

BEFORE THE UNITED STATES TRADE REPRESENTATIVE

**PRE-HEARING BRIEF & REQUEST TO APPEAR AT THE COUNTRY PRACTICE
REVIEW OF**

KAZAKHSTAN

**REGARDING COMPLIANCE WITH THE GENERALIZED SYSTEM OF
PREFERENCES ELIGIBILITY CRITERIA**

USTR-2018-0008

filed by

**THE AMERICAN FEDERATION OF LABOR &
CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO)**

JUNE 5, 2018

Information Required Under 15 CFR § 2007:

- A. *Petitioner:* AFL-CIO, 815 16th Street, N.W., Washington, D.C., 20006
phone: (202) 637-5244
email: cdrake@aflcio.org and cwaters@aflcio.org
- B. *Country Subject to Review:* Kazakhstan
- C. *Section of Law Warranting Review:* 19 U.S.C. § 2642(c)(7)
- D. *Reason for Filing:* The Government of Kazakhstan is not taking steps to afford internationally recognized worker rights in law or practice.

Request to Appear:

This constitutes a request for Celeste Drake, AFL-CIO Trade and Globalization Policy Specialist, to present testimony at the June 19, 2018 hearing regarding Kazakhstan's compliance with the Generalized System of Preferences eligibility criteria, docket number USTR-2018-008.

Pre-hearing Brief:

This brief incorporates by reference prior filings by the AFL-CIO regarding labor rights in Kazakhstan and should be read as a supplement to such filings.

I. Introduction

The Government of Kazakhstan (GOK) is not taking steps to afford internationally recognized worker rights, including the right to freedom of association and the right to bargain collectively, as required by 19 USC § 2462(c)(7). Instead, the GOK continues taking steps to inhibit worker rights in both law and practice, through legal restrictions on the ability to form and join independent trade unions and retaliation against labor leaders and activists.

Over the last four years, the GOK has shuttered virtually all independent trade unions and put prominent labor leaders in prison or under house arrest in connection with legitimate union activities. The 2017 International Labor Organization (ILO) Committee on the Application of Standards (CAS) found a “persistent lack of progress” at addressing severe restrictions on freedom of association and the right to organize and bargain collectively.¹ In May 2018, the ILO sent a high-level tripartite mission to Kazakhstan to investigate the deteriorating situation for workers in the country. Such missions are reserved for the worst violators of internationally recognized worker rights. A mission report has not been released as of this writing.

¹ International Labor Organization Committee on the Application of Standards, Individual Case: Kazakhstan, 106th ILC session (2017) available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3330995

The AFL-CIO urges the United States Trade Representative (USTR) to suspend benefits under 19 U.S.C. § 2462(d) if the GOK does not immediately reverse course and take clear, effective steps to afford internationally recognized worker rights in both law and practice.

II. Recently Enacted Laws Systematically Restrict the Right to Freedom of Association and the Right to Organize and Bargain Collectively

In the past five years, the GOK has erected legal obstacles that prevent both workers and employers from exercising the right to freely associate. This includes the 2014 Law on Trade Unions, which forced the closure of all independent trade unions; the imposition of criminal sanctions on individuals who lead or participate in unsanctioned civic organizations, including trade unions; modifications to the Labor and Criminal Code to further curtail the right to strike; and the Act on the National Chamber of Entrepreneurs, which restricts freedom to association for employers. Taken as a whole, these changes make it virtually impossible for workers to exercise their internationally recognized rights.

A. The 2014 Law on Trade Unions Prevents the Operation of Independent Trade Unions

The 2014 Law On Trade Unions (“the 2014 Law”) places onerous restrictions on the right to freely establish and join independent organizations. Following its adoption, the GOK dismantled all existing independent trade unions and confederations in Kazakhstan and blocked the formation of new organizations. The GOK has not only failed to afford the internationally recognized right to freedom of association, it is deliberately preventing its exercise.

The right to freedom of association includes the right to establish trade unions without prior permission and to adopt internal rules and organize activities and programs without government interference.² The 2014 Law establishes arbitrary requirements governing the internal structure of trade unions. As discussed in detail in our 2017 petition, it includes convoluted requirements that local trade unions be affiliated with higher-level sectoral and national federations, which themselves are subjected to onerous membership quotas that are virtually impossible to satisfy. In its 2017 review of Kazakhstan, the ILO CAS explained that workers must be free to “decide whether they wish to associate or become members of a higher-level trade union structure” and criticized the use of “excessively high” threshold requirements to establish these higher-level organizations.”³

The GOK has used the 2014 Law to de-register and dismantle virtually all independent trade unions. Existing unions and federations were given only one year to amend both their charter documents and organizational structures to adhere to the new requirements. More than 30 independent unions and federations tried unsuccessfully to re-register, including the Confederation of Free Trade Unions of Kazakhstan (CFTUK) and many of its affiliates. Rejections hinged on frivolous issues, such as objections to the union’s chosen name or failure to

² C87 - Freedom of Association and Protection of the Right to Organise Convention, Article 3 (1948) available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232

³ International Labor Organization, Follow-up to the conclusions of the Committee on the Application of Standards 105th Session, May–June 2016 (published 2017) available at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID:3298653

include a sketch of the union’s logo. Some of the rejections were not even based on the restrictive 2014 Law. The unions generally were not given an opportunity to correct the identified errors, and in at least one instance a union discovered that an order to abolish its original registration was issued before its application was even officially denied.

After failing to obtain re-registration, independent unions and confederations tried to form new organizations. The CFTUK attempted to form the Confederation of Independent Trade Unions of Kazakhstan (CITUK), and many of its sectoral and local affiliates tried to register as new organizations as well. The vast majority were eventually rejected. Once again, GOK officials appeared to be searching for any available pretext to reject these applications. As detailed in our 2017 petition, many GOK officials rejected applications without articulating any reason at all. Other officials took issue with formatting, the use of abbreviations or unspecified differences between the required Kazakh-language and Russian-language versions of the charter documents. One rejection stated that a union had underpaid the registration fee by ½ tenge (approximately 0.00145 USD), a unit of currency that does not exist. Several unions submitted applications multiple times, only to have new issues identified each time.

The GOK moved to dismantle independent unions and confederations that were unable to register as new organizations, sometimes seizing their assets in the process. As discussed in our 2017 petition, the Ministry of Justice filed a request for a court order to dismantle the CITUK which was granted in January 2017 and upheld on appeal in March 2017.⁴ The CITUK appealed the decision at Kazakhstan’s Supreme Court, but was refused a hearing. The union then sent a direct appeal to the Chairman of the Supreme Court, which was rejected on May 14, 2018. Independent sectoral unions representing mineworkers, healthcare workers and domestic workers were also shut down by court order in the early months of 2017. The GOK is taking active steps to dismantle independent trade unions and restrict the internationally recognized worker right to freedom of association, in violation of 19 USC § 2462(c)(7).

B. The GOK Has Criminalized Leading or Participating in Independent Unions

Prohibiting unregistered organizations is a direct violation of the International Covenant for Civil and Political Rights, which Kazakhstan has ratified,⁵ and presents serious barriers to the free exercise of the internationally recognized worker right to freedom of association. As discussed in our 2017 petition, the GOK has not only prohibited unregistered organizations, including trade unions, it has imposed criminal liability on individuals who lead, manage, finance or participate

⁴ Kazakhstan: Trade Union Shut Down, Human Rights Watch (January 10, 2017) available at <https://www.hrw.org/news/2017/01/10/kazakhstan-trade-union-shut-down>

⁵ Article 22 of The International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, ratified by Kazakhstan on 26 Aug 1998 (“1. everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests; 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.”)

in non-registered civic organizations, including trade unions.⁶ When read in concert with the GOK’s systematic efforts to de-register independent unions, these changes represents a clear effort to inhibit the exercise of internationally recognized worker rights in violation of 19 USC § 2462(c)(7).

C. The GOK Has Severely Curtailed the Right to Strike

In July 2014, the Code of Civil Procedure and the Criminal Code were modified to give courts greater ability to declare a strike illegal and raise the penalties for participating in an illegal strike. As discussed in detail in our petition, this includes imposing potential prison sentences for simply making statements in support of a strike that has been ruled illegal by the court and allowing employers to discipline employees retroactively for participation in a strike that is subsequently declared illegal. This is not consistent with the internally recognized worker right to freedom of association.⁷

D. The GOK Restricts Employers’ Freedom of Association

The GOK also impermissibly impedes employers’ right to form and join associations of their own choosing.⁸ The Law on the National Chamber of Entrepreneurs requires membership in the National Chamber of Entrepreneurs and grants the GOK discretion over its internal affairs and decision-making.⁹ These changes should be viewed within a larger context of restrictions on civil society that curtail freedom of association and assembly.¹⁰

⁶ Follow-up to the conclusions of the Committee on the Application of Standards, 104th Session, June 2015 (published 2016) available at

http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3253690

⁷ The ILO has repeatedly called for the GOK to amend these provisions, recalling “that no penal sanctions should be imposed against a worker for having carried out a peaceful strike and thus for merely exercising an essential right, and therefore that measures of imprisonment or fines should not be imposed on any account. Such sanctions could be envisaged only where, during a strike, violence against persons or property, or other serious infringements of penal law have been committed, and can be imposed exclusively pursuant to legislation punishing such acts.” Committee on the Application of Standards, Report to the International Labor Conference, 107th Session (2018) available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_617065.pdf (citing the 2012 General Survey on the fundamental Conventions, paragraph 158).

⁸ The ILO Committee on the Applications of Standards has repeatedly criticized the GOK for violating the rights of employers to freely form and join organizations of their own choosing, to do so without prior authorization, and “elect their officers, carry out their activities and formulate their programmes without Government interference.” Follow-up to the conclusions of the Committee on the Application of Standards, 104th Session, June 2015 (published 2016) available at

http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3253690

⁹ Follow-up to the conclusions of the Committee on the Application of Standards, 104th Session, June 2015 (published 2016) available at

http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3253690

¹⁰ See Human Rights Watch World Report 2018: Kazakhstan available at <https://www.hrw.org/world-report/2018/country-chapters/kazakhstan> (discussing restrictions on freedom of assembly and the press and the use of criminal charges to imprison and silence political dissidents); United States Department of State Country Report, Kazakhstan (2017) available at

<https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper> (discussing “restrictions on

III. The GOK Targets Union Leaders and Workers with Criminal Sanctions, Prosecutions, and Harassment Based on their Trade Union Activities

The GOK targets trade union leaders and activists with harassment, arrest and arbitrary detention; prosecutions without due process; and criminal sentences that include jail time, high fines, restrictions on movement and bans from participating in the trade union movement. Trade unionists have been subjected to government scrutiny, harassment and even violence for years, but workers report these abuses have escalated in recent years.¹¹ Detention, arrests and prosecutions of trade unionists create “an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities,”¹² and are wholly inconsistent with the internationally recognized right to freedom of association.¹³ The GOK’s actions to stifle dissent and criminalize trade union activities and leadership present a serious affront to internationally recognized worker rights.

A. CITUK President Larisa Kharkova Is Under House Arrest for Legitimate Trade Union Activities

Larisa Nikolaevna Kharkova, president of the CITUK and a former leader of the CFTUK, has been under house arrest since June 2017 in connection with her trade union activities. Her freedom of movement, including where she lives and works, has been restricted for four years and the GOK has seized both her personal bank accounts and funds from the now-defunct CFTUK. Kharkova has been ordered to cover the procedural costs of the criminal case against her, and the decision leaves open the possibility that she will be required to pay additional civil charges. She is barred from holding a leadership position in any nongovernmental organization, such as a trade union, for five years. This is an egregious restriction of her individual civil liberties, including the right to associate,¹⁴ and an attempt to intimidate other workers to prevent the exercise of labor rights.

freedoms of expression, press, assembly, religion, and association, including restrictions on the activities of nongovernmental organizations”)

¹¹ “We Are Not the Enemy,” Human Rights Watch, Section I: Threats and Reprisals Against Worker Rights Activists (November 23, 2016) available at <https://www.hrw.org/report/2016/11/23/we-are-not-enemy/violations-workers-rights-kazakhstan#e62692>

¹² Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, Geneva, International Labour Office, Fifth (revised) edition, 2006 (hereinafter CFA Digest of Decisions), ¶ 66-67 available at

http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_090632.pdf

(“The detention of trade unionists on the grounds of trade union activities constitutes a serious obstacle to the exercise of trade union rights and an infringement of freedom of association. The arrest of trade unionists and leaders of employers’ organizations may create an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities.”)

¹³ See CFA Digest of Decisions ¶ 41 (“[A]llegations of criminal conduct should not be used to harass trade unionists by reason of their union membership or activities); ¶ 109 (“The Committee has always attached great importance to the principle of prompt and fair trial by an independent and impartial judiciary in all cases, including cases in which trade unionists are charged with political or criminal offences.”)

¹⁴ CFA Digest of Decisions ¶ 121 (“Trade unionists, just like all persons, should enjoy freedom of movement.”);

¶ 124 (“The imposition of sanctions, such as restricted movement, house arrest or banishment for trade union reasons, constitutes a violation of the principles of freedom of association.”)

As discussed in full in our November 2017 petition, Kharkova was convicted of abuse of office following an investigation and trial were marred by a lack of due process.¹⁵ She was not permitted to see the charges against her for several months, which rested on highly unreliable claims by three individuals, one of whom admitted that police pressured her into filing charges. When that case fell apart during the course of the trial, the State Prosecutor asked the court to reclassify her actions as abuse of power. The conviction was upheld by the South Kazakhstan Regional Appeals Court on September 27. Kharkova has sent requests to the Prosecutor-General's Office questioning the legitimacy of her prosecution.

GOK authorities continue to harass Kharkova. On May 23, 2018, she was forced to complete a psychological examination against her will by the Criminal Executive Committee of the Ministry of Internal Affairs. The tests were ostensibly designed to evaluate her for aggression and emotional regulation to determine whether she needed treatment. Kharkova is extremely concerned this could be used as a pretext to institutionalize her. The AFL-CIO shares her concern. It would not be the first time the GOK has used this tactic against a dissident. This year's U.S. Department of State Human Rights Report discusses the case of activist Natalya Ulasiuk, "known for her critical antigovernment posts in social media," who was "placed in a high-security mental hospital" following government assertions that "she was insane and represented a danger to society."¹⁶

As discussed in our 2017 petition, Kharkova's family members, fellow CITUK officials and individuals suspected of associating with her report threats and acts of intimidation by the police and unknown individuals. Retaliation against the CITUK's Press Secretary, Lyudmila Ekzarkhova, has escalated since we filed our 2017 petition. As discussed in the 2017 petition, her husband, Nikolai Gudz, was the victim of a minor traffic accident with an unknown individual driving erratically. He was subsequently charged with causing serious injury and fleeing the scene. On November 10, 2017 he was convicted by the Bostandyksky District Court No. 2. Shortly afterward, Ekzarkhova left the country and Gudz was repeatedly interrogated by officers of the National Security Committee (NSC) about his wife's activities. On February 19, 2018, Gudz, who was born in Kazakhstan but has Russian citizenship, was forcibly deported from the country. Far from taking steps to afford internationally recognized worker rights, the GOK is actively creating a climate of fear for union leaders and those who associate with them.

B. The GOK Continues to Retaliate Against Leaders and Members of the Trade Union of Workers at LLP Oil Construction Company and Has Dissolved the Union

Union leaders Amin Yeleusinov and Nurbek Kushakbayev were both convicted of criminal activity after protesting the government's dissolution of the CITUK and sentenced to prison terms in the spring of 2017. Both men have since been released, but as discussed below their convictions remain intact, as do the convictions against more than 30 workers who participated in the protest. Further, while Yeleusinov and Kushakbayev were in prison, their union, the Oil Construction Company (OCC) Workers' Union, was forcibly dissolved by the GOK. The GOK

¹⁵ Kazakhstan: Trade Union Leader Convicted , Human Rights Watch (July 26, 2017) available at <https://www.hrw.org/news/2017/07/26/kazakhstan-trade-union-leader-convicted>

¹⁶ Section 1.C (2017) available at <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>

has actively interfered with the exercise of internationally recognized worker rights in a critical sector of the Kazakh economy.

Pavlodar Court No. 2 granted parole to Yeleusinov on May 4, 2018 and to Kushakbayev on May 10, 2018. However, their convictions remain intact and both are banned from engaging in trade union activities until May 2022. As discussed in our 2017 petition, as in the case of Larisa Kharkova, their criminal proceedings were devoid of due process and inconsistent with human rights norms.¹⁷ Both were detained for months before being convicted in highly irregular trials and Yeleusinov reports being tortured while in detention, along with fellow detainees. Their sentences included high fines based on estimated losses to the employer that were calculated by the company itself. It is our understanding at this time that the fines may be dropped, but this has not been confirmed.

Criminal fines imposed on workers for engaging in the protest remain. As discussed in our 2017 petition, approximately 490 workers participated in a hunger strike in January 2017.¹⁸ The strike was rapidly declared illegal by Aktua Municipal Court No. 2, a decision based on the 2014 Law of Trade Unions and the company's internal policies. The same court subsequently fined 15 workers for organizing an illegal strike, and ordered an additional 28 workers to compensate their employer 3.5 million *tenge* (US\$10,000) in damages. These trials also did not provide the bare minimum of due process: they were not public,¹⁹ the workers were not allowed legal representation and were given no time to prepare a defense.²⁰ Since our last filing, workers have appealed their cases to the Supreme Court. Some are still pending, but the rulings that have come down have upheld their convictions.

While the leadership of the OCC Workers' Union was in detention, the employer worked with the GOK to shut down the union. The AFL-CIO recently learned that on March 1, 2017 the union's Board appointed Kuspan Koshygulov to serve as Acting President while awaiting the outcome of President Yeleusinov's trial. In response, the employer fired Koshygulov and threatened to dismiss the workers if they did not appoint a different individual, Berik Bekbayev. Workers attempted to fight the retaliation in court, but Aktau Court No. 2 ruled in favor of the company and appointed Bekbayev to the position on April 18, 2017. Koshygulov tried to contest his firing in court, but was dismissed at both the district and appellate level. On April 11, 2018, the Specialised Inter-District Economic Court of the Mangistau Region issued a ruling dissolving the OCC Workers' Union. Bekbayev did not mount a defense in court and has made no attempt to contest the decision.

This appears to be the culmination of a years-long campaign by GOK officials to prevent workers in the oil sector from exercising their rights. As discussed in our 2017 petition, the

¹⁷ Under Article 188 of the Criminal Procedure Code, pre-trial investigations should be conducted at the location where the alleged crime was committed.

¹⁸ Kazakhstan: 2 Union Leaders Arrested, Human Rights Watch (July 7, 2017) available at <https://www.hrw.org/news/2017/01/26/kazakhstan-2-union-leaders-arrested>

¹⁹ Как разогнали акцию голодовки в Актау, Report by Radio Azattyk (January 22, 2017) available at http://rus.azattyq.org/a/kazakhstan_aktau_occ_aktsiya_golodovki/28249780.html.

²⁰ Kazakhstan: 2 Union Leaders Arrested, Human Rights Watch (July 7, 2017) available at <https://www.hrw.org/news/2017/01/26/kazakhstan-2-union-leaders-arrested>

indictment against Kushakbayev included declassified material from the National Security Committee of Kazakhstan (KNB) Department in Mangistauskii and the Office for Combating Organized Crime which indicate that the union and its leadership have been under surveillance since October 9, 2015. In the past seven years, authorities have used excessive force to contain strikes, resulting in at least 12 deaths and “arrested and prosecuted outspoken oil workers and government critics, almost all of whom were convicted despite serious allegations of torture.”

The GOK is not taking steps to afford the internationally recognized rights to associate and bargain collectively, and is instead criminalizing the exercise of these rights.

IV. Conclusion

The GOK has not taken steps to afford internationally recognized worker rights, including the right of association and the right to organize and bargain collectively. Instead, the GOK restricts these rights in both law and practice. The AFL-CIO urges USTR to suspend benefits under 19 U.S.C. § 2462(d) if the GOK does not take immediate and effective steps to afford internationally recognized worker rights.