AIR PACIFIC
FIJI'S INTERNATIONAL AIRLINE

AIR PACIFIC LIMITED
PRIVATE MAIL BAG
NADI AIRPORT FIJI
TELEPHONE: (679) 672 0777
WEBSITE: www.airpacific.com
FAX: (679)
EMAIL:

18 September 2012

Mr. William D. Jackson
Deputy Assistant U.S. Trade Representative
Chairman, GSP Subcommittee
of the Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street NW
Washington, D.C. 20508
USA

Dear Mr. Jackson

On behalf of Air Pacific, thank you for the opportunity to provide comments on the Generalized System of Preferences (GSP) case (003-CP-11) concerning whether the Republic of Fiji provides its workers internationally recognized worker rights.

By way of an introduction, I am a qualified attorney working in Fiji, having been admitted to the Bar and High Court of Fiji since 2005. I have been working in private practice since admission, and have been employed by Air Pacific since July 2010.

My Statement is attached hereto. Thank you for your consideration and the opportunity to comment.

Please do not hesitate to contact me if you have any questions.

Yours sincerely

Jay Shree Raniga
General Counsel

STATEMENT OF JAY SHREE RANIGA

Background and Overview of Air Pacific

1. Air Pacific, Fiji's international airline, was founded in 1947. It commenced regular domestic services in 1951 and began service to Auckland, New Zealand in 1974 and the USA in 1987. Its principal assets are located at Nadi, Fiji Islands. Air Pacific is primarily owned by the Government of Fiji and the Australian airline, Qantas Airways Ltd, which today respectively own 51.0% and 46.3% of the Company. Air New Zealand Ltd and the governments of Kiribati, Tonga, Samoa, and Nauru each hold minor stakes. In 2007 Air Pacific acquired Sun Air, a domestic airline, thus forming the basis for Pacific Sun, Air Pacific's domestic and regional subsidiary.

2. Today, Air Pacific serves thirteen (13) domestic markets and sixteen (16) international markets and is responsible for bringing in 68% of international visitors to Fiji, a country that is heavily dependent on the tourism industry.

3. Air Pacific currently operates a mixed fleet of six (6) aircraft composed of B737-700 (1), B737-800 (3), and B747-400 (2). Pacific Sun operates ATR 45-500 (2) and DHC-6 (3).

4. In FY08/09 and FY09/10, following the global financial crisis, fuel price spikes, increased competition, and significant fuel hedging costs, Air Pacific incurred losses of a $91.8 million. In the face of shutting the airline down, the Board of Air Pacific recruited the current MD/CEO, Mr Dave Pflieger, and mandated him to restructure the airline and return it to profitability.

5. In response, Mr Pflieger and his new Management team implemented a number of sound cost cutting measures and other initiatives aimed at increasing operational efficiency and returning the airline to profit. These measures included changing virtually every aspect of the airline's operations, retiring old fleet, optimizing routes, undertaking measures to reduce fuel burn, and significantly reducing non-fuel expenses. In addition, the Company commenced the re-negotiation of every single vendor contract. In as early as July 2010, Mr Pflieger had put every employee of the Company (unionized, non-unionized, and Management) that he would make every effort to restructure the Company without restructuring employee contracts, and without implementing any involuntary redundancies. However, Mr Pflieger advised that if after all efforts at cost savings, the results had not improved significantly, that he would be left with no choice but to restructure employee contracts in the first instance, and then as a last resort, lay off employees.

6. In December 2010, Mr Pflieger announced that the Company was continuing to make significant losses and depleting its cash reserves and that it was critical to also restructure all employee contracts (including Management) in order to ensure the survival of the airline. It was in this context that union negotiations commenced in January-February 2011.

Economic benefit to Fiji's workers, to the Fijian economy, and to the local community, as a result of the Company's presence in Fiji

7. Fiji is recognised as the hub of the South Pacific region, housing the regional Pacific offices of many worldwide organisations and agencies in its capital, Suva. Fiji's economy has been struggling since 2006, and according to ANZ Bank's latest quarterly research report, is expected to grow by a meager 2.4% in 2012.

8. Tourism is the largest contributor to Fiji's GDP at approximately 33% and Air Pacific acts as Fiji's worldwide ambassador carrying over 67% of all visitors to the country, thus contributing significantly to the country's economy directly as well indirectly by providing over 900 direct jobs and over 9000 indirect jobs in the country (jointly between Air Pacific and Pacific Sun).

Comments on the ENI Decree

9. It is my belief that the ENI Decree was critical in allowing Air Pacific to restructure its Company and ensure its survival by allowing a more equitable environment between the Company and its labour groups. The employment laws of Fiji prior to the enactment of the ENI Decree (Employment Relations Promulgation ("**ERP**")) were unsuited to employees that worked in a 24/7 operation. For example, the ERP required pay at 150% for any work done on a Saturday, 200% for any work done on a Sunday, and 300% for any work done on a public holiday. Additionally, in respect of overtime, the ERP required that employers pay their employees overtime at 150% for the first two hours of work, and at 200% for any work thereafter.

Staff and Labour Relations

Staff numbers

10. Current: 785 employees in total; females: 376 (47.90%); unionized employees: 321 (40.89%).

Labour relations

11. As an employer, Air Pacific recognises the rights of workers to collectively bargain. The Company's pilots and its flight attendants have chosen such collective representation.

12. Air Pacific's other staff are not currently represented by a union but are covered by individual contracts as required by Fiji's law (these contracts prohibit termination without just cause).

13. Air Pacific maintains open, productive and healthy relationships with its employees and unions, which was not the case prior to the implementation of the ENI Decree (when the union heads and Management were often at loggerheads with each other even over trivial issues).

Negotiations

Labour contracts and individual contracts

14. As mentioned above, discussions about a possible restructure of all employee contracts started from early July 2010, but whole-scale union negotiations commenced in January-February 2011, long before the ENI Decree was introduced.

15. The overarching aim of all the contract renegotiations (Management, union agreements, and individual contracts) was to ensure the survival of the Company.

16. After the ENI Decree was passed and implemented, the Company and both its union groups (flight attendants and pilots) continued to meet in earnest and both sides were able to reach consensual agreements in a matter of days. The current union agreements were mutually

agreed to in late 2011 and have a 5 year term. The individual contracts were also all consensually signed at about the same time. Air Pacific completed all of these contract negotiations with no disruptions to its operations.

Improvements to staff contracts (unionized and non-unionized): the Company's own initiatives

17. Air Pacific has recently completed and is in the process of completing a number of labour-related initiatives.

18. Earlier this year, the Company announced a profit-sharing scheme (commencing next financial year) through which employees will also be able to partake in the sustainable profits of the Company.

19. Further, at the beginning of the current financial year, Air Pacific commenced a quarterly-incentive scheme which enables all employees to potentially earn up to $1,200 per annum extra as an incentive payout if the Company's target KPIs are met. The first quarter payments have already been made whereby all employees received $225 each for meeting three (3) out of four (4) KPIs for the first quarter. This incentive scheme was implemented by the Company of its own volition and initiative, **after** the conclusion of the union negotiations.

20. Additionally, the Company agreed to provide all employees with short and long term medical disability benefits (self-funded), by which an employee is eligible for a medical leave of absence for twelve (12) months, the first six (6) months at 100% salary, and the second six (6) months at 50% salary.

21. Over the past year, Air Pacific has also overhauled its employee medical scheme, increasing employee access to general practitioners, and offering enhanced levels of access to private hospital treatment. The revised health plan also provides coverage for additional specialists, including dietician services, occupational therapists, speech therapy, and podiatry.

22. The Company also agreed to implement an arbitration policy although this was not required by the ENI Decree.

23. Moreover, Air Pacific is in the process of building a comprehensive staff travel program which will give its employees access to cheaper and more flexible travel.

High level summary of union contract comparison: old vs current

Flight Attendants

24. The current contract increased the base salary of the flight attendants by approximately 25%, realigned the allowances and work-rules that allowed the airline to become more efficient and productive, and provided flight attendants with a premium pay of 125% for any hours worked above seventy (70) hours per month. It also preserved benefits such as layover per diem, hotel accommodation and transport. Moreover, for the first time in Air Pacific's history, it guaranteed pay increases for flight attendants every year for the term of the agreement.

25. In addition, as discussed above, flight attendants are entitled for the first time in Air Pacific's history, and arguably, for the first time in the country's history, to participate in the Company's profit sharing scheme. They are also now eligible to short and long term medical disability benefits as described above (this too, for the first time in Air Pacific's history). Further, they now benefit from a better and more comprehensive medical insurance scheme. They are also entitled to arbitration of any disputes in accordance with the Company's policy. And, when the Company's new travel benefits policy is finalized, they will see significant improvements in their entitlement. In addition to all of this, flight attendants also participate in the Company's quarterly incentive scheme (as noted above, this incentive scheme was voluntarily introduced by the Company after the new contracts were agreed and without any negotiation).

Pilots

26. The current contract increased base salary for almost all pilots who were at the top of their longevity scale. The current contract required no base-pay cuts for any pilot, and in fact ensured that the B767 pilots would not receive 21% pay-cuts when forced down to B737 positions (both for Captains and First Officers) at the end of the lease term for the B767, and will ensure that B747 pilots would not receive a minimum of 18% pay-cuts when forced down to a lower position (both for Captains and First Officers) at the end of the B747 terms.

27. The current contract realigned the allowances and work-rules that allowed the airline to become more efficient and productive, and provided pilots with a premium pay of 125% for any hours worked above seventy (70) hours per month. It also preserved benefits such as layover per diem, hotel accommodation and transport.

28. In addition, similar to flight attendants, pilots are also entitled to participate in the Company's profit sharing scheme. They are also now eligible to short and long term medical disability benefits as described above (this too, for the first time in Air Pacific's history). Further, they now benefit from a better and more comprehensive medical insurance scheme. They are also entitled to arbitration of any disputes in accordance with the Company's policy. And, when the Company's new travel benefits policy is finalized, they will see significant improvements in their entitlement too. In addition to all of this, pilots also participate in the Company's quarterly incentive scheme (as noted above, this incentive scheme was voluntarily introduced by the Company after the new contracts were agreed and without any negotiation).

High level summary of individual contract: comparison – union contract vs current individual contracts

29. The current individual contracts largely increased the base salary of almost all employees that were previously represented by unions. The current individual contracts realigned the allowances and work-rules that allowed the airline to become more efficient and productive, and provided employees with a premium pay of 125% for any overtime work, and work on holidays. It also preserved benefits such as transport.

30. In addition, similar to flight attendants and pilots, all other employees are also entitled to participate in the Company's profit sharing scheme. They are also now eligible to short and long term medical disability benefits as described above (this too, for the first time in Air Pacific's history). Further, they now benefit from a better and more comprehensive medical insurance scheme. They are also entitled to arbitration of any disputes in accordance with the Company's

policy. And, when the Company's new travel benefits policy is finalized, they will see significant improvements in their entitlement too. In addition to all of this, all other employees also participate in the Company's quarterly incentive scheme (as noted above, this incentive scheme was voluntarily introduced by the Company after the new contracts were agreed and without any negotiation).

31. At Air Pacific, the new individual contracts came into effect on 9 November 2011, and the new collective bargaining agreements came into effect on 2 January 2011. My experience and assessment is that since the new contracts have been in force, the number of complaints and issues raised by employees has reduced significantly because of the more open and frank discussions that now take place between employees and Management, and indeed Management has demonstrated the ability to respond individually rather than through unions (which as noted previously, often tended to end up at loggerheads).

Experience with the Ministry of Labour or other governmental representatives as part of labour relations interactions

32. The Company has not had much reason to interact with Government for any labour relations matters. Late in 2010, Pacific Sun consulted with the Ministry of Labour (as was required by the law then applicable to the Company) during a time when the Company announced some redundancies. The Company had offered significantly higher severance packages than required by law.

33. As part of the redundancy process, the Company also consulted with the Attorney General of Fiji (also the Line Minister responsible for Civil Aviation in Fiji). The Attorney General in turn also consulted with the union leaders then representing the workforce in Pacific Sun. All those consultations were very fruitful and ended in amicable agreement between the Company and the (former) employees and resulted in no union action.

The Petition filed by the American Federation of Labor & Congress of Industrial Organizations (AFL-CIO) to Remove Fiji from the List of Eligible Beneficiary Developing Countries Pursuant to Section 19 USC § 2462(d) of the Generalized System of Preferences (GSP) ("the Petition")

34. I have read the Petition and in particular note a number of inaccurate statements pertaining to sections D and E of the Petition, in respect of the ENI Decree. I set out my comments, responses and observations in response to the Petition in Appendix A to this Statement.

Appendix A

D. Essential National Industries (Employment) Decree of 2011 and its Regulations

On July 29, 2011, the government of Fiji promulgated the Essential National Industries (Employment) Decree 2011. On September 9, the government gazetted the decree and it came into full effect. It designated 11 corporations in the finance, telecommunications; aviation, and public utilities sectors as essential industries *and allows the regime to include any other industries as and when it wishes.*

Comment [jsr1]: This is a loose statement and suggests that the Fiji Government can arbitrarily include any other industries as and when it wishes. This is not so. The reality is that one would need to qualify and meet the definition of "essential national industry" and "designated corporation" as those terms are defined in section 2 of the ENI Decree.

Under this Decree, as described below, trade unions in essential industries *will be forced to re-register under onerous new rules and hold new elections.* Collective bargaining agreements will also be abrogated. These measures strike a severe blow to workers' rights in many economic sectors in Fiji *and abrogate Fijians' rights to free association and collective bargaining under international labor law.*

Comment [jsr2]: Not true, there is provision in the ENI Decree for voluntary recognition of a Bargaining Unit without an election: see section 9 of the ENI Decree. Air Pacific recognized both its union groups under this provision and did not force an election.

Comment [jsr3]: Not true. Employees still have a right of association and the right to collectively bargain. Those internationally recognized rights still exist today. Air Pacific still has two union groups -- pilots and flight attendants; if these rights were abrogated, these unions would not exist.

On September 13, ILO Director General Juan Somavia said the following with regard to the decree:

> By going ahead with this Decree the Government has demonstrated the same lack of concern for the views of the international community as it has for the rights and aspirations of its own people. What is really essential for Fiji is that it change course now. That means reversing this and other restrictive labor decrees, a return to dialogue with trade unions and employers, an end to assaults on and harassment of trade unionists, and the immediate restoration of basic civil liberties.

Unfortunately, the regime has ignored the ILO's entreaties and appears wholly committed to the dismantling of the trade union movement by force and by decree. Included below are some of the most objectionable provisions.

Comment [jsr4]: ILO sent a delegation to Fiji in August 2011, and as part of their visit, that delegation met up with Govt officials NGOs, trade unionists (Fiji Nursing Union, and the Fiji Islands Council of Trade Unions), the Fiji Council of Churches and Air Pacific MD/CEO, Mr Dave Pflieger also. Following the meeting with Mr Pflieger, Mr David Lamone (ILO director country office for South Pacific Island Countries) said he had had "a fruitful discussion". See Annexure 1.

Union Registration and Recognition

Under Article 6, all union registrations in designated industries will effectively be cancelled; in order to operate, *unions are required to re-register under new and highly problematic*

procedures. The CFA has on many prior occasions opined that the *cancellation* of a union registration by the executive branch constitutes a serious infringement of the principles of freedom of association.[1]

Under Article 7, the leaders of re-registered unions, including officers, representatives, and executives, must be employed by the designated corporations they represent, which conflicts with ILO jurisprudence on workers' ability to elect representatives of their choice.[2] Those that run afoul of this provision face steep civil and penal sanctions—a fine of up to $50,000 or imprisonment of up to 5 years for individuals and up to $100,000 for the union.

Under Article 10, a union first must apply to the Prime Minister to seek to be elected or re-elected as representative of the bargaining unit *and supply specified information.*

Upon receipt of an application, *the Prime Minister has complete discretion, under Article 11, to decide the composition and scope of the bargaining unit, and workers have no opportunity to appeal that decision.*

Comment [jsr5]: Not correct, refer comment 3 above.

Comment [jsr6]: This words' statement is out of context, it is not cancellation of registration without opportunity to re-register. To the contrary, a new process is defined and re-registration necessary to comply with the new process.

Comment [jsr7]: *---- No, the words italicized in footnote 1 (footnote 20 in the Petition) are incorrect. See section 10 of the ENI Decree, which prescribes the rules of how a union may be registered. The rules are very clear, and there is no ability in the ENI Decree for the Government to refuse registration if the union met the registration criteria set forth in section 10; i.e. it is most definitely NOT a discretionary power.*

Comment [jsr8]: In the Air Pacific context, the pilots' union leaders and representatives were already employed by Air Pacific, the Flight Attendants' union leader was not a flight attendant nor employed by the Company. In my experience and assessment, though, our former employee was not appropriately representing them as he did not understand their issues or workrules; and a number of people in the flight attendants union specifically told us that their non-employee union leader was willing to listen to their requests to meet with Management or negotiate.

Comment [jsr9]: The information required is not onerous, the ONLY additional requirement (compared to the ERT requirements) is that the union show that at least 35% of the workers wish to be represented by the union. By contrast, the RLA in the USA requires unions to present authorization cards from at least 50% of the employees in a class or craft. Thus this ENI Decree provision is clearly significantly more favorable to employees than its counterpart under the RLA.

Comment [jsr10]: Not correct. See section 11 of the ENI Decree – the Minister consults with the Minister for Industry and Trade; may get whatever information as necessary from the employer of the current/ prospective union. This is similar to the RLA provision which requires the National Mediation Board to determine the composition of class and craft for a group of employees. Fiji is not as sophisticated as the USA is and does not have similar resources or administrative bodies like the NMB, thus, as a local, it is not at all hard for me to imagine why this function has been delegated to the Minister rather than setting up a whole new body akin to the NMB to look after a relatively small number of unions in Fiji.

---

[1] *See, e.g.*, CFA Digest of Decisions ¶ 689 ("Legislation which accords the minister the complete discretionary power to order the cancellation of the registration of a trade union, without any right of appeal to the courts, is contrary to the principles of freedom of association."). Here, the legislation automatically cancels the registration and requires all existing unions to reregister *[under a deeply flawed system that grants the government considerable discretion]*

[2] *See e.g.*, CFA Digest of Decisions ¶¶ 407-408 ("The requirement of membership of an occupation or establishment as a condition of eligibility for union office are not consistent with the right of workers to elect their representatives in full freedom."); ("If the national legislation provides that all trade union leaders must belong to the occupation in which the organization functions, there is a danger that the guarantees provided for in Convention No. 87 may be jeopardized. In fact, in such cases, the laying off of a worker who is a trade union official can, as well as making him forfeit his position as a trade union official, affect the freedom of action of the organization and its right to elect its representatives in full freedom, and even encourage acts of interference by employers.").

Once a union is elected, the Registrar will have the power to cancel the registration of the union and force a new election at any time if, upon receipt of a complaint from an employer, it finds there is sufficient evidence that the union no longer enjoys the requisite minimum support.[3]

Comment [jsr11]: Yes, the employer in such circumstances may provide new terms and conditions of employment but it may also continue with the existing terms and conditions. Further, this is NOT a unique provision in Fiji, the National Labor Relations Act (NLRA) in the USA – which governs labor relations in all industries in the USA except for railroads and air carriers – has a procedure that is very similar to this ENI Decree provision of decertification of a union. Under the NLRA, if an employer has objective evidence that a union has lost the support of a majority of employees, the employer may withdraw recognition from the union. The employer may also file a petition with the NLRA Board (the agency tasked with administering the NLRA) for a new election. Similarly, employees may also petition the NLRA Board for a new election.

In such case, the collective agreement is voided and the employer may impose the terms and conditions of employment.

Comment [jsr12]: Refer comment 11 above. In addition, in the same manner, under the RLA, if a class or class returns to a non-union status, the collective bargaining agreement between the employer and former union becomes null and void

Overall, there seems little doubt that the re-registration process is an attempt to depose current trade union leaders and interfere with the capacity of unions to represent their members, thereby denying workers their fundamental right.

Collective Bargaining

[3] Dissolution for insufficient membership must allow for an appeal by a court of law, not the administrative authorities. *See e.g.*, CFA Digest of Decisions ¶ 402("A legal provision which requires the dissolution of a trade union if its membership falls below 20 or 40, depending on whether it is a works union or an occupational union, does not in itself constitute an infringement of the exercise of trade union rights provided that such winding up is attended by all necessary legal guarantees to avoid any possibility of an abusive interpretation of the provision; in other words, the right of appeal to a court of law.").

Under Article 8, all existing collective agreements are void 60 days after the decree enters into force.[4] The parties are to negotiate a new agreement *under new procedures* before the expiry of the 60 days; however, the decree provides that if no agreement is in place following collective bargaining under the new procedures, the corporation may unilaterally implement new terms and conditions through a new collective agreement or individual contracts. *This will only encourage unscrupulous employers to appear to bargain in good faith while they wait for 60 days to pass, at which point they can then impose terms in the absence of a mutually accepted collective agreement.*

Comment [jsr13]: Not sure what new procedures!

Part 4, which sets forth rules for collective negotiation, also raises several major concerns. First, Article 21(3) provides for a bargaining period of up to three years.[5] If there is no agreement after three years, either party may seek the intervention of the Prime Minister under Article 21(4), who may impose a final and binding agreement.[6] That agreement shall be binding on the parties for two years.

Comment [jsr14]: No, to the contrary, to the best of my knowledge, most employers (other than Air Pacific) designated a "designated corporation in an essential industry" applied to the Govt for an extension of time within which to negotiate new agreements. Air Pacific did not apply for an extension for 3 reasons: (1) it was already in negotiations with its unions and had made significant progress already; (2) it reached a mutual agreement with the flight attendants union almost 2 weeks prior to the end of the 60 days deadline, and thus, did not need to get an extension when it had a mutually agreed collective agreement; (3) Govt granted the extension of time to other other designated corporations and did this by publishing another Gazette granting such extension; that Gazette was not published until well after Air Pacific had concluded its negotiations with both its union groups. See Annexure 2. Even Pacific Sun (Air Pacific's wholly owned subsidiary company) applied for an extension of time and got such extension from the Govt

Under Article 22, collective bargaining agreements do not expire; instead, they are subject to amendment every five years in the absence of an agreement to the contrary.[7]

Comment [jsr15]: This is again not a situation that is unique to Fiji. As a matter of practice, collective bargaining agreements under the RLA do not expire but become amendable on a certain, specified date.

There appears to be no mechanism to amend an agreement by mutual consent if not during the amendment period.

Comment [jsr16]: Not correct in the Air Pacific context; we included a provision in both union agreements to allow for amendments by mutual consent.

---

[4] *See e.g.*, CFA Digest of Decisions ¶ 942 ("A legal provision which allows the employer to modify unilaterally the content of signed collective agreements, or to require that they be renegotiated, is contrary to the principles of collective bargaining.").

[5] A two-year period for collective bargaining may be excessive. *See e.g.*, CFA Digest of Decisions ¶ 1046 ("In one case where the legislation contained a provision whereby a time limit of up to 105 days was fixed, within which employers had to reply to proposals by the workers, and a time-limit of six months fixed within which collective agreements had to be concluded (which could be prolonged once for a further six months), the Committee expressed the view that it would be desirable to reduce these periods in order to encourage and promote the development of voluntary negotiation, particularly in view of the fact that the workers in the country in question were unable to take strike action.").

[6] *See e.g.*, CFA Digest of Decisions ¶ 861 ("The imposition of a compulsory arbitration procedure if the parties do not reach agreement on a draft collective agreement raises problems in relation to the application of Convention No. 98.").

[7] *See e.g.*, CFA Digest of Decisions ¶ 1047 ("The duration of collective agreements is primarily a matter for the parties involved, but if government action is being considered any legislation should reflect tripartite agreement.").

Right to Strike

Article 27(1) of the decree is categorical in stating that "no job actions, strikes, sick-outs, slowdowns or other financially or operationally harmful activities shall be permitted at any time for any reason," a prohibition which is on its face inconsistent with core labor standards.[8] *Notably, there is no such categorical prohibition on employers' economic weapons, such as lock-outs.* The decree goes further to state that such actions are "expressly prohibited" in connection with efforts to obtain registration, efforts to influence the outcome of bargaining or in the course of collective bargaining, and in disputes over the interpretation or application of a collective bargaining agreement, even though the ILO has recognized the legitimacy of strikes in connection with registration and collective bargaining.[9]

Comment [jsr17]: This statement is out of context. When you read the sections together, it is very clear that the same restrictions apply to employers.

Despite Article 27(1), 27(2) provides that a union may strike if the parties failed to reach a new collective agreement after three years of bargaining, and even then only after a 28-day notice period and prior written approval from the government. Moreover, the Minister has to verify the results of the secret-ballot vote to authorize the strike.

Comment [jsr18]: The RLA in the US also contains a similar mechanism that parties must go through before either party may engage in self help. Parties may apply for NMB mediation if they are unable to reach an agreement through direct negotiations. Parties are not able to engage in self help during these negotiations. If, after the negotiations with a mediator, the NMB mediator determines that the parties have bargained in good faith to an impasse, the NMB will proffer binding arbitration to the parties. If either party declines the proffer, the parties will be placed in a 30 day cooling off period. The parties are not allowed to resort to self help during this cooling off period. If the parties are not able to come to an agreement during a 30 days' cooling off period, the President of the USA may convene a PEB to investigate and report on the status of the dispute. If the President creates a PEB, the parties remain in the cooling off period and are prevented from engaging in self-help until 30 days after the PEB's report. Only at the end of this second 30 day period, are the parties generally allowed to engage in self help, assuming Congress does not otherwise act to resolve the dispute.

In the highly unlikely case there is a strike, the employer is permitted to lock-out the workers and unilaterally impose terms and conditions of employment, which effectively abrogates the entire right to strike. The Minister may also declare illegal any strike in an essential industry at any time.[10]

Comment [jsr19]: See comment 18 above. Again, given the lack of sophistication in Fiji, the lack of resources, and lack of expertise and manpower, it is completely understandable to me (from a local perspective) that Fiji would choose to delegate this function to the Minister rather than set up an administrative body at a significant cost to look after a very small number of corporations.

---

[8] See, e.g., CFA Digest of Decisions ¶ 521-23, 525 ("The prohibition on the calling of strikes by federations and confederations is not compatible with Convention No. 87.").

[9] *See e.g.*, CFA Digest of Decisions ¶ 522. The right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests); ¶ 535 ("The fact that a strike is called for recognition of a union is a legitimate interest which may be defended by workers and their organizations.").

[10] A strike should only be declared illegal by an independent authority. *See e.g.*, ILO CFA Digest of Decisions ¶ 628 ("Responsibility for declaring a strike illegal should not lie with the government, but with an independent body which has the confidence of the parties involved.").

A person who violates the law may be subject to a fine of $50,000 and 5 years in jail; the union may face a $250,000 sanction.[11]

Comment [jsr20]: In the US context, under the RLA, if employees engage in an unlawful strike/ job action, the employer may seek a court order enjoining the unlawful job action. If self-help continues in violation of the injunction, the court may find the violater in contempt and award the harmed party civil monetary damages. Additionally, some jurisdictions in the US have legislated criminal penalties for public sector employees who engage in illegal strikes.

Additional Concerns

Article 24(2) & (3) provide that no person in a designated company that operates full-time shall be entitled to overtime pay for work performed on the weekends or on public holidays. In the airline industry, workers are not entitled to overtime pay under any circumstances, unless otherwise agreed by the employer and union.

Comment [jsr21]: Two preliminary points. (1) of all the companies designated a "designated corporation", only Air Pacific and Pacific Sun are truly industries that operate on a 24/7 basis. Thus this provision does not impact most corporations. (2) The Employment Relations Promulgation (ERP), which was the law governing all employment matters before the ENI Decree, was unsuited for companies that operated on a 24/7 basis, or industries that were critical to the country's GDP. The other important thing to note is that the ENI Decree does not preclude overtime pay for work on weekends or on public holidays; it simply provides that overtime pay for such work will be agreed upon by the employer and the union. Again, this provision is not unusual or unique to Fiji. In the US, the RLA does not require overtime compensation for rail or air-carrier employees. In the US, at the federal level, the Fair Labor Standards Act (FSLA) governs employer obligations, if any, to provide overtime compensation. Under section 213(b)(2) of the FSLA, RLA rail carriers are exempt from payment of overtime, and section 213(b)(3) exempts RLA air-carriers from payment of overtime compensation. In the US, it is thus not at all unusual for overtime compensation, if any, to be a matter for collective bargaining and/or carrier policy.

Comment [jsr22]: Air Pacific, of its own volition, agreed to provide overtime pay at 125% to its employees (even non-unionized employees) for work on weekends or on Public Holidays.

Article 24(4) *prohibits* automatic dues deductions unless the employer agrees to do so, which seems unlikely given the overall anti-union legal scheme.

Comment [jsr23]: This is incorrect... the word "prohibits" suggests it is outlawed; that is not true. The language in the ENI Decree is: "There shall be no requirement for an employer to deduct union fees..." This is NOT equal to a prohibition!!

Comment [jsr24]: Air Pacific agreed, of its own volition, without being asked to do so and without the matter even being raised by either union, to continue to do union deductions in accordance with past practice.

[11] *See e.g.*, ILO CFA Digest of Decisions ¶ 672 ("No one should be deprived of their freedom or be subject to penal sanctions for the mere fact of organizing or participating in a peaceful strike.").

Article 30 provides that the validity of the decree itself, decisions by government officials taken under the decree, and the decisions of any corporation taken under the decree are not reviewable by anyone before any tribunal. The decree goes so far as to extinguish any pending claims under the ERP 2007.

Comment [jsr25]: Notwithstanding such a provision, Air Pacific agreed, again of its own volition and without being asked to, to provide aggrieved employees the opportunity to arbitrate disputes in accordance with a company policy to be developed

Thus, workers and unions in essential industries have absolutely no redress for any violation of what little is left of their rights at work.

Comment [jsr26]: Same comment 25

E. Critical Industries in Financial Distress Decree of 2011 (proposed)

Pursuant to Article 23 et. seq. of the Critical Industries in Financial Distress Decree 2011, employers that have applied for and have received a declaration of financial distress *from an arbitrator* would be able to apply to *terminate unilaterally existing collective bargaining agreements.*

Comment [jsr27]: Not sure where they get this from? There is no such language in the ENI Decree

Comment [jsr28]: This is incorrect. What actually happens under the ENI Decree is that if an employer has suffered operating losses (as the term is defined in the Decree), it has the right to re-negotiate its existing collective bargaining agreements after giving requisite notice of such. If the parties are unable to reach agreement, then the employer may submit its proposals for a new or amended collective agreement to the Minister for review. Thereafter, the Minister makes his own assessments in consultation with others regarding whether the employer's proposals are made in good faith, and whether the proposals will assist the employer in returning to profitability or sustainability in the future. Thereafter, the Minister may make a decision which shall be binding and final for all parties. Thus, there is nothing that an employer can do unilaterally!

To overcome concerns about the employer's application raised by a union, the employer would need only show, pursuant to Article 26, that the decision to terminate the agreement is "a reasonable exercise of the company's business judgment," that the collective agreement "in any way reduced the productivity of the company, or makes it uncompetitive, or is not an industry norm," that "the balance of convenience favours rejecting the agreement" or that "reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution." Although Article 27 would require the employer to make a proposal to the union regarding the modifications to the agreement it deems necessary, to provide the union with information necessary to

evaluate the proposal, and to make an effort to meet and confer with the union, the union would have very little opportunity or leverage to bargain collectively to reach truly necessary, fair and equitable modifications.

Comment [jsr29]: Again, on this one, I am not sure where they get this from? There is no such language in the ENI Decree…! And, indeed no Decree called the Financial Distress Decree in Fiji

Together, these decrees completely undermine the principles of freedom of association for workers in the public service and increasingly workers in the private sector. Indeed, the incremental loss of trade union rights by decrees issued in 2009-10 was surpassed by the complete elimination of trade union rights for public service workers effectuated by Decree 21 in 2011. *Today, public service workers, a majority of the workforce of Fiji, enjoy none of the rights set forth in Conventions 87 and 98.* As the CFA has repeatedly observed, "Public servants, like all other workers, without distinction whatsoever, have the right to establish and join organizations of their own choosing, without previous authorization, for the promotion and defence of their occupational interests."

Comment [jsr30]: This statement is unsubstantiated. Air Pacific is one of the country's largest employers. Air Pacific has totally preserved employee's rights to association and the right to organize and collective bargaining --- in compliance with Convention Nos. 87 and 98, respectively.

Of course, workers must also have access to competent tribunals to assert their rights under law *(which no longer exist)*. The inability to challenge even the validity of the loss of these fundamental rights by decree, which is clearly contrary to the country's obligations under international labor law, in addition to extinguishing all pending claims, is only further evidence of deepening authoritarianism in Fiji.

Comment [jsr31]: Certainly not true in the Air Pacific context; we have prescribed workers the right to arbitration

Annexure 1

http://www.islandsbusiness.com/news/index_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=130/focusContentID=25077/tableName=mediaRelease/overideSkinName=newsArticle-full.tpl

ILO offered to review Fiji's employment decree

During their three-day visit earlier this month, a delegation from the International Labour Organisation (ILO) had offered to review governments Essential National Industries (Employment) Decree.

Thu, 18 Aug 2011
SUVA, Fiji (FIJI LIVE) ---- During their three-day visit earlier this month, a delegation from the International Labour Organisation (ILO) had offered to review governments Essential National Industries (Employment) Decree. The suggestion was apparently made during discussions between the ILO executives and Prime Minister Commodore Voreqe Bainimarama and Attorney General Aiyaz Sayed-Khaiyum. Confirming the invitation extended to Fiji's two top officials, ILO South Pacific Countries director David Lamotte said they also offered to provide technical advice related to the new employment decree. "The ILO did make an offer to the government to review the labour law and provide technical advice which is not the same as making a judgement," Lamotte said. "We did say to the government, if you want technical advice than we are prepared to give that and very willingly provide that information." He said further that they are now awaiting a reply from the Fiji government whether they would accept their proposal. Lomette also confirmed that a full report was handed to ILO governor general Juan Somavia on Tuesday. Meanwhile, The International Labour Organisation (ILO) has confirmed having a meeting with Fiji's international airline Air Pacific regarding trade union issues surrounding the new Essential National Industries (Employment) Decree 2011. ILO director country office for South Pacific Island Countries, David Lamotte said the ILO delegation sent by the director general Juan Somavia met with Air Pacific

chief executive Dave Pflieger and had a fruitful discussion. He said a full report of their meeting has been filed and presented to the ILO director general on last Monday. Lamotte said the report is confidential. He said all recommendations made by the ILO to Fiji will be based on their experts judgment. The ILO delegation to Fiji met with government officials, non-governmental organisations and unionists including the Fiji Nursing Association, Fiji Islands Council of Trade Unions (FICTU), the Fiji Council of Churches and the CEO of Air Pacific Dave Pflieger during their mission.

Annexure 2

EXTRAORDINARY

REPUBLIC OF FIJI ISLANDS GOVERNMENT GAZETTE

PUBLISHED BY AUTHORITY OF THE FIJI GOVERNMENT

Vol. 12 FRIDAY, 18th NOVEMBER 2011 No. 116

[1665]

GOVERNMENT OF FIJI

ESSENTIAL NATIONAL INDUSTRIES (EMPLOYMENT) (AMENDMENT) DECREE 2011

(DECREE NO. 47 OF 2011)

IN exercise of the powers vested in me as President of the Republic of Fiji and the Commander in Chief of the Republic of Fiji Military Forces by virtue of the Executive Authority of Fiji Decree 2009, I hereby make the following Decree—

Short title and commencement

1. This Decree may be cited as the Essential National Industries (Employment) (Amendment) Decree 2011, and shall come into force on the date of its publication in the *Gazette*.

Section 8 amended

2. Section 8 of the Essential National Industries (Employment) Decree is amended—

(i) in subsection (2) by deleting "commencement of this Decree" and inserting "designation as a "Designated Corporation""; and

(ii) by inserting a new subsection after subsection (4)

"(5) The Minister may, upon receipt of an application in writing, extend the period prescribed in this subsection (2), provided however, that such extended period does not exceed three months."

Given under my hand this 15th day of November 2011.

EPELI NAILATIKAU
President of the Republic of Fiji

Price: 50c

A. V. NAIVAKASORO, Government Printer, Suva, Fiji—2011
Official Printer Since 1970

163/FGG/11—1,300