SINDICATO NACIONAL DE UNIDAD DE TRABAJADORES DE SUNAT
(NATIONAL UNION OF SUNAT WORKERS)
REGISTRATION No. 58925-08-DRTPELC/DPSC/SDRG/DRS
RUC 20518480473
LIMA - PERU

OFFICIAL LETTER No. 0191-2010/SINAUT-SUNAT

Lima, December 29, 2010

Miss
ANA ASLAN
Latin America Team Leader
Office of Trade and Labor Affairs

Subject: **Complaint for non-compliance by the National Superintendency of Tax Administration (SUNAT[1]) in the collective bargaining for the 2008-2009 term**

Reference: **Chapter Seventeen of the Free Trade Agreement (FTA) with the United States of America**

We, **NATIONAL UNION OF SUNAT WORKERS—SINAUT[2]**, with certificate of recording on the Union Registry No. 58925-08-DRTPELC/DPSC/SDRG/DRS of the Lima Regional Bureau of Labor and Employment Promotion, acting by and through its General Secretary, Ms. Paola Aliaga Huatuco, identified by National Identity Document 06785143, with domicile at **Av. Roosevelt (ex República de Panamá) N° 5893, Mezzanine, Urb. Aurora, Miraflores**, hereby state as follows:

Under Chapter 17 of the Free Trade Agreement with the United States of America (FTA-EEUU) we request you, **as point of contact**, to admit this **complaint** on the **violation** by the National Superintendency of Tax Administration (SUNAT) **of the fundamental principle and right of *effective recognition of the right to collective***

1 National Superintendency of Tax Administration (SUNAT) – www.sunat.gob.pe
2 **Our Union represents more than 1,400 employees nationwide**.

bargaining, contained in item b) of Article 17,2 of Chapter 17 and, consequently, to implement the following mechanisms:

i) To cause the Lima-Callao Regional Bureau of Labor and Employment Promotion to continue processing our 2008-2009 collective bargaining, ordering the commencement of the arbitration (optional) that we timely requested;
ii) To distribute nationwide the regulatory directives that, in application of the Constitutional Court's criterion, allow Regional Bureaus of Labor to implement the optional arbitration in the collective bargaining in process at arbitration stage;
iii) To demand SUNAT to include in its budget the economic aspects of the terms of claims of the collective bargaining in process;
iv) To regulate the incorporation into public entities' budgets of a framework of participation in the economic aspects of its workers' terms of claims;
v) To inform, nationwide, on the status of the collective bargaining suspended at arbitration stage.

GROUNDS OF THE COMPLAINT:

1. Institutional Framework

1.1. The **Council of Labor Affairs** (the Council) is the competent body –within the context of the Free Trade Agreement–, to supervise the implementation and review the progress of Chapter 17, through which Peru and the United States have undertaken to:

a) adopt,
b) maintain,
c) apply,
d) not to cease applying,
e) not to render ineffective,
f) not to offer to cease applying, and

g) not to offer to render ineffective,

the rights established in the *Declaration on Fundamental Principles and Rights at Work and the Follow-up thereto* (1998 ILO Declaration), among others, *"the effective recognition of the right to collective bargaining"*, contained in item c) of Article 17.2 of Chapter 17.

1.2. **The Point of Contact** is the body within each Ministry of Labor that allows the public to send the parties (Peru and the United States) the notices (complaints) about the matters related to Chapter 17.

1.3. **The Point of Contact** of **Peru** is the **General Office of Cooperation and International Affairs** designated by Ministerial Resolution No. 007-2009-TR. This Office is in charge of the receipt and consideration of the notices from the persons in Peru and, in addition, it must make such notice available for the United States.

1.4. The purpose of the notices (complaints) filed by the public is that each party (Peru and the United States) reviews them pursuant to its internal procedures, being able to call for specialists and representatives of workers and entrepreneurs' organizations in order to know their points of view (paragraphs 6 and 7 of Article 17.5).

1.5. The reviews of the complaints may give rise to the implementation of various measures intended for the **application of the fundamental labor rights recognized in paragraph 1 of Article 17.2**, with the understanding that the non-application thereof affects trade and investments between Peru and the United States.

1.6. Consequently, the **Council of Labor Affairs** is prepared for supervising the implementation and checking the progress with respect to the fundamental labor rights, as well as for preparing reports regarding said implementation and making them available for the public (items a) and c) of paragraph 2 of article 17.5).

1.7. In turn, the Point of Contact of each country assists the Council of Labor Affairs by establishing priorities, developing cooperation activities, the exchange of information on labor practices of each country, including good practices and how to strengthen them, as well as by looking for assistance from international organizations in order to move forward in the common commitments on labor rights.

1.8. In that regard, our organization requests the Council of Labor Affairs to take measures that allow overcoming the impasse with respect to the exercise of our right to collective bargaining for which a set of tasks is proposed in order to face and strengthen the ***"right to effective collective bargaining"***, which is currently one of the most seriously affected labor rights in Peru.

2. Evidence declared by ILO that our right to effective collective bargaining has been affected

2.1. The **Committee on Freedom of Association** assembled at the **International Labor Office**, in Geneva, on May 27th and 28th and June 4, 2010, to discuss ***Case No. 2690*** and made the following recommendation:

> *"b) the Committee **highlights** that the impossibility of negotiating wage increases in a permanent manner contravenes the principle of free and voluntary negotiation contained in Convention 98 and **requests the Government** to promote appropriate mechanisms for the Union of SUNAT Workers (SINAUT-SUNAT) and the National Superintendency of Tax Administration (SUNAT) to be able to enter into a collective bargaining agreement **in the near future**. The Committee requests the Government to keep it informed in that respect."*

3. Facts that violate our right to effective collective bargaining:

2.2. As it has been proved to ILO, our union organization has been plunged since 2008 into a paralyzing collective bargaining, with respect to which the National Superintendency of Tax Administration (SUNAT) has no interest in executing it. The lack of interest and will, as well as the lack of consideration for the neighbor are evident:

a) Our terms of claims were filed on July 31, 2008.

b) The negotiation table for direct dealing was NEVER set. There was NEVER direct dealing, but given the frustration of direct dealing it was necessary to go to the conciliation stage.

c) SUNAT agreed to sit at the negotiation table in the conciliation stage on January 14, 2009, that is, more than five (5) months after the request for collective bargaining was filed.

d) SUNAT attended the conciliation meetings but it never made a proposal or approach. We could never even get into the negotiation of any of the issues contained in the terms of claims.

e) Given the frustration of any possibility of negotiation through conciliation, a series of *sui generis* sessions known as "out-of-court meetings" took place, unofficially called by the labor authorities, both at regional and national level.

f) These "out-of-court meetings" (five in total) did not work either because not even the slightest gesture of negotiation was made in any of them.

g) The sole argument presented by SUNAT was its refusal to negotiate on economic aspects for budgetary reasons, without taking into consideration that, in any case, our requests were not limited to economic matters.

h) Due to SUNAT's absolute lack of will to negotiate, we requested the terms of claims to be settled in arbitration, as set forth in the Law on Collective Labor Relations.

i) SUNAT refused to submit the complaint to arbitration, so everything has hit a dead end, which evidences the violation of our right to effective collective bargaining.

j) **MORE THAN TWO (2) YEARS have elapsed and no solution has been reached for our collective bargaining**.

3. Conclusions of the Committee on Freedom of Association:

3.1. **The Committee on Freedom of Association** concludes that:

a) *«it is aware that the collective bargaining in the public sector demands the verification of the resources available in the different public companies or organizations, that such resources are contingent upon the budgets of the Government and that the term of the collective agreements in the public sector does not always coincide with the effectiveness term of the State Budget Law, which may pose difficulties » (paragraph 944);*

b) *«if by virtue of a stabilization policy a government considers that wage rates cannot be freely set through collective bargaining, such restriction should be applied as exception measure, be limited to what is necessary, it should not exceed a reasonable period and it should include appropriate guarantees to protect the workers' standard of living» (paragraph 45) (stabilization policy that, by the way, does not exist and is not necessary in Peru nowadays, which is a country in economic growth);*

c) *"are consistent with the Convention those legislative provisions that enable the Congress or the competent body in budgetary matters to set a wage range that serves as basis for negotiations, or to establish a fixed global budgetary «allocation» under which the parties may negotiate the clauses of pecuniary or regulatory nature (for example, the reduction of work time or other arrangements in terms of employment conditions, the regulation of wage increases based on the*

different levels of remuneration, or the establishment of measures to stagger readjustments), or even the provisions that confer on the public authorities that have been attributed financial responsibilities, the right to take part in the collective bargaining together with the direct employer, to the extent that they leave significant space for collective bargaining; and that authorities should give priority, to the extent possible, to collective bargaining as a mechanism to determine officers' employment conditions; if it was not possible due to the circumstances, this type of measures should be applied during limited periods and be intended to protect the most affected workers' standard of living. In other words, ***there should be equitable and reasonable commitment between, on the one hand, the need to preserve to the extent possible the parties' autonomy in the negotiation and, on the other hand, the governments' duty to take the measures necessary to overcome their budgetary difficulties." (paragraph 945);***

d) *and, therefore,* ***"the Committee highlights that the impossibility of negotiating wage increases in a permanent manner contravenes the principle of free and voluntary negotiation contained in Convention 98, and requests the Government to promote appropriate mechanisms for the parties to be able to enter into a collective bargaining agreement in the near future****." (paragraph 946).*

4. Recommendation made by the Committee on Freedom of Association

4.1. Based on the foregoing, the Committee on Freedom of Association requests the Peruvian Government ***"to promote appropriate mechanisms for the Union of SUNAT Workers (SINAUT-SUNAT) and the National Superintendency of Tax Administration (SUNAT), to be able to enter into a collective bargaining agreement in the near future"***, considering that ***"the impossibility of negotiating wage increases in a permanent manner contravenes the principle of free and voluntary negotiation contained in Convention 98."***

5. <u>Demandable actions based on the Recommendation made by the Committee on Freedom of Association: IMPLEMENTATION OF THE OPTIONAL ARBITRATION:</u>

5.1. Based on the requirement to promote appropriate mechanisms for the *Union of SUNAT Workers (SINAUT-SUNAT) and the National Superintendency of Tax Administration (SUNAT)* ***<u>to be able to enter into a collective bargaining agreement in the near future</u>*****, it is urgently indispensable that the Peruvian Government**, mainly through the Ministry of Labor and Employment Promotion, **<u>implements optional arbitration in collective bargaining nationwide</u>**, as established by the Constitutional Court in Case File 03561-2009-PA/TC.

6. <u>Reasons to implement the optional arbitration in collective bargaining:</u>

6.1. <u>Background</u>

On September 29, 2009, the Constitutional Court published on its website the judgment entered in Case File 03561-2009-PA/TC in the proceeding filed by *Sindicato Único de Trabajadores Marítimos y Portuarios del Puerto del Callao* (Exclusive Union of Maritime and Port Workers of the Port of Callao) against *Asociación Peruana de Operadores Portuarios* (Peruvian Association of Port Operators), *Asociación Peruana de Agentes Marítimos* (Peruvian Association of Shipping Agents) and *Asociación Marítima del Perú* (Peruvian Maritime Association), for an action for the protection of constitutional rights due to the violation of the right to collective bargaining.

The judgment **declared** that the complaint was well grounded. But it also determined that as the second sentence of the first paragraph of Article 45 of Supreme Decree No. 010-2003-TR is unconstitutional, it does not apply to the specific case. The sentence deemed unconstitutional is: *"Given the absence of agreement, the negotiation will be held at company's level."* Consequently, the judgment also **specified** that *"given the*

absence of agreement to decide on the negotiation level, it shall be determined through arbitration, without there being a prior declaration of strike."

On March 25, 2010, the Constitutional Court published the resolution declaring that the request for nullity of judgment filed by the Peruvian Association of Port Operators lacked basis, and the request for clarification filed by the Callao Bureau of Labor and Employment Promotion was well grounded. Consequently, the Constitutional Court stated that the arbitration referred to in the judgment (on the determination of the negotiation level given the absence of agreement) is the (economic) arbitration regulated in the Single Revised Text (TUO, as in Spanish) of the Law on Collective Labor Relations, and not the (legal) arbitration regulated in Legislative Decree 1071.

Recently, on June 17, 2010, the Constitutional Court published the resolution that, on its own motion, clarified that the arbitration *"referred to in Article 61 of Supreme Decree No. 010-2003-TR, […] is optional"*.

6.2. Legal considerations

a) On the nature of the arbitration referred to in Article 61 of Supreme Decree No. 010-2003-TR

Article 61 of Supreme Decree No. 010-2003-TR (TUO of the Law on Collective Labor Relations) sets forth: *"If no agreement has been reached in direct negotiation or conciliation, if requested by workers, the parties may submit the dispute to arbitration."*

The Law does not specify whether such submission to arbitration requires the acceptance of both parties (voluntary arbitration) or if the request by one of them is sufficient for the other to be bound by such decision (optional arbitration).

The Constitutional Court –in order to solve the issue of the arbitration on the negotiation level— has construed that the arbitration regulated in Article 61 of

Supreme Decree No. 010-2003-TR (TUO of the Law on Collective Labor Relations) is optional.

For the Constitutional Court, the arbitration referred to in Article 61 of the Law (to which any of the parties may submit the collective bargaining, after the direct dealing and conciliation have failed) is optional.

In fact, in ground 9 of the clarifying resolution, the Constitutional Court establishes:

> *"Consequently, there is the need to specify that the arbitration through which the negotiation level shall be decided given the lack of agreement between workers and employer, is that referred to in* ***Article 61 of Supreme Decree No. 010-2003-TR, which is optional****.* ***In that respect, having the dispute been submitted to arbitration by any of the parties, the other party has the obligation to submit to it****."* The highlighting and underlining have been added.

In order to reach such conclusion, the Constitutional Court states that, within the labor scope, there are three types of arbitration: mandatory, voluntary and optional.

The Court alleges that the arbitration referred to in Article 61 is not mandatory because it is evident that it depends on the parties' will: *"Therefore, it is evident that the arbitration referred to in Article 61 of Supreme Decree No. 010-2003-TR, does not meet the criteria to be mandatory, since it depends on the parties' will. Thus, it must be determined whether the arbitration is voluntary or optional."*

Then -adds the Court- *"if it is the Party's will, the right to strike must be recognized (and, to that extent, respected and guaranteed), but not encouraged or fostered, meanwhile the forms of peaceful solution for labor conflicts must be promoted, it is evident that the arbitration referred to in Article 61 of Supreme Decree No. 010-2003-TR, which is intended to determine the negotiation level given the lack of agreement, is optional and not voluntary.* ***This means that, given the lack of agreement, and upon expression of the will of one of the parties to resort to arbitration, the other party is obliged to accept this formula to settle the dispute****."*

b) On the binding nature of the criterion established by the Constitutional Court

Having the Constitutional Court established that the arbitration that may be resorted to in a collective bargaining procedure is optional and not voluntary, the question arises about the binding nature of said decision with respect to the judicial bodies and administrative authorities. Is this decision also of mandatory compliance for labor authorities?

In order to answer this question, we need to analyze the Code of Constitutional Procedure, other judgments of the Constitutional Court and some general principles of law.

With respect to the Code of Constitutional Procedure, we should distinguish two scenarios: that of constitutional provisions and principles, and that of binding precedents.

With respect to the first scenario, the last paragraph of **Article VI** of the Preliminary Title reads as follows:

> *"Judges **interpret and apply** laws or any legally binding rule and the regulations **pursuant to the constitutional provisions and principles**, **according to the interpretation thereof arising from the resolutions issued by the Constitutional Court**."* The highlighting and underlining have been added.

Meanwhile, Article VII of the Preliminary Title provides that:

> *"Judgments rendered by the Constitutional Court with the authority of res judicata are **binding precedent when so expressed in the judgment**, **specifying the aspect of its regulatory effect**. (…)."*The highlighting and underlining have been added.

The difference lies in the fact that the binding precedent has regulatory effects to the extent that it establishes the creation of a rule of law, for example, to which cases an

action for the protection of constitutional rights applies or which are the requirements to file a specific claim, or what things should or should not be required from a citizen. Therefore, rules of law must be expressly stated in the judgment.

Unlike the precedents, constitutional provisions and principles are canons for the interpretation of rights, which arise from the case law of the Constitutional Court. Said interpretation canons must be followed by all judicial bodies when trying a cause in application of the principle of equality. If the Constitutional Court interprets that the contents of the right to work has two aspects, that of access to work and that of protection in case of wrongful dismissal, all judicial bodies must follow said interpretation guideline and interpret and apply laws and regulations in accordance therewith.

In the case being analyzed, all judicial bodies —when interpreting and applying Article 61 of the Law on Collective Labor Relations in order to decide on the specific case that they are hearing— shall interpret that the arbitration referred to in Article 61 of the Law on Collective Labor Relations is optional since it is a constitutional provision arising from the case law of the Constitutional Court, as set forth in Article VI of the Preliminary Title of the Code of Constitutional Procedure.

Given that Article VI of the Preliminary Title only refers to judges, it may be concluded that administrative authorities and even private parties would not be subject to the constitutional provisions and principles arising from the resolutions of the Constitutional Court. However, this conclusion is incorrect.

Article 51 of the Constitution adopts the principle of supremacy of the Constitution that any authority (judicial, administrative or any other type of authority) and every person must comply with it. According to this principle: *"The Constitution prevails over any legal rule; the law, over rules of lower rank, and so on. (…)."* Consequently, if an administrative authority must act in compliance with the Constitution, then the interpretations that it makes of certain law must be in accordance with the Constitution,

and therefore the authority (and any person) must follow the constitutional provisions and principles arising from the interpretations of the Constitutional Court.

This conclusion has been adopted by the Constitutional Court in grounds 6 and 7 of STC 03741-2004-AA/TC (Salazar Yarlenque Case). In this case, the Court stated as follows:

> *"6. **This duty to respect and opt for the legal principle of supremacy of the Constitution also extends, evidently, to the public administration**. Just as the branches of the government and the constitutional bodies, it is **subject**, **firstly, to the Constitution in a direct manner and, secondly, to the principle of legality, in accordance with Article 51 of the Constitution**. So, **the legitimacy of administrative acts is not determined by the compliance with law**– more so if it can be unconstitutional– **but by the binding nature with respect to the Constitution**. The fact that the administration is bound by the Constitution is shown in Article IV of the Preliminary Title of the General Administrative Procedure Law, which, although it has been formally designated by the Law itself as «Principle of Legality», in the end it is just the materialization of the legal supremacy of the Constitution, in providing that «administrative authorities must act in compliance with the Constitution and the law (...)» (the emphasis has been added).*
>
> *7. Pursuant to these de facto assumptions, the Constitutional Court considers that **the public administration**, through its administrative courts or its collective bodies, has not only **the power to enforce the Constitution**–given its regulatory force–, but also the constitutional duty to perform the diffuse control of the rules that support administrative acts and that go against the Constitution or the interpretation thereof by the Constitutional Court (Article VI of the Preliminary Title of the Code of Constitutional Procedure). This is based first on the fact that although the Constitution, pursuant to the second paragraph of Article 138, recognizes for judges the power to perform diffuse control, it does not establish that said power corresponds only to judges, and that diffuse control must be made only within the framework of a judicial proceeding either."* The highlighting is ours.

Administrative authorities are bound by the constitutional provisions and principles as established by the Constitutional Court when regulating the binding precedent in the case of the precept of diffuse control by administrative authorities. If an administrative

authority is obliged to perform the diffuse control when a provision contravenes a binding precedent or goes against the constitutional provisions and principles shown by the Constitutional Court, even more so it is obliged to comply with said constitutional provisions and principles, as well as with the corresponding binding precedents.

This binding precedent has been established in the clarifying resolution dated November 14, 2005 in Case File 03741-2004-AA/TC (Salazar Yarlenque Case), when stating that ground 7 of the clarifying resolution is an integral part of the binding precedent established in ground 50 of STC 03741-2004-AA/TC.

Ground 7 of the clarifying resolution provides the following:

> *"7. The exercise of administrative diffuse control is performed at a party's request; in this alleged case, the administrative courts or collective bodies referred to above are authorized to evaluate whether the request should be admitted, using objective and reasonable criteria, provided that the intention is to grant more constitutional protection to the subjects' fundamental rights. In those cases in which they notice that such requests are intended for clearly obstructionist or illegitimate purposes, sanctions may be determined and imposed pursuant to law. Exceptionally, diffuse control applies ex officio* ***in case of the application of a provision that goes against the interpretation thereof made by the Constitutional Court, in accordance with the last paragraph of Article VI of the Preliminary Title of the Code of Constitutional Procedure****; or when the application of a provision contravenes a binding precedent of the Constitutional Court established pursuant to Article VII of the Preliminary Title of the Code of Constitutional Procedure."* The highlighting has been added.

6.3. Legal conclusion

The criterion established by the Constitutional Court with respect to the optional nature of the arbitration regulated in Article 61 of the Law on Collective Labor Relations is also binding for labor authorities and, therefore, it must be implemented nationwide as soon as possible.

THEREFORE:

Based on the foregoing, we request that the following mechanisms be implemented:

- To cause the Lima-Callao Regional Bureau of Labor and Employment Promotion to continue processing our 2008-2009 collective bargaining, ordering the commencement of the arbitration (optional) that we timely requested;
- To distribute nationwide the regulatory directives that, in application of the Constitutional Court's criterion, allow Regional Bureaus of Labor to implement the optional arbitration in the collective bargaining in process at arbitration stage;
- To demand SUNAT to include in its budget the economic aspects of the terms of claims of the collective bargaining in process;
- To regulate the incorporation into public entities' budgets of a framework of participation in the economic aspects of its workers' terms of claims;
- To inform, nationwide, on the status of the collective bargaining suspended at arbitration stage.

FIRST ADDITIONAL PLEADING: **Exhibits**: We enclose hereto a copy of the following documents:

1. Union registration of our organization.
2. National Identity Document of our general secretary.
3. 357. Report of the Committee on Freedom of Association in the part applicable to this case.
4. The resolution of the Constitutional Court entered in Case File 03561-2009-PA/TC.

SECOND ADDITIONAL PLEADING: We hereby state that the various documents related to our union organization appear in the corresponding dockets of the Union and Collective Bargaining Registry.

THIRD ADDITIONAL PLEADING: We request to be notified of the sessions to be held by the Council of Labor Affairs and to receive a response as to the actions to be taken with respect to this complaint, for which the address indicated in the introduction to this document must be taken into consideration.

Lima, December 29, 2010

Paola Aliaga Huatuco
Secretaria General