Limón and Moín using its own funds. However, the truth of the matter is that by stating, “JAPDEVA **shall be responsible** to the workers and the Union **for the performance of the provisions of this chapter of the contract**” (emphasis added) any worker who feels the licensee is not meeting its obligation can hold JAPDEVA responsible by demanding its enforcement. In this sense, the previously cited contract provisions would require the commitment of the public funds on which JAPDEVA depends.

Moreover, even assuming for a moment that the private licensee would pay the amount of the supplementary severance with its own funds, this payment will ultimately be passed on through the port’s utility service fees to the ultimate users of said utilities – the people of Costa Rica. Also, since public officials promised an additional severance in excess of the one established by law so that the JAPDEVA workers would not oppose the privatization of the docks, the supplemental severance is likely a violation of Costa Rica’s criminal laws. Specifically, the so called “severance” offered to the current JAPDEVA workers for a total of 137 million dollars (80 billion colones) in exchange for accepting the privatization, through concessions of the docks in the Ports of Limón and Moín, likely constitutes a violation of the following statutes: the Public Official Anti-Corruption Act, Law No. 8422; Articles 52, 56, 57, 58, 64 (Articles 345, 354 and 356 of the amended Penal Code); the General Law of Public Administration, Law No. 6227; Article 199, sections 1 and 2; Regulation No. 32333 pertaining to the aforementioned Public Official Anti-Corruption Act; Article 1, section 5, items (a), (b) and (e); the National Financial Administration and Public Budget Act, No. 8131; and Article 110, sections (d) and (h), as well as Articles 115 and 116.

By violating the aforementioned laws, crimes such as influence peddling, illegal granting of employment benefits, unlawful influence against the Department of Public Finance, bribery sanctions, misappropriation of funds, among others may have been committed.

c. Failure to Enforce Domestic Laws

The conduct outlined above has been challenged at multiple levels of government, including in the labor, criminal and administrative courts, over the course of the last year. To date, the Costa Rican government continues to blatantly disregard domestic and international labor law.

d. Failure to Ratify ILO Conventions

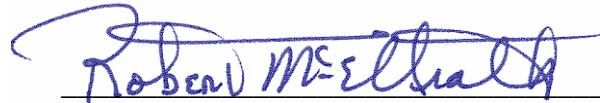
Failure to Ratify ILO Conventions Nos. 151 and 154: to date, the Costa Rican government has refused to ratify ILO Conventions Nos. 151, Labor Relations (Public Service) Convention (1978) and 154, Collective Bargaining Convention (1981), for the negotiation of collective agreements in the sector public.

VII. Conclusion

The case herein demonstrates that the government of Costa Rica has failed to honor its commitments under DR-CAFTA. The case of SINTRAJAP sets forth facts more than sufficient to establish a recurring course of action or inaction on the part of the government. The failure to effectively enforce labor laws also affects trade between the United States and Costa Rica. The United States government should immediately invoke the Cooperative Labor Consultations mechanism under Article 16.6 of DR-CAFTA and require that the government of Costa Rica take all measures necessary and consistent with domestic and international labor law to remedy the claims herein. If the consultations fail to bring about a resolution, the United States government should invoke the dispute settlement mechanism and proceed forward until such time that the government of Costa Rica complies with its laws.

This petition is filed by the ILWU on Monday, July 19, 2010 with the OTLA on behalf of the following petitioners:

International Longshore and Warehouse Union, Coast Longshore Division;
Sindicato de Trabajadores (as) de JAPDEVA; and
Asociación Nacional de Empleados Públicos y Privados.



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