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Report of the Committee of Experts on the Application of Conventions and Recommendations

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Thailand

Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19) (ratification: 1968)

In a communication dated 5 June 2009, the State Enterprise Workers' Relations Confederation (SERC) alleges that the Government of Thailand fails to grant to migrant workers who fall victims of industrial accidents, and to their dependents, the right to equal treatment with Thai nationals, in breach of domestic and international labour standards.

Since 2006, the SERC has supported research undertaken by the Human Rights and Development Foundation (HRDF) establishing that refusal to allow migrants access to work-related accident and disease compensation from the Workmen's Compensation Fund (WCF) constitutes systematic discrimination against approximately two million unskilled migrant workers from Myanmar, Cambodia and Lao People's Democratic Republic. The refusal of access to the WCF results from the inability of migrant workers to satisfy, in most cases, the conditions imposed on them by the circular of the Social Security Office (SSO) RS0711/W751 of 2001 relating to the provision of protection for migrant workers who incur work-related accidents or illnesses, which requires migrant workers to possess a passport or alien registration documents and obliges their employer to register and pay contributions to the WCF in respect of the worker concerned. Recognizing that many of these workers have entered Thailand illegally without official documents, the Government of Thailand has, since 1996, created systems for registering migrants from Myanmar to work legally once they are in Thailand and has issued work permits and identity cards with the mention "not possessing Thai nationality" to over 500,000 nationals of Myanmar (documents Thor. Ror. 38/1, issued by the Department of Provincial Administration, Ministry of Interior). The SSO, however, refuses to accept these documents to enable migrants to access the WCF as insufficient documentary evidence under the circular RS0711/W751, and prohibits employers of migrant workers holding Thai work permits and identity cards from paying contributions to the WCF. The SERC alleges that the circular RS0711/W751 and its implementation by the SSO violate the

Workmen's Compensation Act of 1994 (WCA), which applies equally to national and migrant workers and obliges employers to pay contributions to the WCF irrespective of their nationality. The numerous attempts to challenge the legality of the SSO circular before the labour and administrative tribunals have failed. The Labour Court of Appeal refused to revoke the SSO circular on the basis that it did not exceed the powers of the SSO. The Supreme Administrative Court also rejected the case on the basis that administrative tribunals are not competent to review labour policies falling within the jurisdiction of labour courts. Although the decision of the Labour Court of Appeal was itself appealed to the Supreme Court and to the Central Labour Court, the SERC states that any decision of these courts revoking the SSO circular will not be binding since in the Thai legal system the only tribunals having competence to revoke administrative acts of the Ministry of Labour are the administrative courts. Having exhausted all domestic legal remedies and fearing that the SSO circular instituting unequal treatment of migrant workers might become unreviewable by the national tribunals, the SERC has decided to seek protection of migrant workers in Thailand under Convention No. 19.

In reply to these allegations, the Government states that the SSO of the Ministry of Labour realizes the suffering of migrant workers, many of whom are illegal migrants whose nationalities have not been verified. At present, the Department of Employment of the Ministry of Labour is verifying these workers' nationalities and is expected to complete this task by February 2010. Migrants will subsequently be covered by the social security system, i.e. both the Social Security Fund and the WCF. Consequently, the requirement established by the SSO circular to possess a valid passport will no longer be applied to migrant workers. As for the employers' obligation to pay contributions to the WCF in respect of migrant workers, the Government indicates that the WCA provides for equal treatment between Thai and foreign workers in this matter. Although migrant workers are not entitled to compensation from the WCF for work injuries, they receive compensation directly from their employers, the amount of which is equal to the compensation paid by the WCF.

The Committee notes with *deep concern* the situation of some 2 million workers from Myanmar, many of whom are described by the SERC as being in "a social zone of lawlessness" where they are not protected by the laws of Thailand or Myanmar. It notes, however, the stated commitment of the Thai Government to treat all workers fairly and equally without any discrimination based on nationality and to promote the human dignity of all migrant workers, documented or undocumented. The Committee considers that in a situation where equal treatment of migrant workers may be jeopardized on a mass scale leading to exploitation and suffering, the bona fide application of the Convention would require member States to deploy special and urgent efforts commensurate with the gravity of the situation, unilaterally as well as in cooperation with one another. With regard to the measures reported by the Thai Government, the Committee notes that, while it endeavors to treat all workers equally irrespective of their nationality, the SSO does not recognize the identity cards issued by the Thai authorities with the mention "not possessing Thai nationality" and the measures reported by the Government are directed exclusively at verifying nationalities of migrant workers. With regard to the situation in law, the Committee observes that, while the WCA grants foreign workers the right to equality of treatment, the SSO circular RS0711/W751 subjects the exercise of this right to

fulfillment of certain conditions, which in the current situation effectively deprives migrant workers of protection by the WCF enjoyed by the Thai workers. With respect to the Government's statement that foreign workers who are thus deprived from compensation by the SSO, are entitled instead to an equal compensation from their employer, the Committee notes that the Government does not contest the fact that, in practice, as explained by the SERC, the SSO orders obliging the employer to pay compensation directly to the worker concerned are usually ignored, as migrant workers are unable to engage in costly and lengthy judicial proceedings necessary to enforce the SSO orders. With these considerations in mind, the Committee observes that the principle of equal treatment in social security would lose all meaning if access to social security benefits were made subject to such conditions, the fulfillment of which for migrant workers becomes either particularly difficult or depends on the actions of the employers or of the authorities of the receiving country. To prevent and remedy such situations, the international social security law has put in place a number of safeguards, which offer guidance to governments wishing to apply the principle of equality of treatment in good faith. In particular, eligibility for workers' compensation shall not be made conditional upon the payment of contributions by the employer in respect of the worker concerned. Governments shall assume the general responsibility for the proper administration of the social security institutions, ensuring their close cooperation with other agencies, such as the Ministry of Interior, Department of Employment, Immigration Service, etc., with a view, inter alia, to facilitating social security coverage of migrants.

The Committee asks the Government to review the policy of the SSO concerning social security coverage and protection of migrant workers in case of occupational accidents and diseases in the light of the above guiding principles and safeguards established by international law for the promotion of equal treatment of foreign workers. Taking into account the gravity of the situation, the Committee asks the Government to instruct the SSO to take positive and urgent measures lifting restrictive conditions and facilitating access of migrant workers to the WCF irrespective of their nationality. With respect to the SSO circular RS0711/W751, the Government is asked to explain what procedures exist in the Thai legal system to supervise, review and revoke contested circulars issued by a government agency at the level of the ministry concerned, at the level of the Government or by an independent judiciary authority. Finally, noting that the legality of the SSO circular is currently pending before the Supreme Court as well as the Central Labour Court, the Committee hopes that these jurisdictions will take into account the present comments.

[The Government is asked to reply in detail to the present comments in 2010.]