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### NINTH ITEM ON THE AGENDA

## Reports of the Committee on Freedom of Association

### 363rd Report of the Committee on Freedom of Association

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## Introduction

1. The Committee on Freedom of Association set up by the Governing Body at its 117th Session (November 1951), met at the International Labour Office, Geneva, on 15, 16 and 23 March 2012, under the chairmanship of Professor Paul van der Heijden.
2. The members of Argentinian, Colombian, Japanese and Mexican nationality were not present during the examination of the cases relating to Argentina (Cases Nos 2660, 2702, 2743, 2809 and 2837), Colombia (Case No. 2761), Japan (Cases Nos 2177 and 2183) and Mexico (Case No. 2828), respectively.

\* \* \*

3. Currently, there are 172 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 38 cases on the merits, reaching definitive conclusions in 21 cases and interim conclusions in 17 cases; the remaining cases were adjourned for the reasons set out in the following paragraphs.

### **Serious and urgent cases which the Committee draws to the special attention of the Governing Body**

4. The Committee considers it necessary to draw the special attention of the Governing Body to Cases Nos 2254 (Bolivarian Republic of Venezuela), 2609 (Guatemala) and 2761 (Colombia) because of the extreme seriousness and urgency of the matters dealt with therein.

### **Urgent appeals**

5. As regards Cases Nos 2712 (Democratic Republic of the Congo), 2726 (Argentina), 2765 (Bangladesh), 2847 (Argentina), 2860 (Sri Lanka), 2861 (Argentina) and 2863 (Chile), the Committee observes that, despite the time which has elapsed since the submission of the complaints, it has not received the observations of the governments. The Committee draws the attention of the governments in question to the fact that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it may present a report on the substance of these cases if their observations or information have not been received in due time. The Committee accordingly requests these governments to transmit or complete their observations or information as a matter of urgency.

### **New cases**

6. The Committee adjourned until its next meeting the examination of the following cases: 2908 (El Salvador), 2909 (El Salvador), 2910 (Peru), 2911 (Peru), 2912 (Chile), 2913 (Guinea), 2914 (Gabon), 2915 (Peru), 2916 (Nicaragua), 2917 (Venezuela), 2918 (Spain), 2919 (Mexico), 2920 (Mexico), 2921 (Panama), 2922 (Panama), 2923 (El Salvador), 2924 (Colombia), 2925 (Democratic Republic of the Congo), 2926 (Ecuador), 2927 (Guatemala), 2928 (Ecuador), 2929 (Costa Rica), 2930 (El Salvador), 2931 (France), 2932 (El Salvador), 2933 (Colombia) and 2934 (Peru), since it is awaiting information and observations from the governments concerned. All these cases relate to complaints submitted since the last meeting of the Committee.

## Observations requested from governments

7. The Committee is still awaiting observations or information from the governments concerned in the following cases: 2318 (Cambodia), 2620 (Republic of Korea), 2648 (Paraguay), 2708 (Guatemala), 2713 and 2715 (Democratic Republic of the Congo), 2723 (Fiji), 2739 (Brazil), 2794 (Kiribati), 2796 (Colombia), 2797 (Democratic Republic of the Congo), 2808 and 2812 (Cameroon), 2814 (Chile), 2817 (Argentina), 2869 (Guatemala), 2870 (Argentina), 2871 (El Salvador), 2878 and 2879 (El Salvador), 2880 (Colombia), 2883 (Peru), 2885 (Chile), 2894 (Canada), 2902 (Pakistan), 2903 (El Salvador), 2904 (Chile), 2905 (Netherlands) and 2906 (Argentina).

## Partial information received from governments

8. In Cases Nos 2265 (Switzerland), 2445 (Guatemala), 2673 (Guatemala), 2749 (France), 2806 (United Kingdom), 2813 (Peru), 2820 (Greece), 2824 (Colombia), 2826 (Peru), 2840 (Guatemala), 2846 (Colombia), 2858 (Brazil), 2874 (Peru), 2882 (Bahrain), 2889 (Pakistan), 2893 (El Salvador), 2897 (El Salvador) and 2900 (Peru), the governments have sent partial information on the allegations made. The Committee requests all these governments to send the remaining information without delay so that it can examine these cases in full knowledge of the facts.

## Observations received from governments

9. As regards Cases Nos 2203 (Guatemala), 2508 (Islamic Republic of Iran), 2516 (Ethiopia), 2528 (Philippines), 2694 (Mexico), 2706 (Panama), 2709 (Guatemala), 2727 (Bolivarian Republic of Venezuela), 2745 (Philippines), 2758 (Russian Federation), 2763 (Bolivarian Republic of Venezuela), 2778 (Costa Rica), 2786 (Dominican Republic), 2801 (Colombia), 2815 (Philippines), 2816 (Peru), 2821 (Canada), 2822 (Colombia), 2823 (Colombia), 2827 (Bolivarian Republic of Venezuela), 2828 (Mexico), 2829 (Republic of Korea), 2830 (Colombia), 2833 (Peru), 2835 (Colombia), 2844 (Japan), 2845 (Colombia), 2848 (Canada), 2849 (Colombia), 2851 (Peru), 2852 (Colombia), 2853 (Colombia), 2855 (Pakistan), 2859 (Guatemala), 2862 (Zimbabwe), 2864 (Pakistan), 2865 (Argentina), 2866 (Peru), 2872 (Guatemala), 2873 (Argentina), 2877 (Colombia), 2881 (Argentina), 2884 (Chile), 2887 (Mauritius), 2890 (Ukraine), 2891 (Peru), 2895 (Colombia), 2896 (El Salvador), 2898 (Peru), 2899 (Honduras), 2901 (Mauritius) and 2907 (Lithuania), the Committee has received the governments' observations and intends to examine the substance of these cases at its next meeting.

## Withdrawal of complaints

10. The Committee takes due note of the request of the complainant, *Association des procureurs aux poursuites criminelles et pénales*, to withdraw its complaint in Case No. 2886 (Canada), in light of an agreement concluded with the Government of Quebec regarding conditions of work of public attorneys and the adaptation of relevant legislative amendments.

## Article 26 complaint

11. The Committee is awaiting the observations of the Government of Belarus in respect of the recommendations relating to the measures taken in follow up to the Commission of Inquiry.

## Receivability of a complaint

12. As regards Case No. 2623 (Argentina), the Condominium Owners' Association (APIPH) and the Argentine Federation of Consortia (FAC) with the support of the Argentinean Chamber of Commerce, requested, in view of new information and a judicial decision, the reopening of the case that had previously been declared not admissible [see 355th Report, para. 10]. In these circumstances, and in order to be able to examine this matter in full knowledge of the facts, the Committee requests the Government to send its observations in this respect without delay.

## Transmission of cases to the Committee of Experts

13. The Committee draws the legislative aspect of the following cases to the attention of the Committee of Experts on the Application of Conventions and Recommendations: Poland (Case No. 2888), Romania (Case No. 2611) and Turkey (Cases Nos 2789 and 2892).

## Effect given to the recommendations of the Committee and the Governing Body

### Case No. 2701 (Algeria)

14. The Committee last examined this case at its June 2010 meeting, when it urged the Government to register the National Union of Vocational Training Workers (SNTFP) without delay and noted that the time that had passed since the initial application to register (August 2002) might have prevented the union from organizing its activities in an appropriate way. Moreover, it stated that it expected that the Government would ensure the strict application of national law and of the principles concerning the right to form trade unions, and ensure that the actions of the administration, in particular as they entailed violation of Convention No. 87, would not recur in the future [see 357th Report, para. 142].
15. In a communication dated 14 March 2011, the complainant organization indicates that, pursuant to the Committee's recommendations, it submitted a request for a hearing to the Ministry of Labour on 25 July 2010; although a delegation from the complainant organization visited the Ministry on four occasions (on 15, 17, 22 and 24 August 2010) to request a certificate of registration, it was not even received by the Ministry. In its communications dated 11 September 2011 and 2 February 2012 the SNTFP indicates that the Government has failed to implement the Committee's recommendations.
16. In its communications dated 21 February and 25 May 2011, the Government indicates that the Committee's recommendations are under consideration and that it will inform the Committee without fail of any developments in the case.
17. *The Committee notes with deep regret that the Government has not yet complied with the recommendations which it made more than a year ago and has thus not yet registered the SNTFP. The Committee strongly reiterates its recommendations and expects the Government to take all the necessary measures to register the SNTFP without delay.*

**Case No. 2433 (Bahrain)**

18. The Committee last examined this case, which concerns legislation prohibiting government employees from establishing trade unions of their own choosing, at its March 2010 session. On that occasion the Committee, noting that amendments to article 10 of the Trade Union Act were being considered, again urged the Government to take the necessary measures without delay to amend this provision so as to ensure, for all public service employees with the exception of the armed forces and the police, the right to establish organizations of their own choosing. It once again emphasized that technical assistance of the Office was available in this regard. In the absence of information on its previous comments concerning Ms Najjeyah Abdel Ghaffar, the Committee again urged the Government to take the appropriate steps, pending amendment to article 10 of the Trade Union Act, to compensate Ms Ghaffar for the periods of suspension without pay imposed upon her, and to ensure that no further disciplinary action is taken against her or other members of public sector trade unions for activities undertaken on behalf of their organizations [see 356th Report, paras 17–19].
19. In a communication dated 20 September 2011, the Government states that any amendments to national legislation would require significant constitutional measures, and reiterates that the amendments to the provisions of the Trade Union Act (Decree No. 33 of 2002), which granted additional rights to trade unions, had been referred to the legislative authority consisting of the Parliament and the Consultative (*Shura*) Council for consideration. According to the Government, while the legislative authority was considering these amendments, the recent regrettable events in the country have unfortunately contributed to the disruption of the work of the Council which has been very much occupied by the political situation. The Government hopes that the amendments will be put before the legislative authority at its next session. Furthermore, the Government indicates that Ms Najjeyah Abdel Ghaffar obtained an award of the higher appeal court by virtue of which the disciplinary decision issued previously against her has been cancelled.
20. *The Committee notes with interest the information provided by the Government according to which, by virtue of an award of the higher appeal court, the disciplinary decision previously issued against Ms Najjeyah Abdel Ghaffar has been cancelled. The Committee requests the Government to confirm that Ms Ghaffar has been adequately compensated for the periods of suspension without pay imposed upon her, and firmly expects that, pending the amendment to article 10 of the Trade Union Act, the Government would take appropriate steps to ensure that no further disciplinary action was taken against other members of public sector trade unions for activities undertaken on behalf of their organizations.*
21. *Furthermore, the Committee notes the Government's indication that the recent events and political situation in the country have resulted in the disruption of the work of the legislative authority and that it is hoped that the amendments will be put before it at its next session. Recalling that it had been highlighting the need for legislative reform for over six years, the Committee once again strongly urges the Government to take the necessary measures without delay to amend article 10 of the Trade Union Act so as to ensure that all public service employees (with the sole possible exception of the armed forces and police), like all other workers, have the right to establish organizations of their own choosing to further and defend their occupational interests.*

**Case No. 1787 (Colombia)**

22. The Committee last examined this case, which concerns murders and other acts of violence against trade union leaders and trade unionists, and also anti-union dismissals at its March 2010 meeting [see 356th Report, March 2010, paras 473–571]. On that occasion, the Committee made the following recommendations:
- (a) While noting with interest the measures adopted by the Government to combat violence, the Committee deeply regrets the murder of trade union leaders and members denounced by the complainants. The Committee urges the Government to continue taking all necessary steps to guarantee that workers and their organizations can fully exercise their rights in freedom and safety. The Committee requests the Government to keep it informed in this regard.
  - (b) While noting with interest the measures adopted by the Government and the commitment it has made to investigate all the allegations presented under this case, the Committee: (1) requests the trade union organizations to provide the competent bodies with all the information in their possession that might facilitate such investigations; (2) invites the Government and the social partners to establish criteria on a tripartite basis for compiling the information to be transmitted to the investigating bodies; and (3) requests the Government to keep it informed in detail of any developments in the climate of impunity, and of any concrete progress in the investigations that have been initiated and any other measures adopted in this matter, especially regarding the alleged existence of links between paramilitary groups and the Administrative Department of Security (DAS) responsible for providing protection for trade union leaders and members, and regarding the allegations concerning the plan known as “Operation Dragon” whose purpose is said to be the elimination of a number of union leaders.
  - (c) The Committee strongly urges the Government to continue to guarantee the full protection of the union leaders and members whose lives have been threatened.
  - (d) Taking into account the extent of the threat which hovers over trade union leaders and members, and thus over the trade union movement as a whole, the Committee will pay particular attention to the evolution of this case and in this regard urgently invites the parties concerned to transmit all information on the developments with respect to each of these allegations.
  - (e) The Committee draws the Governing Body’s attention to the extreme seriousness and urgent nature of this case.
23. In communications dated 12 April, 4 May, 3 June, 10 June and 6 October 2010, the Single Confederation of Workers of Colombia (CUT), the National Union of Food Industry Workers (SINALTRAINAL) and the National Trade Union of Workers of ECOPETROL SA (SINCOPEPETROL) sent additional information on recent murders and acts of violence. [These allegations will be addressed under Case No. 2761 since Case No. 1787 exclusively covers the period 1994–June 2009.]
24. In a communication dated 31 January 2011, the Government provided the statistics available on acts of violence against trade unionists submitted by the Subunit for Crimes against Trade Unionists, according to which, between 1 October 2007 and July 2010 there were 1,344 cases assigned, 550 cases under preliminary investigation, 317 cases under investigation (defendant known), 527 persons placed in preventive detention, 176 indictments, 234 cases are at the stage of formulation of preliminary charges, 326 guilty verdicts and 330 convictions obtained. The Government sent information and tables indicating the status of judicial proceedings of hundreds of cases, including information provided by the office of the public prosecutor.
25. The Government also indicates that in 2009 and 2010, 2,983 trade unionists received individual protection.

26. The Government highlights that it has made various efforts to fight impunity and acts of violence against workers. These include signing a letter of intent, whereby it contributed US\$300,000 towards strengthening the Special Committee on the Handling of Conflicts referred to the ILO (CETCOIT) and promoting international standards; increasing the budget for the protection of trade unionists; decongestion measures established by the Administrative Chamber of the Higher Council of the Judiciary; and the updating in May 2011 of the tripartite agreement on freedom of association and democracy, which the social partners had signed in 2006 and which includes the objective of fighting impunity and measures to strengthen the criminal justice system.
27. As regards the allegations concerning the plan known as “Operation Dragon”, whose purpose is said to be the elimination of a number of union leaders, the Government refers to the ruling handed down by the office of the Inspector General shelving the case for lack of evidence to suggest the existence of a conspiracy to jeopardize the lives and physical safety of trade unionists and of the leaders of the democratic left. *The Committee invites the complainant organizations to submit comments in relation to these declarations.*
28. *The Committee recalls that this case concerns more than 1,580 cases of murders of Colombian trade unionists and acts of violence that occurred between the submission of the complaint in 1994 and June 2009. The Committee is compelled to express its indignation and its condemnation of these crimes and recalls that at some point, such as in the early 1990s, there were up to 250 murders a year. Given that this is the first time that the Committee is following up on this case, having already examined its substance on repeated occasions, it wishes to stress that the main objective of this follow-up is to prevent impunity in each of the cases submitted to it.*
29. *Therefore, with regard to recommendation (b)(3), on developments in the climate of impunity and any concrete progress in the investigations that have been initiated, the Committee notes the global statistics provided by the Government, namely that between 1 October 2007 and July 2010 there were 1,344 cases assigned, 550 cases under preliminary investigation, 317 cases under investigation (defendant known), 527 persons placed in preventive detention, 176 indictments, 234 cases at the stage of formulation of preliminary charges, 326 guilty verdicts and 330 convictions obtained.*
30. *The Committee also appreciates the Government’s statement that in 2009 and 2010, 2,983 trade unionists received individual protection and that it has increased its budget for the protection of trade unionists.*
31. *The Committee welcomes the progress in perpetrator identification and conviction cases but stresses that these figures are still far from allowing the Committee to conclude that more than 1,500 murders and acts of violence examined by the Committee in this case have been resolved and led to conviction. The Committee urges the Government to continue to take measures to combat impunity in consultation with workers’ and employers’ organizations. The Committee observes that the tables and the successive and extensive communications provided by the Government make it difficult to extract the overall figures of the cases where the perpetrators have been identified and sanctioned, as well as the nature of the sanctions taken, and it requests the Government to send a list which would follow, in chronological order, the cases of violence. The Committee recalls that it had requested that the trade unions, particularly the complainants, be involved in order to ensure comprehensive investigations, drawing on the information at their disposal, in collaboration with the competent authorities. In this regard, with respect to recommendation (b)(1), requesting the complainant organizations to provide any information that might facilitate the investigations, the Committee observes that the complainant organizations have not notified it of having submitted this information to the*

*competent judicial authorities. The Committee urges them to do so in order to facilitate the investigations.*

- 32.** *Lastly, with respect to recommendation (b)(2), on the establishment by the Government and the social partners of criteria for compiling the information to be transmitted to the investigating bodies on a tripartite basis, the Committee observes that the Government has provided no information in this regard. Therefore, the Committee reiterates its previous recommendation and requests that the Government, together with the trade unions, address this issue and inform it accordingly.*

### **Case No. 2355 (Colombia)**

- 33.** The Committee last examined this case at its November 2010 meeting [see 358th Report, paras 43–46], when it asked the Government to provide without delay the information requested in recommendations (a), (d) and (e), specifically:

- As regards the declaration as illegal of a strike called at ECOPETROL on 22 April 2004, the Committee, while reiterating its considerations expressed on many occasions, must again urge the Government, in consultation with the representatives of workers' and employers' organizations, to take steps without delay to send a proposal to the legislative authority with a view to amending the legislation (section 430(h) of the Substantive Labour Code) in order to define the conditions for the exercise of the right to strike in the petroleum sector with the possibility of providing for the establishment of a negotiated minimum service involving the participation of the trade unions, the employer and the public authorities concerned. The Committee requests the Government to keep it informed of all the relevant developments in the legislation;
- The Committee invites the complainant organization to provide the Government with all the information in its possession concerning the allegations that ECOPETROL grants benefits, better working conditions or bonuses individually to non-unionized workers, encouraging them to give up trade union membership, and requests the Government to take the necessary steps, as a matter of urgency, to carry out an independent investigation in order to determine on the basis of complete information whether the allegations are true. The Committee requests the Government to keep it informed in this respect; and
- As regards the allegations relating to the refusal of Chevron Petroleum Company to bargain collectively with the trade union, the appointment of a Compulsory Arbitration Tribunal and the appeal for annulment of the arbitral award lodged by the company and the trade union in the Supreme Court of Justice, the Committee requests the Government to keep it informed of the pending administrative investigation into the company.

- 34.** In its communication dated 21 December 2010, the Government states that the Labour Chamber of the High Court of the District of Cúcuta handed down ruling No. T-1936/10 dated 22 July 2010, which (1) revokes in its entirety the ruling handed down on 4 June 2010 by the Third Labour Court of the Cúcuta Circuit and instead accords the plaintiffs the court's protection in respect of their fundamental right to work, to freedom of association, to join trade unions and to strike, which the enterprise *Empresa Colombiana de Petróleos* (ECOPETROL SA) infringed by refusing to comply with the recommendations of the ILO Committee on Freedom of Association; and (2) orders the enterprise, through its legal representative and within 48 hours of notification of the court's ruling, to proceed with the reinstatement of the workers, who had been dismissed for taking part in the 22 April 2004 strike, in the same posts as they had held previously, or in posts of an equal or higher grade, and to grant them the wages and benefits that they had ceased to receive, as if for all legal purposes there had been no interruption in their employment relationship with the enterprise, and as if the disciplinary proceedings that were initiated by the enterprise and led to the termination of the workers were null and void. The Government adds that, on 26 July 2010, the enterprise and the Petroleum Industry Workers' Trade Union (USO)

agreed not to resort to legal action against the abovementioned ruling, and to set up an induction and reinstatement programme to promote the working lives of the workers covered by the ruling. In its communication dated 22 February 2011, the Government also states that Order No. 004311 of the Attorney-General's Office created scope for dialogue between the Attorney-General and the trade union with a view to putting an end to trials and sanctions and the sanctions imposed on the workers. On 24 September 2010, the High Court of Cúcuta announced injunction No. T-2005/10 ordering the enterprise to reinstate other workers. The Government emphasizes that the parties will continue to negotiate to resolve the cases of workers who are still dismissed, namely, five Cartagena workers.

35. *The Committee notes with interest the above information and requests the Government to keep it informed of changes in the status of those five workers. Furthermore, the Committee observes that neither the complainant organization nor the Government has replied to its earlier recommendation in which it: (1) invited the complainant organization to provide the Government with all the information in its possession concerning the allegations that ECOPETROL grants benefits, better working conditions or bonuses individually to non-unionized workers, encouraging them to give up trade union membership; and (2) requested the Government to take the necessary steps, as a matter of urgency, to carry out an independent investigation in order to determine on the basis of complete information whether the allegations are true. The Committee reiterates this recommendation.*
36. In its communication dated 25 October 2011, concerning the refusal of Chevron Petroleum Company to bargain collectively with the trade union, the appointment of a Compulsory Arbitration Tribunal and the appeal for annulment of the arbitral award lodged by the company and the trade union in the Supreme Court of Justice, the Government states that no labour administration inquiry was conducted, bearing in mind that the Ministry of Social Protection, through Decision No. 003404 of 20 September 2006, ordered the establishment of a Compulsory Arbitration Tribunal tasked with settling the dispute. The Tribunal was then set up and duly started operations. *Given the above information, the Committee requests the Government to confirm that the appeal for annulment of the arbitral award lodged by the company in the Supreme Court of Justice was rejected.*
37. *Lastly, the Committee observes that the Government has provided no information on the Committee's recommendation urging it, in consultation with the representatives of workers' and employers' organizations, to take steps without delay to send a proposal to the legislative authority with a view to amending the legislation (section 430(h) of the Substantive Labour Code) in order to define the conditions for the exercise of the right to strike in the petroleum sector with the possibility of providing for the establishment of a negotiated minimum service involving the participation of the trade unions, the employer and the public authorities concerned. The Committee reiterates this recommendation and requests the Government to keep it informed in this respect.*

### **Case No. 2356 (Colombia)**

38. The Committee last examined this case, which concerns allegations of anti-union dismissals in the Cali Municipal Enterprises (EMCALI) (with regard to which the Committee requested the Government to consider taking the necessary measures to ensure the reinstatement of the 45 trade union members and six union leaders dismissed by EMCALI) at its meeting in November 2010 [see 358th Report, paras 47–49]. The Committee recalls that on that occasion it noted with interest that, thanks to a preliminary contacts mission, the parties have reached an agreement whereby: (1) in the light of the Committee's recommendation in its 357th Report, which SINTRAEMCALI welcomes, the parties agree to establish a round table to explore methods of consultation and negotiation on Case No. 2356, for which EMCALI undertakes to present a proposal; (2) the parties



agree to hold a first meeting on 14 July 2010 and to hold as many meetings as necessary to reach an agreed solution; and (3) in witness of their desire to establish a permanent dialogue, the parties undertake to discuss all relevant labour and trade union issues together. Noting that the trade union organization SINTRAEMCALI had informed that during the last meeting with the enterprise EMCALI, a proposal was made which did not correspond to the claims of the trade union since it did not include the reinstatement of the dismissed workers, and that it was willing to continue to participate in the mediation process, with the assistance of the ILO, until a final agreement was reached, the Committee requested the Government to consider appointing a mediator with the aim of finding a workable solution to this long outstanding case in line with the Committee's previous recommendations and to keep it informed of the progress made in this regard.

39. In a communication dated 25 October 2011, the Government states that: (1) the enterprise expresses its willingness to continue to engage in dialogue; (2) it should be noted that the case of the 51 dismissals is currently being processed by the ordinary courts and that it is these courts that must order any reinstatements since administrative officials are not legally entitled to do this; (3) the trade union brought an action for the protection of constitutional rights (*tutela* proceedings) before the Eleventh Criminal District Court of Cali against EMCALI for violating the fundamental rights to work, to organize and to freedom of association by failing to comply with the recommendations issued by the Committee on Freedom of Association and supported by the Governing Body; (4) EMCALI filed an appeal and the court rejected the trade union's *tutela* proceedings (the trade union appealed against the ruling which is currently being examined by the second criminal circuit court); and (5) it respects the judiciary's decisions under the separation of powers and reiterates its commitment to continue to engage in dialogue with a view to settling the current disagreements between EMCALI and SINTRAEMCALI.
40. In its communication of 15 December 2011, the complainant organization indicates that: (1) the Eleventh Criminal Circuit Court issued a second instance ruling on 13 October 2011 overturning the first instance ruling and thereby issuing a *tutela* ruling ordering the enterprise to reinstate the union leaders and affiliated workers to the positions that they had held previously or to other positions of equivalent characteristics and pay; (2) it should be noted that this is a second instance ruling and that *tutela* proceedings only have two instances, consequently compliance with the court order must be immediate; (3) after the 48 hours established by the judge had passed and the enterprise had not complied with the second instance ruling, the complainant organization filed proceedings for contempt of court before the Eleventh District Criminal Court of Cali to guarantee the protection of the fundamental rights established under that ruling; (4) the enterprise is insisting on a review of the *tutela* ruling before the Constitutional Court that decided to allow the ruling and this appeal process can take up to six months; and (5) as a result of the enterprise's failure to comply with the *tutela* ruling (the enterprise manager has been found in contempt of court by an interlocutory judgment of 27 December 2011), some of the 51 dismissed workers went on a hunger strike. The complainant also indicates that in June 2011, prior to this second instance *tutela* ruling, the administrative authority, represented by the Deputy Minister of Labour, indicated that it could not find any valid reason why at least the workers that had won the ordinary labour proceedings on appeal had not been reinstated, and it did not understand why the EMCALI management had chosen to lodge an application for judicial review, which was unlikely to receive a favourable ruling in view of the rulings handed down by the first and second instance judges. Lastly, the complainant organization requests the Committee and the competent ILO bodies to send a direct contacts mission to the country to meet the parties concerned and to emphasize and insist on the importance of compliance with the Committee's recommendations and, in this case, with the decisions of the Colombian courts.

41. *The Committee notes this information and, in particular, notes with interest the second instance tutela ruling ordering the reinstatement at the EMCALI enterprise of the SINTRAEMCALI union leaders and members, in compliance with the Committee's recommendations. The Committee observes that the enterprise has filed further judicial proceedings against the second instance court order. Given these circumstances, and underlining that these workers were dismissed in 2004, the Committee recalls that "justice delayed is justice denied" [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 105] and firmly expects that the Constitutional Court will hand down a decision without delay on the second instance tutela ruling. The Committee recalls its previous recommendations concerning the reinstatement of these trade unionists and requests the Government to ensure their implementation. The Committee requests the Government to keep it informed in this respect.*

### **Case No. 1865 (Republic of Korea)**

42. The Committee has been examining this case since its May–June 1996 meeting and on the last occasion at its March 2009 meeting [see 353rd Report, paras 584–749, approved by the Governing Body at its 304th Session].

43. In communications dated 14 June 2010 and 29 October 2011, the Korean Confederation of Trade Unions (KCTU) and the Korean Government Employees' Union (KGEU) submitted additional allegations. The KCTU also submitted additional information in communications of December 2010 and 31 October 2011.

44. The Government provided its observations in a communication dated 1 February 2011, in reply to the additional information submitted on 14 June 2010 by the complainants, and in communications dated 19 December 2011 and 6 February 2012.

45. At its March 2009 session, the Committee called the Governing Body's attention to this case because of the serious and urgent matters therein and made the following recommendations:

- (a) With regard to the Act on the Establishment and Operation of Public Officials' Trade Unions and its Enforcement Decree the Committee requests the Government to give consideration to further measures aimed at ensuring that the rights of public employees are fully guaranteed by:
  - (i) ensuring that public servants at all grades, regardless of their tasks or functions, including firefighters, prison guards, those working in education-related offices, local public service employees and labour inspectors, have the right to form their own associations to defend their interests;
  - (ii) ensuring that any restrictions of the right to strike may only be applicable in respect of public servants exercising authority in the name of the State and essential services in the strict sense of the term; and
  - (iii) allowing negotiation on the issue of whether trade union activity by full-time union officials should be treated as unpaid leave.

The Committee requests to be kept informed of any measures taken or contemplated in this respect.

- (b) The Committee requests the Government to ensure that the following principles are respected in the framework of the application of the Act on the Establishment and Operation of Public Officials' Trade Unions:
  - (i) that in the case of negotiations with trade unions of public servants who are not engaged in the administration of the State, the autonomy of the bargaining parties is fully guaranteed and the reservation of budgetary powers to the legislative authority does not have the effect of preventing compliance with collective

agreements; more generally, as regards negotiations on matters for which budgetary restrictions pertain, to ensure that a significant role is given to collective bargaining and that agreements are negotiated and implemented in good faith;

- (ii) that the consequences of policy and management decisions as they relate to the conditions of employment of public employees are not excluded from negotiations with public employees' trade unions; and
- (iii) that public officials' trade unions have the possibility to express their views publicly on the wider economic and social policy questions which have a direct impact on their members' interests, noting though that strikes of a purely political nature do not fall within the protection of Conventions Nos 87 and 98.

The Committee requests to be kept informed in this respect.

- (c) As regards the other legislative aspects of this case, the Committee urges the Government:
  - (i) to take rapid steps to continue and undertake full consultations with all social partners concerned with a view to the legalization of trade union pluralism at the enterprise level, so as to ensure that the right of workers to establish and join the organization of their own choosing is recognized at all levels;
  - (ii) to expedite the resolution of the payment of wages by employers to full-time union officials so that this matter is not subject to legislative interference, thus enabling workers and employers to conduct free and voluntary negotiations in this regard;
  - (iii) to ensure that, in issuing decisions determining the minimum service, the Labour Relations Commission takes due account of the principle according to which a minimum service should be confined to operations that are strictly necessary to avoid endangering the life or normal living conditions of the whole or part of the population and to continue to keep it informed of the specific instances in which minimum service requirements have been introduced, the level of minimum service provided and the procedure through which such minimum service was determined (negotiations or arbitration);
  - (iv) to amend the emergency arbitration provisions of the TULRAA (sections 76–80) so that emergency arbitration can only be imposed by an independent body which has the confidence of all parties concerned and only in cases in which strikes can be restricted in conformity with freedom of association principles;
  - (v) to repeal the provisions prohibiting dismissed and unemployed workers from keeping their union membership and making non-union members ineligible to stand for trade union office (sections 2(4)(d) and 23(1) of the TULRAA); and
  - (vi) to bring section 314 of the Penal Code (obstruction of business) in line with freedom of association principles.

The Committee requests to be kept informed of the progress made in respect of all of the abovementioned matters.

- (d) The Committee requests the Government to keep it informed of the progress of the appeal proceedings in respect of Kwon Young-kil.
- (e) The Committee once again requests the Government to reconsider the dismissals of Kim Sang-kul, Oh Myeong-nam, Min Jum-ki and Koh Kwang sik Han Seok-woo, Kim Young-kil, Kang Dong-jin and Kim Jong yun in the light of the subsequent adoption of the Act on the Establishment and Operation of Public Officials' Trade Unions. The Committee requests to be kept informed in this respect.
- (f) With regard to section 314 of the Penal Code on obstruction of business, the Committee once again urges the Government to consider all possible measures, in consultation with the social partners concerned, so as to revert to a general practice of investigation without detention of workers and of refraining from making arrests, even in the case of an illegal strike, if the latter does not entail any violence. The Committee requests to be kept informed in this regard, including by providing copies of court judgements on any new cases of workers arrested for obstruction of business under the terms of the present section 314 of the Penal Code.

- (g) The Committee requests the Government to keep it informed of the outcome of the appeal filed by Choi Seong-jin against his dismissal for having participated in a strike staged by KALFCU in 2005.
- (h) Recalling that the death of Kim Tae Hwan, President of the FKTU Chungju regional chapter, took place in the context of an industrial dispute, the Committee requests the Government to provide a copy of the relevant investigation report.
- (i) The Committee urges the Government to take all necessary measures to ensure that the investigation under way concerning the death of Ha Jeung Koon, member of the Pohang local union of the KFCITU, is concluded without further delay so as to determine where responsibilities lie, allowing for the guilty parties to be punished and the repetition of similar events to be prevented. The Committee requests to be kept informed in this respect.
- (j) The Committee requests the Government to take all necessary measures for the effective recognition of the right to organize of vulnerable “daily” workers in the construction sector, notably by refraining from any further acts of interference in the activities of KCFITU affiliates representing such workers, to keep it informed of the outcome of proceedings pending at the final instance with regard to the Daegu Construction Workers Union, and to review the convictions of the members and officials on grounds of extortion, blackmail and related crimes, for what appears to be ordinary trade union activities. The Committee requests to be kept informed of developments in this respect.
- (k) The Committee once again requests the Government to undertake further efforts for the promotion of free and voluntary collective bargaining over terms and conditions of employment in the construction sector covering, in particular, the vulnerable “daily” workers. In particular, the Committee requests the Government to provide support to construction sector employers and trade unions with a view to building negotiating capacity and reminds the Government that it may avail itself of the technical assistance of the Office in this regard if it so wishes. The Committee requests to be kept informed of developments in this respect.
- (l) The Committee recalls the Government’s indication of its willingness to ratify Conventions Nos 87 and 98, in the near future, which it made to the ILO High-level Tripartite Mission in 1998 and which was reported to the Governing Body in March 1998 (see document GB.271/9) and requests the Government to keep it informed of developments in this respect.
- (m) The Committee calls the Governing Body’s attention to this serious and urgent case.

**46.** In a communication dated 14 June 2010, the KCTU and KGEU provided additional information concerning acts of interference in the activities of the KGEU. The complainants indicate that the KGEU was divided in two by the Government’s repression, and merged again in September 2009. According to the complainants, in response to the KGEU’s decision to affiliate with the KCTU, the Government reinforced its repression. The Ministry of Labour refused to accept the registration of KGEU three times. Also, there were numerous closures of branch and chapter offices, as well as seizure and search of KGEU’s headquarters.

**47.** *Repression on participants at the 19 July national rally and on those who published a newspaper advertisement.* According to the complainant, the Government is severely repressing the public officials’ unions. The Government sued and reprimanded public officials who participated in a rally for “Restoring Democracy and Improving People’s Livelihood”, in which the main opposition, the Democratic Party and three other major opposition parties, participated. In addition, public officials who published a newspaper advertisement under the title “We want to become civil servants of the people” were persecuted. The Government sued 16 union members and directed Governmental bodies, to which concerned officials belong, to discipline 105 public officials (so far 57 disciplined, including 18 dismissed).

- 48.** *Oppression of KGEU with regard to the general ballot.* According to the complainants, the Government has mobilized the Ministry of Public Administration and Security (MOPAS), State and Local Governments and the National Intelligence Service to interfere in the process of integration among three public officials' unions and their accession to the KCTU. In this regard, the Government instructed several governmental organizations to discipline 29 union officials (among them, eight faced heavy discipline) because of their involvement in the advertising of a union ballot on the integration of the three unions. Moreover, the Government made a request to reprimand the former president of the steering committee of the Korean Unified Government Employees' Union, an integrated union, for having a "People's Ceremony", to pay tribute to democracy martyrs, instead of the usual national ceremony that takes place in union meetings.
- 49.** *Closures of KGEU offices.* MOPAS and the Ministry of Employment and Labour (MOEL) are keeping the public officials' union unrecognized and powerless by coercing 95 of the union's regional offices to close.
- 50.** *MOEL's request to supplement the report on the establishment (ROE) of KGEU, convene a general meeting and submit subordinate rules.* On 4 December 2009, MOEL returned the application to register the KGEU. The KGEU understands that MOEL unlawfully exerted approval authority by forcing the KGEU to complement the application when usually registration itself is sufficient. However, the KGEU decided to reapply for registration after complementing it with additional documents to avoid unnecessary conflicts with the Government and to stabilize the public officials' community.
- 51.** In order to make sure that the KGEU's statute was in line with MOEL's requirements, should the Government once again reject the registration, the KGEU revised its statutes through a general direct ballot of its members on 23 and 24 February 2010 (68.5 per cent went to the ballot and 91 per cent voted in favour). The revised statute was submitted to MOEL on 25 February 2010. However, the registration was returned again on 3 March 2010, on the basis that dismissed workers as well as those in grade 6 in semi-managerial positions were still members of the union.
- 52.** *Interference in KGEU's inauguration assembly.* On 24 March 2010, MOPAS ruled that the KGEU was an illegal organization, on the basis of its inauguration rally that took place on 20 March. It also indicated that public officials who had participated in the rally would be identified and given heavy disciplinary sanctions. It also declared that all activities performed in the name of the union would be declared illegal. In this regard, the following measures were put in place: removal of all KGEU's signboards; removal and ban of all KGEU's banners and posters; blocking the access to the KGEU's website and interruption of the connection to the intranet and external networks; prohibition of all union activities in the name of the KGEU, including issuing labour union newsletters, picketed rallies, labour union official elections, retreats, inauguration rallies of branches and chapters, meetings and demonstrations, and refusing accommodation requests for events in the name of the KGEU. The Government also prevented delegates from Public Services International, Asia-Pacific (PSI-AP) from entering the Republic of Korea, in order to hinder KGEU's inauguration rally on 20 March 2010.
- 53.** *Prosecution of union officials.* Lately, the police and intelligence officials illegally hacked the website of the Korean Democratic Labour Party, and illegally traced individual bank accounts, emails and cellular phones, and on the authority of this information, the Government charged 90 KGEU officials and was about to dismiss them for violation of the Political Party Act and the Political Fund Act.

- 54.** The Government also conducted an investigation based on the information illegally hacked in January 2010, to press charges on 293 labour union officials of the KGEU and the KTU (KGEU 103, KTU 190). On 2 March 2010, 284 labour union officials' cases were sent to the public prosecutor's office and were under investigation and on 6 May 2010, 273 labour union officials have been charged (KGEU 90, KTU 183).
- 55.** *Interference in the Gwangju Rally.* The KGEU decided to have a "Gwangju Pilgrimage" to celebrate the 30th anniversary of the "Gwangju Democratisation Movement" with members and their families. On 6 May 2010, MOPAS stressed that the KGEU was an illegal organization, that they considered this event to be an illegal union action, and indicated that heavy disciplinary measures would be taken against the participants. In this respect, all Government offices gathered the projected participants list with their photos and reported to MOPAS. On the day of the event, 350 officers of MOPAS were present to identify all the KGEU members.
- 56.** *Legislative issues.* According to the complainants, the Government announced that it will revise the Government Employees' Work Regulation so that any comment made by public officials on the web, including on the KGEU website, that are deemed to violate Government employees' obligation to stay politically neutral will be banned. Already, on 24 November 2009, the Cabinet meeting issued a bill to revise the Government Employees' Work Regulation stipulating that "public officials are banned on opposing to government policies". In December 2009, the cabinet meeting also issued a bill to revise the Government Employees' Remuneration Regulation to strengthen the provision on deduction of union dues from pay checks. In addition, a legislation to prohibit public officials in the National Election Commission and the courts from joining and forming unions is under consideration.
- 57.** *Revision of the Trade Union and Labour Relations Adjustment Act (TULRAA).* In a communication dated December 2010, the KCTU provides additional information with regard to the revision of TULRAA and more particularly concerning the ban on wage payment for full-time union officials and the introduction of a maximum time-off limit. According to the complainant, these revisions were unilaterally made by the Government on 1 January 2010, despite strong disagreement from unions and opposition parties, and are invalid. Under the pretext of this revision, the Government went further and adopted measures that were outside the boundaries of what was allowed by law – limiting the role of full-time union officials and capping the number of full-time officials. According to the complainant, these additional measures clearly violate the law.
- 58.** The amendments of TULRAA enforce a ban on payment of wages to full-time union officials and punishment for employers who do not comply. According to the complainant, this amendment is in direct contradiction with the ILO's repeated recommendations to the Government that payment of wages to full-time union officials should not be subject to legislative interference. Furthermore, through the introduction of the time-off system, paid full-time union work will be allowed only within the limits set by MOEL, based on the agreement with the employers. Full-time union work will be limited to activities related to bargaining and consulting with employers, grievance handling, occupational safety and health, and basic maintenance and operation of unions for development of sound industrial relations. Activities related to industrial action, political empowerment of workers, solidarity of the broader working class, work related to affiliated federation or confederation, etc., will be disallowed. In other words, according to the complainant, paid full-time union work will only be allowed for "union duties" – those performed as a part of company's labour/HR management – and not for independent "union activities", thus negating the principle of freedom of association.

59. Moreover, TULRAA's revision of 1 January 2010 delays the adoption of union pluralism for another year and a half, while enforcing unification of bargaining channels. According to the complainant, even when union pluralism will take effect, the exercise of the fundamental labour rights will be hindered since employers will be able to utilize various means to evade negotiations with unions.
60. *Manual on the application of maximum time-off limits.* Just before 1 July 2010, when the revised TULRAA was about to come into force, MOEL published the *Manual on the application of maximum time-off limits (Manual)*, which includes provisions that override the boundaries of the revised TULRAA, thereby seriously undermining union activities. In the *Manual*, the Ministry introduced the concept of "time off for union officials", under which not only full-time union officials but also part-time officials would become subject to the time-off limits. Furthermore, union activities that are supposed to be paid as guaranteed by TULRAA and other laws would also be subject to the time-off system, constraining the scope of union activities. Moreover, although the revised TULRAA regulates only the total number of hours under the time-off system – so that within the hours stipulated, there will be no loss of pay for union work – the enforcement decree and the *Manual* added a limitation on the number of persons eligible to use the time-off system. According to the complainant, these provisions are illegal in the sense that they do not have any basis in the main law.
61. According to the complainant, MOEL has also limited the scope of full-time union work without any legal basis. Such actions undermine free and voluntary activities of unions and can be interpreted as attempts to reduce the types of work subject to paid time off. According to the complainant, despite the fact that types of union activities eligible for time off should be decided voluntarily by unions, MOEL limits the scope of eligibility to those in which "labour and management have common interests". It goes further to say that "time-off officials" should primarily perform union work during time off. However, this interpretation of law is illegitimate. Moreover, MOEL states that labour and management should decide upon the criteria and procedure of setting the number of union officials subject to time off, and claims that unions must submit to employers beforehand the names of fixed time-off union officials.
62. Finally, according to the complainant, the *Manual* should be considered illegal because the Time-off Deliberation Committee has ignored all legal procedures.
63. In addition, under the pretext of the revised TULRAA, collective bargaining agreements (CBAs) have been unilaterally terminated in many workplaces including Korea Railroad, National Pension Service and Korea Gas Corporation. Such cancellations are particularly widespread among public corporations.
64. The KCTU believes that the recent series of labour repression are being carried out under explicit and implicit consent between the Government and employers, based on the revised TULRAA. According to KCTU, the biggest problem is that the revised TULRAA, which is the source of the repression, is in direct confrontation with ILO Conventions. In particular, after the revised TULRAA took effect, free and voluntary industrial relations have been undermined by distortion or misinterpretation of the revised law. MOEL has also recently been issuing rectification orders that instigate unfair labour practices. Such rectification orders include issues in CBAs unrelated to payment of wages to full-time union officials, such as those related to provision of facilities and conveniences, membership eligibility, limitations in terminating CBAs, etc. These actions clearly show the repressive intentions of the Government. Even if labour and management come to an agreement, this kind of attitude on the part of MOEL undermines confidence on whether the agreement will actually be able to have effect. It also explicitly and implicitly limits the ability of unions and management to come to a free and voluntary agreement, thus

stimulating further industrial disputes. It has resulted in employers becoming irresponsible to bargaining, showing insincerity in the bargaining process or resorting to unfair labour practices. In addition, with the revised TULRAA, the Government has started to excessively intervene in industrial relations at the company level by exerting control over issues that were previously left to the discretion of labour and management, thereby seriously eroding fairness and trust, which are core values in labour administration. Distrust towards labour administration will deteriorate not only industrial relations but also labour–Government relations. According to the complainant, all this conflicts with ILO Conventions Nos 98 and 154.

- 65.** The revision of TULRAA also includes the lifting of a ban on union pluralism, on the condition of unifying the bargaining channel. The introduction of union pluralism will take effect on 1 July 2011, after having been postponed for another one-and-a-half years. According to the complainant, during the lull, freedom of association will, de facto, be limited. Furthermore, in 2011, after the adoption of union pluralism, bargaining channel can be unified by force if the employer does not agree to voluntary negotiations. According to the complainant, this forced unification restricts rights to bargaining and collective action of minority unions. The Government has allowed union pluralism under the pressure from the international community, but has done so in a way that minority unions in practice will not be able to exercise their fundamental labour rights.
- 66.** According to the complainant, the revised TULRAA also stipulates that supra-enterprise unions are subject to the unification of bargaining channels, which will eviscerate industrial bargaining while rooting down enterprise bargaining. Specifically, not only will cross-bargaining in certain workplaces affiliated to an industrial union be impossible, but minority unions will not be able to participate in industrial bargaining. Even unions currently participating in industrial bargaining can be deprived of their right to participate later on, if that union loses its majority status. The Government and employers' organizations argue that such unification will save costs, however, the short-term effects of saving costs and downgrading working conditions by forcing a single bargaining channel will fall far short of the mid and long-term effects of stable industrial bargaining.
- 67.** According to the KCTU, the revised TULRAA's provisions on the unification of bargaining channel gives bargaining representatives the authority not only to bargain, but also to sign CBAs and file complaints in cases of non-compliance on the part of employers, and all rights and powers pertaining to industrial relations and guarantee of union activities are devoted to them. Therefore, rights of minority unions including their right to seek relief in cases of unjust labour practices and their right to industrial actions, including strikes, will, de facto, be denied. In other words, this provision will seriously violate the fundamental labour rights of minority unions and their members, and is therefore unconstitutional. The Government has said that it will minimize the side effects by enforcing a "duty of fair representation" by the majority union; however, this measure will not be legally binding and will not be able to play a substantive role.
- 68.** According to the complainant, with the revised TULRAA, industrial actions shall be decided only through direct secret vote of all members of all unions that have participated in bargaining through the unified channel. This means that unions that do not have bargaining representatives or unions who do have bargaining representatives but are not the majority will not be able to exercise their right to strike, if other unions are unwilling to strike. Furthermore, in reality, even unions that do have the majority status and the bargaining representatives will only be able to strike if members of other unions agree to it. Under these circumstances, not only will minority unions lose their right to strike, but cooperative unions or "yellow" unions, even if they constitute the minority, will be able to incapacitate the right to industrial action of all trade unions in that workplace. As a result,



under the proposed union pluralism, trade unions' right to collective action will, de facto, be deprived, leading to serious infringement of constitutional fundamental labour rights.

69. In their communication of 29 October 2011, the KCTU and the KGEU provide additional detailed information on the continuing acts of repression and denial of the KGEU's request for registration, the devastating results of the ban on check-off and refers to another prosecution of 1,600 Government employees due to small contributions. The KCTU, in its communication dated 31 October 2011, further denounces the practical application of the recent amendments to TULRAA which it states give rise to systemic unfair labour practices and evasion of collective bargaining responsibilities. The KCTU refers to a number of specific enterprises in both the private and public sector where it alleges that yellow unions have been formed under the system of enterprise pluralism, disciplinary punishment taken against union members, including dismissal.
70. In its communication dated 4 February 2011, the Government indicates that the actions it has taken are to ensure political impartiality of public officials as defined under the Constitution, and are by no means intended to suppress public officials' trade unions as the complainants argue. According to the Government, the KGEU clearly violated the duty of political impartiality under the laws and therefore, it cannot be qualified as a legitimate trade union under the laws. Therefore, the Government's actions against the KGEU are lawful administrative measures in due compliance with Convention No. 87.
71. *Alleged repression on participants at the 19 July national rally and on those who published a newspaper advertisement.* Article 7 of the Constitution requires political impartiality on all public officials. Therefore, public officials' involvement in political activities, taking part in and supporting political rallies or expressing political views in newspaper advertisements, defies the spirit of the Constitution. Moreover, such engagements constitute illegal collective activities under both article 66 of the State Public Officials Act (SPOA) and article 58 of the Local Public Officials Act (LPOA); and they do not fall within the justified collective activities allowed under article 3(1) of the Act on the Establishment, Operation, etc., of Public Officials' Trade Unions (APOTU). Henceforth, it was the rightful action of MOPAS to prosecute 16 leaders who participated in the Rally, violating the relevant laws and regulations, and to request the competent authorities to take disciplinary actions against 105 participants.
72. *Allegation of oppressing KGEU with regard to the general ballot.* According to the Government, it was found that some union members in local governments made themselves available, through false reports of having business trips or being absent without leave, in their efforts to encourage more participation of union members in the ballot voting. The Government directed and requested disciplinary actions against the 29 union leaders who engaged in these unlawful activities with the objective of preventing the recurrence of such incidents.
73. *Allegation of barring public officials from countering Government policies.* On grounds of article 21(1) of the Constitution, the spirit of the LPOA, the duty of fidelity under the Act, the Supreme Court ruled on 15 October 2004 that the prohibition of collective activities under article 66 of the SPOA and article 58 of the LPOA are intended to ban collective activities of public officials that are sought to serve private interests against the common interests, which obstruct faithful pursuance of public officials' duty as being servants to the population.
74. *Closures of KGEU offices.* On 20 October 2009, MOEL notified its decision of confirming the KGEU as an unauthorized organization, thus being disqualified from being a legitimate trade union under APOTU, on the ground that dismissed employees, i.e. non-public officials, were allowed to hold membership in the organization.

Accordingly, upon receiving MOEL's notification, MOPAS directed ministries and Government agencies to reclaim offices once awarded to the KGEU in accordance with article 81(4) of TULRAA as the KGEU was no longer entitled to such benefits after losing its qualification as a trade union. A total of 96 offices previously used by the KGEU were returned to the Government as of 4 December 2009.

- 75.** *KGEU's inauguration assembly.* The Government decided not to qualify the KGEU as a legitimate trade union established under the law as it carried out political and collective actions, which violate the duties specified under the SPOA and LPOA. For instance, participants at the assembly explicitly opposed to the Government's policies and condemned the Government.
- 76.** *Inspection carried out by the Government in March 2010.* From the period of 15–26 March 2010, a field inspection on trade unions in a total of 58 Government's agencies and institutions was conducted. The inspection led to finding that illegal and unfair practices such as agencies neglecting to condemn unlawful practices, including union activities carried out during the official service hours. In this regard, according to the Government, the complainant's allegation of awarding incentives to Government agencies that suppress trade unions is unjustified and does not stand to reason.
- 77.** *Donation to the Democratic Labour Party.* According to the law, public officials shall not make donations (membership fees) to any political party or to their supporters' association. Therefore, the 90 indicted KGEU members violated the SPOA, LPOA, PFA, and PPA when they joined the Democratic Labour Party, a registered political party under the PPA and made donations either in the name of the party's membership fee or the supporters' association membership fee. MOPAS directed disciplinary actions against 89 public officials on the grounds of the prohibition of political activities clauses under the SPOA and LPOA as they joined a political party and/or the party supporters' association and donated political funds.
- 78.** *The Gwangju Rally.* According to the Government, the KCFU rally is a political gathering as it carries participants' views on the Government. Therefore, prior to 15 May 2010, MOPAS informed all Government agencies that public officials' collective action in association with the political rally would be deemed illegal.
- 79.** *MOEL's request to supplement the ROE of the KGEU, convene a general meeting and submit subordinate rules.* When the KGEU submitted the ROE on 1 December 2009 to MOEL, some mandatory contents were missing. MOEL did not accept the ROE documents after due deliberation and requested the KGEU to resend them with the required information no later than 4 December 2009. MOEL requested the KGEU: (1) to clarify the membership status of dismissed workers; (2) to verify the union by-law being instituted at a general meeting; (3) to prove that union representatives were being elected via a direct secret ballot by and of all members concerned; and (4) to revise provisions in by-laws that promote members' political activities and to delete provisions that allow the dismissed to join the union. However, the KGEU failed to resubmit the ROE documents by the specified date, and MOEL returned KGEU's ROE documents accordingly.
- 80.** A revised ROE was delivered to MOEL on 25 February 2010. It, however, turned out that eight managerial officials as well as the dismissed ones, in other words non-public officials, who are disqualified to form or join the public officials' trade union, held membership in the concerned organization. Again, it failed to meet the qualification to be a registered trade union. Hence, MOEL returned the documents on 3 March 2010, in accordance with article 12(3) of TULRAA. The latest ruling by the Seoul Administrative Court, delivered on 23 July 2010, reconfirms its historical standing by citing MOEL's decision to decline KGEU's ROE being legitimate and lawful. Therefore, all circumstances

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and rulings suggest that MOEL's return of KGEU's ROE and request for supplements were legitimate and necessary in due course of law enforcement.

- 81.** According to sections 16 and 17 of TULRAA, a trade union cannot legally come into existence without a union by-law that prescribes its scope, composition, and other procedural matters. In the KGEU's case, however, the initial union by-law of the KGEU was established at a delegation meeting instead of at a general meeting, which clearly runs against TULRAA. According to the Government, a general meeting does not necessarily require a huge venue where all members can gather under one roof. Members can cast their votes at their workplace via predetermined procedure without visiting a separate place for a general meeting. Appropriate arrangements can be designed to reflect direct voices of members.
- 82.** Organizations shall submit the ROE and the by-laws to the competent authority in order to be duly recognized as a trade union. The subordinate rules of the by-laws are also part of the by-laws. Article 11 of the TULRAA mandates to incorporate substantive information such as the purpose, members and election procedures into the union by-law for the sake of an autonomous and democratic operation of the trade union. However, the submitted KGEU by-laws did not touch upon such matters as honorary members, accounting and audit committee, and elections management. Rather, it refers such matters to be discussed under its subordinate rules, which were not delivered to MOEL. Accordingly, MOEL requested the KGEU to submit the said "subordinate rules" which are supposed to present the mandatory information needed to complete the ROE, and which was missing in the KGEU's by-laws.
- 83.** *Legislation to ban public officials of the Election Commission and the courts from joining a trade union.* The bill suggests classifying public officials in charge of election management at the Election Commission as special service officers whose duties and rights present unique features that mark them off from the general service officials, and accordingly institute some restrictions on their right to join trade unions. The captioned initiative was pursued at the National Assembly, which has nothing to do with the Government's intention. Anyhow, the bill as of January 2011 was still pending at the National Assembly.
- 84.** *Union dues deduction.* The Government revised the Government Employees' Work Regulation in December 2009, which added new provisions of banning any dues from being withheld unless otherwise stated under the law. Or when deemed necessary, the accounting department shall obtain employee's prior written consent before withholding his/her dues or other fees of such kind. This explains that the revision primarily aims to protect public officials' property rights by mandating a prior written consent of the person concerned for the withholding of any type of contribution under various names and labels including the union due.
- 85.** In its communications dated 19 December 2011 and 6 February 2012, the Government replies to the January and October 2011 KCTU communications largely relating to the criticisms of the revisions of TULRAA. In the first instance, the Government explains that the unified bargaining channel was introduced as a solution to the institutional obstacles relating to the need to bring into force provisions for enterprise pluralism. The Government states that the contents of the revised act were developed through tripartite discussions and the Federation of Korean Trade Unions (FKTU) and the Korean Employers' Federation (KEF) reached an agreement on 4 December 2009. The Government emphasizes that its labour laws provide strong safeguards against unjust dismissals.

- 86.** *Paid time-off system.* The Government recalls that the issue of full-time union officials has been a serious problem. It emphasizes that full-time union officials should not be dependent on the employer for their wage payment as this would undermine their independence and maintain the vested interests of the union leadership. Nearly 20 per cent of all labour disputes in the country related to the supply of facilities to trade unions, including approval of full-time union officials. Many full-time union officials never return to work creating a higher number of officials in relation to the number of employees. Regulations against these unreasonable practices were necessary and the National Assembly had already prohibited such payments in 1997, while providing for a grace period before the provision would come into effect. The prohibition was suspended for 13 years, while during this time, labour has neither downsized the number of full-time officials nor made efforts to establish their own financing.
- 87.** The revised TULRAA specifies the paid time-off system. While prohibiting the payment of wages to full-time union officials on the basis that it is an unfair labour practice, it permits an exception for a certain amount of time that may be compensated by the employer. Had this system not been put in place, the earlier amendment would have come into force merely prohibiting all payment of union officials. In addition, the system provides for a wide range of activities that may be covered by the paid time-off system: consultation and bargaining with the employer; grievance handling; occupational safety activities; and functions of maintaining and managing the trade union for sound development of industrial relations. It can be applied to most union activities except certain activities, such as strikes. With the introduction of the system, it was necessary to prohibit the employer from paying wages to full-time union officials for activities not covered by the system. As regards the allegations made by the KCTU in relation to the *Manual* issued by MOEL, the Government states that such a publication was clearly within its responsibility and was aimed at preventing abuses of the system by instructing that activities that are in the mutual interest of labour and management should be carried out by union officials eligible for paid time off. As regards the question of officials dispatched to an affiliated association, the Government states that it would not be right to make the employer pay for such an official who is not an employee in the enterprise. In conclusion, the Government considers that the paid time-off system that it has developed is, compared to other advanced nations, relatively generous and flexible.
- 88.** *Bargaining representative system.* This system was necessary to reduce the side effects of multiple unions, such as overlapping bargaining and excessive bargaining costs, and aimed at promoting the creation of consistent working conditions in one workplace. In addition, it increases unions' bargaining power. The Government recalls that many collective bargaining systems provide for exclusive representation and adds that the system under the revised TULRAA permits unions first to determine the bargaining representative autonomously and if they fail, the union having a majority of the membership of all the unions in the enterprise becomes the representative. If there is no such majority union, a joint bargaining team is organized. Multiple unions may bargain individually if the employer agrees.
- 89.** In reply to the allegation that the bargaining representative system constrains industry-level bargaining, the Government states that, while industry-level bargaining is possible under the system, there is no obligation to impose industry-level bargaining and it should only be carried out by agreement between labour and management. Industry-level bargaining is fully available upon agreement between labour and management, the only difference is that the industrial trade union should obtain the bargaining representative status at the enterprise level. Allowing an exception to the unified bargaining channel for industry-level bargaining would be unfair to unions that are not organized at the industry level and would give rise to multiple collective agreements which would undermine the consistency of working conditions.

- 90.** The Government refutes the allegation that the system erodes minority unions' bargaining rights, as all unions are involved in determining the representative union where there is no majority union and with the introduction of union pluralism such unions can exist where they could not have been formed previously. In addition, the revised TULRAA prohibits undue discrimination against minority unions by imposing the duty of fair representation on the bargaining representative union. The limitations that may exist are an inevitable part of union pluralism and given that representative status is only granted for a two-year term, the minority union will always have a chance to leave the representative union at a later date.
- 91.** The Government believes that consolidating the bargaining power through the representative union has practical benefits for the promotion of collective bargaining. The fundamental source of bargaining power is unity and solidarity. Also, when there is a representative union, the employer would feel more willing to participate in bargaining to set working conditions that are consistently applicable enterprise wide. In addition, individual bargaining is not necessarily advantageous for workers as it weakens the unions' bargaining power as a whole.
- 92.** As regards restrictions on industrial action, the Government states that the revised TULRAA provides that only the representative union can lead industrial action, with the approval of a majority of all the members involved in the procedure. This is a reasonable principle as strikes are just a means to accomplish an end in the bargaining process and not an end in themselves. Strikes have a great impact on the other union members and the company and should be resorted to as a last resort and exercised prudently. The Government asserts that the KCTU's allegation that the bargaining representative cannot take industrial action without consent from other unions is not true as it needs only the approval of its own members if it is a majority of all the participating unions.
- 93.** As regards the allegation of the ban on striker replacements, the Government states that this ban still applies although it has been relaxed to some degree for essential public services. As for the question of obstruction of business, the Government states that the precedent whereby the Supreme Court had ruled that any illegal strike, even where peaceful, is considered the collective threat of force in itself and therefore constitutes obstruction of business has now been altered by a full bench decision of 17 March 2011. As a consequence, strikes that are simply workers' peaceful refusal to work, not involving the illegal occupancy of the workplace, interference with business operations, etc., have almost no chance of being penalized on charges of obstruction of business. Since the change, there have been no court decisions placing obstruction of business charges on workers for their passive refusal to work, even if the strike was not legitimate.
- 94.** As regards the allegation of lack of protection against unfair labour practices, the Government emphasizes that yellow-dog contracts, unfavourable treatment due to union membership, domination over or interference with a trade union or financial support for a trade union all constitute unfair labour practices and are prohibited and subject to a penalty of up to two years imprisonment or a fine of up to 20 million Korean (South) won (KRW). An employer's refusal to bargain collectively is also an unfair labour practice and the Labour Relations Commission, a tripartite body, will conduct mediation and arbitration with the agreement of the parties. The employer must implement the Commission's order and if he or she refuses to implement a judicially confirmed order he or she will face criminal punishment or imprisonment or a fine.
- 95.** The Government asserts that it has steadfastly maintained a "zero tolerance" policy on unfair labour practices. It investigates not only legal complaints and petitions about unfair labour practices but also alleged cases of such practices collected in various ways. In this regard, the Government set up an "Internet Report Centre" in July 2011 at the outset of the

introduction of the enterprise-level multiple unions system to receive reports, including anonymous ones, of unfair practices related to multiple unions. Any report, complaint or petition received by the Centre is followed up on thoroughly for strict review and measures.

- 96.** The KCTU's allegation that the number of "yellow unions" and unfair labour practices surged right after the enterprise-level bargaining channel unification system entered into force is groundless. The cases of trade unions that disaffiliated with the KCTU or of multiple unions that were newly formed in companies with KCTU unions following the introduction of the multiple union system, prominently concern labour relations characterized by conflict and confrontation. Indeed, the phenomenon is driven by the KCTU members who are opposed to the KCTU's line.
- 97.** Since the multiple unions system was enforced, only 34 reports on 24 firms were filed at the Internet Report Centre by 30 January 2012. Three companies are facing judicial action as their unfair labour practices were confirmed; 15 were cleared without charges. Investigation is in progress for two of the six cases (Yusung Enterprise and Korea Western Power) and the remaining four cases (Central, Korea East–West Power, Yusung Rivera, KEC) went through an exhaustive investigation process, including seizure and search, and was handed over to the prosecutor's office with the opinion of indictment.
- 98.** The Government confirms that 85.9 per cent of the trade unions newly created after the introduction of the multiple unions system were registered as non-affiliated unions, but asserts that this is the extension of a trend that began before the bargaining channel unification system was launched on 1 July 2011.
- 99.** The bargaining channel unification system was designed to facilitate reasonable bargaining practices between labour and management under the new multiple unions system. Two people or more can form a trade union whenever they want, and the employer has the responsibility to accept a trade union's request for bargaining. Any violation in this regard is punished as an unfair labour practice. Therefore, it would be unrealistic to require the employer to negotiate with every individual trade union under such circumstances where multiple unions can be established without limit.
- 100.** In conclusion, the Government states that, as of the end of December 2011, in 96.1 per cent of the enterprises with multiple unions where bargaining is in progress, the representative union selection process has been completed. Specifically, 95.2 per cent of enterprises with KCTU unions and 95.3 per cent of enterprises with FKTU unions completed the process. Meanwhile, the proportion of unions that concluded wage negotiations with employers was 82.2 per cent, up by 13 per cent from 69.2 per cent a year earlier. This illustrates how smoothly unions and companies have been adapting to the new process of collective bargaining since the introduction of the multiple unions system. It also shows that the KCTU's allegation that the bargaining channel unification system is undermining promotion of collective bargaining totally lacks empirical evidence. Moreover, at the end of July 2011, 93.3 per cent of all workplaces had introduced the paid time-off system and 99.4 per cent were abiding by the maximum limits. About 80 per cent of workplaces were complying with the procedure for selecting a bargaining representative. The Government asserts that the bargaining channel unification system is completely consistent with the Constitution and is not contrary to ILO standards.
- 101.** *The Committee recalls that it has been examining this case, which concerns both legislative and factual issues, since 1996. The Committee observes from its previous conclusions and the information before it that although significant progress has been achieved in terms of the steps taken to revise the legislation, allegations remain*

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concerning the practical implementation of the legislation and the measures appropriate to promote a stable and constructive industrial relations system in the country.

- 102.** *The Committee recalls that the outstanding legislative issues concern, on the one hand, the Act on the Establishment and Operation of Public Officials' Trade Unions, which concerns the public sector only, and, on the other hand, TULRAA and other legislation which is generally applicable.*
- 103.** *With regard to TULRAA and other generally applicable legislation, the Committee recalls that the pending issues concerned the need to: (i) legalize trade union pluralism at the enterprise level; (ii) resolve the issue of payment of wages to full-time union officers in a manner consistent with freedom of association principles; (iii) ensure that, in issuing decisions determining the minimum service, the Labour Relations Commission takes due account of the principle according to which a minimum service should be confined to operations that are strictly necessary to avoid endangering the life or normal living conditions of the whole or part of the population; (iv) amend the emergency arbitration provisions of TULRAA (sections 76–80) so that it can be imposed only by an independent body which has the confidence of all parties concerned and only in cases in which strikes can be restricted in conformity with freedom of association principles; (v) repeal the provisions prohibiting dismissed and unemployed workers from keeping their union membership and making non-union members ineligible to stand for trade union office (sections 2(4)(d) and 23(1) of TULRAA); and (vi) amend section 314 of the Criminal Code concerning obstruction of business to bring it into line with freedom of association principles.*
- 104.** *When it last examined the case, the Committee recalled that the question of wage payment to full-time union officers should not be subject to legislative interference and should be left to free and voluntary negotiations between the parties. It had therefore requested the Government to expedite the resolution of this matter, in accordance with freedom of association principles so as to enable workers and employers to conduct free and voluntary negotiations in this regard.*
- 105.** *The Committee notes from the KCTU's new allegations that amendments to TULRAA concerning the ban on wage payment for full-time union officials and the introduction of a maximum time-off limit were unilaterally adopted by the Government on 1 January 2010, despite strong disagreement from unions and opposition parties. This amendment came into force on 1 July 2010. The Committee further notes that the TULRAA revision of 1 January 2010 delayed the adoption of pluralism for another year and a half, while imposing the unification of the bargaining channel.*
- 106.** *The Committee notes the strong disagreement of the KCTU concerning these amendments and the extensive arguments they have presented to illustrate how they violate their freedom of association. With regard to the ban on wage payment for full-time union officials and the introduction of a maximum time-off limit, the Committee notes that according to the KCTU: (i) the time-off system contains a dual restriction on both activities covered and maximum time limits; (ii) the revised law stipulates that union activities which are guaranteed by the CBAs shall be treated as unpaid time off and will therefore make union activities in the broad meaning such as opinion collecting, union education, policy-related activities, and activities for federations and confederations impossible. If paid time off is granted for these union activities in a CBA, it would be a violation of TULRAA and the administrative offices could order to correct the relevant CBA (article 31.3 TULRAA); (iii) the majority union will monopolize the paid-time off; and (iv) the method of using time off violates the autonomy of unions, the right to decide how those hours will be used and by whom should be reserved for unions.*

- 107.** *According to the Government: (1), while prohibiting the payment of wages to full-time union officials on the basis that it is an unfair labour practice, the revised TULRAA permits an exception for a certain amount of time that may be compensated by the employer; (2) the system provides for a wide range of activities that may be covered by the paid time-off system applicable to most union activities except certain activities, such as strikes; (3) the Manual issued by MOEL was aimed at preventing abuses of the system by instructing that activities that are in the mutual interest of labour and management should be carried out by union officials eligible for paid time off; and (4) it would not be right for an employer to have to pay for officials who have been dispatched to an affiliated association.*
- 108.** *The Committee notes that the maximum time-off limits (by Notification No. 2010-39 of the Ministry of Labour), attached to the KGTU's communication dated December 2010, are the following:*

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**Maximum time-off hours**


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Size of membership (unit: person)	Decision made by the deliberation		
	Maximum time-off hours (number of full-time union officials)		Maximum limit (converted into person)
50 or less	1 000 (0.5)	* Part-time union officials cannot exceed three times the number of full-time union officials.	1-3
50 ~ 99	2 000 (1.0)		1.9
100 ~ 199	3 000 (1.5)		
200 ~ 299	4 000 (2.0)		
300 ~ 499	5 000 (2.5)	** Part-time union officials cannot exceed two times the number of full-time union officials.	3-7
500 ~ 999	6 000 (3.0)		
1 000 ~ 2 999	10 000 (5)		24.1
3 000 ~ 4 999	14 000 (7)		
5 000 ~ 9 999	22 000 (11)		
10 000 ~ 14 999	28 000 (14)		
15 000 or more	Until June 30, 2012: 28 000 hours (i) 2 000 hours; (ii) additional for every 3 000 members  Effective from 1 July 2012: maximum 36 000 hours (18)		

\* Membership means the total number of union members of a business or workplace.

\*\* The calculation of one full-time union official comes from 2,000 work hours based on a 40-hour work week multiplied by 52 weeks per year.

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- 109.** *The Committee notes with regret that despite its previous repeated recommendations, the amendments to TULRAA retain the enforcement of a ban on the payment of wages to full-time officials and provides for sanctions against employers and unions who do not comply (articles 24(2), 81(4), 90 and 92). The Committee notes, however, that according*



to the new amendments: (i) the identity of full-time union officials is to be decided through the voluntary collective bargaining between labour and management (article 24(1) and (3)); (ii) the wage payment for full-time union officials may be allowed exceptionally within the maximum time-off limit to carry out functions prescribed by TULRAA or other acts, including consultation and bargaining with the employer, grievance handling and occupational safety activities, and the functions of maintaining and managing the trade union for the sound development of industrial relations, if it is stipulated in the collective agreement or consented by the employer (article 24(4)); and (iii) the employers may allow the workers to carry out activities referred to in article 24(4) during working hours, may provide subsidies for the welfare of the workers, or for the prevention and relief of financial difficulties and other disasters, and may provide union offices.

- 110.** *The Committee recalls from its previous examination of this case that the question of wage payment to full-time union officers should not be subject to legislative interference and should be left to free and voluntary negotiations between the parties. The Committee understands the historical complexity of this issue in the Republic of Korea and the Government's intention to strike a balance by providing limits to the amount of paid full-time union officials in a new context of trade union pluralism. The Committee regrets, however, that in so doing, the Government has retained the overall ban on such payments which are subject to sanctions and that, according to the allegations, resources of the labour inspectorate are devoted to investigating whether the provisions on the maximum limit have been exceeded. In addition, the Committee expresses concern at the legislative interference into the type of activities that may be carried out by a full-time union officer and the apparent restriction that labour-management relations should only be handled by such officers and not simply the appropriate person designated by the union. As regards the Government's indication that activities, such as strikes, should not be covered by such payments, the Committee, while agreeing that salary deductions for days of strike give rise to no objection from the point of view of freedom of association principles [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 654], considers more generally that paid full-time union officers should be able to carry out their trade union duties in accordance with the rules of their organization without having to account for each activity to the management. Such activities should include educational activities, activities carried out under the aegis of the relevant federation or confederation and those related to the preparation of action on a collective dispute.*
- 111.** *In light of the above considerations, the Committee trusts that the Government will be in a position in the very near future to repeal the outstanding ban on payment of full-time union officers and, while it may be appropriate to provide guidance in terms of the number of paid union officials in relation to the workforce, the overall determination of wage payment to full-time union officers will be left to free and voluntary negotiations between the parties, without legislative interference. The Committee requests the Government to keep it informed of developments in this respect and to provide a copy of the adopted revised TULRAA and its enforcement decrees as well as a copy of the Manual as soon as possible. The Committee also requests the Government to indicate whether any sanctions have been taken against employers or unions for violations of the above provisions.*
- 112.** *As regards the long-awaited introduction of enterprise pluralism, the Committee notes the concerns raised by the complainant in relation to the elaboration of a unified bargaining channel. In particular, the complainant maintains that: (i) the unified bargaining channel under union pluralism will restrict rights to collective bargaining and collective action of minority unions; (ii) in supra-enterprises, minority unions will not be able to participate in industrial bargaining; (iii) the revised TULRAAs provisions on unification of bargaining channels, delegates to bargaining representatives the authority not only to bargain, but also to sign CBAs and file complaints in case of non-compliance on the part of employers,*

*and all rights and powers pertaining to industrial relations and guarantees of union activities are devoted to them; rights of minority unions including their right to seek relief in case of unjust labour practices and their right to industrial action including strikes, de facto, will be denied; (iv) unions that do not have bargaining representatives or unions who do have bargaining representatives but are not the majority will not be able to exercise their right to strike, if other unions are unwilling to strike. Even unions that do have the majority status and bargaining representatives will only be able to strike if the members of other unions agree to it; and (v) TULRAA limits bargaining unit separation among unions which have different working conditions.*

**113.** *The Committee notes the observations made by the Government that: (1) the unified bargaining channel system was necessary to reduce the side effects of multiple unions and aimed at promoting consistent working conditions in one workplace; (2) multiple unions may bargain individually if the employer agrees; (3) an exception for industry-level bargaining would be unfair to other non-affiliated unions and would undermine consistent working conditions; (4) minority unions have a say in the bargaining representative where there is no majority union and are protected by the duty of fair representation; (5) the procedure for industrial action led by the representative union and supported by a majority of all union members is reasonable; and (6) national legislation provides adequate safeguards against employer interference and unfair labour practices.*

**114.** *With regard the method and procedure of the bargaining channel's unification, the Committee notes that TULRAA provides for the following steps: (1) voluntary unification among unions; (2) if voluntary unification fails within a certain period, the majority union becomes the representative union; (3) in case of no majority union, a joint representative body should be established of unions whose members make up more than 10 per cent of the workforce; and (4) if a joint representative body fails to be established, proportional representation should be established. With regard to the bargaining unit, the Committee notes that a majority union can be established through the association of more than two unions and that the Labour Relations Commission has the authority to determine whether the division of the bargaining unit is appropriate, taking into account the difference of working conditions, employment type, bargaining practice, etc.*

**115.** *Firstly, the Committee welcomes the long-awaited introduction of trade union pluralism at the enterprise level. The Committee understands that in introducing pluralism, the Government has sought to implement a system that would bear in mind the particularities of the Korean situation and that consultations have taken place with the social partners for over a decade on the type of system to be introduced, even though not all partners may be satisfied with the results. In this regard, the Committee recalls that systems of collective bargaining with exclusive rights for the most representative trade union and those where it is possible for a number of collective agreements to be concluded by a number of trade unions within a company are both compatible with the principles of freedom of association. Recognizing the possibility of trade union pluralism does not preclude granting certain rights and advantages to the most representative organizations. However, the determination of the most representative organization must be based on objective, pre-established and precise criteria so as to avoid any possibility of bias or abuse, and the distinction should generally be limited to the recognition of certain preferential rights, for example, for such purposes as collective bargaining, consultation by the authorities or the designation of delegates to international organizations. Where, under a system for nominating an exclusive bargaining agent, there is no union representing the required percentage to be so designated, collective bargaining rights should be granted to all the unions in this unit, at least on behalf of their own members. Minority trade unions that have been denied the right to negotiate collectively should be permitted to perform their activities and at least to speak on behalf of their members and represent them in the case of an individual claim [Digest, op. cit., paras 354, 359, 950 and 976].*

116. *With regard to the provisions of the revised TULRAA concerning the unification of the bargaining channel, the Committee requests the Government to take all the necessary measures to ensure that: (i) when there is no union representing the required percentage to be designated on a representative body, collective bargaining rights are granted to all the unions in this unit, at least on behalf of their own members; and (ii) minority trade unions that have been denied the right to negotiate collectively are permitted to perform their activities, to speak on behalf of their members and represent them in individual grievances.*
117. *The Committee further notes with concern the numerous and detailed allegations of unfair labour practices upon the introduction of the unified bargaining channel system and the absence of a Government reply in this regard. The Committee welcomes the Government's indication of its zero tolerance policy and the establishment of an Internet reporting centre. It requests the Government to keep it informed on the remaining pending cases identified and to review the specific allegations raised by the complainant with all social partners concerned with a view to ensuring the prevention or sanction of any such acts. It requests the Government to keep it informed of the steps taken in this regard.*
118. *The complainant further alleges that the revised TULRAA stipulates that industrial actions like strikes shall be decided only through direct secret vote of all members of all unions that have participated in bargaining through the unified channel, thereby preventing unions who do not have bargaining representatives or unions who do have bargaining representatives but are not the majority from exercising their right to strike. The Committee recalls that the right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement; workers and their organizations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members interests. 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 [Digest, op. cit., paras 531 and 535]. The Committee requests the Government to take the necessary measures to ensure that strike action may be carried out beyond the limited question of industrial disputes for the signing of a collective agreement, in accordance with these principles, and that the legality of such action is not dependent upon the representative status of the organization.*
119. *The Committee notes that the revised TULRAA stipulates that in the case of a strike in an essential public service, the employer and the union have to indicate the ratio of members of each union to guarantee a minimum service. The Committee recalls its previous observations in this regard and once again requests the Government to take the necessary measures to ensure that the Labour Relations Commission, in issuing decisions determining the minimum service, takes due account of the principle according to which a minimum service should be confined to operations that are strictly necessary to avoid endangering the life or normal living conditions of the whole or part of the population and to continue to keep it informed of the specific instances in which minimum service requirements have been introduced, the level of minimum service provided and the procedure through which such minimum service as determined (negotiations or arbitration) [see 353rd Report, para. 711].*
120. *The Committee notes that according to the complainant, under the pretext of the revised TULRAA, CBAs have been unilaterally terminated in many workplaces including Korea Railroad, National Pension Service and Korea Gas Corporation and that such cancellations are particularly widespread among public corporations. In addition, after the revised TURAA took effect, free and voluntary industrial relations have been undermined by distortion or misinterpretation of the revised law. MOEL has also been issuing rectification orders that instigate unfair labour practices. Such rectification orders include issues in CBAs unrelated to payment of wages to full-time union officials, such as*

those related to provision of facilities and conveniences, membership's eligibility, limitations in terminating CBAs, etc. The Committee further notes that according to the complainant, it also explicitly and implicitly limits the ability of unions and management to come to a free and voluntary agreement, thus stimulating further industrial disputes. It has resulted in employers becoming irresponsive to bargaining, showing insincerity in the bargaining process or resorting to unfair labour practices. The Committee recalls that the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organizations should have the right to organize their activities and to formulate their programmes. The Committee also recalls that agreements should be binding on the parties [**Digest**, *op. cit.*, paras 881 and 939]. The Committee requests the Government to provide full observations on the allegations of interference in the negotiations between unions and employers and to indicate the reasons for the unilateral termination of binding CBAs that took place in several workplaces, including Korea Railroad, National Pension Service and Korea Gas Corporation.

- 121.** *With regard to the legislation to ban public officials of the Election Commission and the court from joining a trade union, the Committee notes that the Government indicates that the bill suggests to classify public officials in charge of election management at the Election Commission as special service officers whose duties and rights present unique features that mark them off from the general service officials, and accordingly institutes some restrictions on their right to join trade unions. The bill, which was not initiated by the Government, was still pending at the National Assembly. As concerns persons exercising senior managerial or policy-making responsibilities, the Committee is of the opinion that while these public servants may be barred from joining trade unions which represent other workers, such restrictions should be strictly limited to this category of workers and they should be entitled to establish their own organizations [**Digest**, *op. cit.*, para. 253]. The Committee therefore requests the Government to ensure that public officials working for the Election Commission and the courts have the right to form their own associations so as to defend their interests.*
- 122.** *With regard to the bill to revise the Government Employees' Work Regulation to strengthen the provision on check-off deduction of union dues, the Committee notes the Government's indication that the revision primarily aims to protect public officials' property rights by mandating a prior written consent of the person concerned for withholding of any type of contribution under various names and labels including union dues. The Committee observes however that the Employees' Work Regulation Bill provides for the banning of check-off of union dues unless otherwise stated under the law or when deemed necessary. The Committee recalls that the withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious industrial relations and should therefore be avoided. The deduction of trade union dues by employers and their transfer to trade unions is a matter which should be dealt with through collective bargaining between employers and all trade unions without legislative obstruction [**Digest**, *op. cit.*, paras 475 and 481]. While observing that the requirement of written consent for dues check-off would not be contrary to the principles of freedom of association, the Committee requests the Government to ensure respect for the abovementioned principles and ensure that any legal provisions regulating check-off will not hinder the right to address this matter through collective bargaining.*

123. When it last examined the case, the Committee expressed deep regret at the gravity of the allegations involving serious acts of extensive interference in the activities of the KGEU and requested the Government to immediately cease all acts of interference, in particular the forced closure of KGEU offices nationwide, the unilateral discontinuance of the check-off facility, the disallowance of collective bargaining, the pressure on KGEU members to resign from the union as well as administrative and financial sanctions against local governments which fail to comply with the Government's directive. It further called upon the Government to abandon these directives and to take all possible measures with a view to achieving conciliation between the Government (in particular the Minister of Government and Home Affairs (MOGAHA)) and the KGEU so that the latter may continue to exist and ultimately to register within the framework of the legislation which should be in line with freedom of association principles. The Committee requested to be kept informed in this respect [see 353rd Report, para. 588].
124. The Committee deeply regrets that MOEL has not yet accepted the registration of the KGEU and has requested it to supplement the report on establishment on three new occasions, to convene a general meeting and to submit subordinate rules. The registration was returned to the KGEU on 3 March 2010, on the basis that: (i) dismissed workers as well as those in grade 6 in semi-managerial positions were still members of the union; (ii) the initial union by-law of the KGEU was established at a delegation meeting; and (iii) the KGEU by-law and subordinate rules did not indicate the honorary members, accounting and audit committee and elections management.
125. The Committee recalls that the formalities prescribed by law for the establishment of a trade union should not be applied in such a manner as to delay or prevent the establishment of trade union organizations. Any delay caused by authorities in registering a trade union constitutes an infringement of Article 2 of Convention No. 87. National legislation providing that an organization must deposit its rules is compatible with Article 2 of Convention No. 87 if it is merely a formality to ensure that those rules are made public. However, problems may arise when the competent authorities are obliged by law to request the founders of organizations to incorporate in their constitution certain provisions which are not in accord with the principles of freedom of association [*Digest*, *op. cit.*, paras 279–280].
126. The Committee recalls that when it last examined the case, it urged the Government to repeal the provisions prohibiting dismissed and unemployed workers from keeping their union membership and making non-union members ineligible to stand for trade union office (section 2(4)(d) and 23(1) of TULRAA) [see 353rd Report, para. 749(c)(iv)]. Noting with regret that the Government has not repealed these provisions, the Committee once again urges the Government to do so and to take all possible measures with a view to achieving conciliation between the Government and the KGEU so that the latter may continue to exist and ultimately to register within the framework of the legislation, which should be in line with freedom of association principles.
127. The Committee also deeply regrets the new allegations of: acts of interference in the activities of the KGEU; the hindrance of the freedom of expression and opinion of its members; and anti-union discrimination in the form of disciplinary measures against its members.
128. The Committee notes with regret that on 24 March 2010, MOPAS once again ruled that the KGEU was an illegal organization and that all activities performed in the name of the union would be branded illegal, on the basis of its inauguration rally on 20 March 2010. It also said that public officials who had participated in the rally would be identified and given heavy disciplinary measures. In this regard, the Committee deeply regrets the allegations that the Government has requested the removal of the KGEU's signboard, the

*removal and ban on putting up of the KGEU's banners and posters, the blocking of access to the KGEU's website and the prohibition of all union activities in the name of the KGEU, including the issuance of labour union newsletters, picketing rallies, labour union official elections, retreats, inauguration rallies of branches and chapters, meetings and demonstrations.*

- 129.** *The Committee notes the Government's indication that these actions were taken to ensure the political impartiality of public officials as defined under the Constitution, and were by no means intended to suppress public officials' trade union as the complainants argue. According to the Government, the KGEU clearly violates the duty of political impartiality under the law and cannot therefore be qualified as a legitimate trade union. Therefore, all the actions taken by the KGEU's members, such as rallies, publications, ballots, inauguration assemblies, donations, and more, are considered as illegal collective activities under articles 7 and 21(1) of the Constitution, article 66 of the SPOA, article 58 of the LPAC and article 3(1) of APOTU and henceforth, it was the rightful action of MOPAS to prosecute people who participated therein.*
- 130.** *In its previous examination of the case, the Committee had noted that section 4 of the Act on the Establishment and Operation of Public Officials' Trade Unions prohibits political activities by public officials and that according to the Government, the status of public servants is such that certain purely political activity can be considered contrary to the code of conduct that is expected of these servants and that trade union organizations should not engage in political activities in an abusive manner and go beyond their true functions by promoting essentially political interests. The Committee notes that according to the Government, public officials' involvement in political activities, such as taking part and supporting political rallies, expressing political views in newspaper advertisements, countering Government policies, making donations to any political party and joining a political party defies the spirit of the nation's Constitution and constitutes illegal activities.*
- 131.** *The Committee recalls that provisions imposing a general prohibition on political activities by trade unions for the promotion of their specific objectives are contrary to the principles of freedom of association. A general prohibition on trade unions from engaging in any political activities would not only be incompatible with the principles of freedom of association, but also unrealistic in practice. Trade union organizations may wish, for example, to express publicly their opinion regarding the Government's economic and social policy [see **Digest**, op. cit., paras 500 and 503]. The full exercise of trade union rights calls for a free flow of information, opinions and ideas, and to this end workers, employers and their organizations should enjoy freedom of opinion and expression at their meetings, in their publications and in the course of other trade union activities. Nevertheless, in expressing their opinions, trade union organizations should respect the limits of propriety and refrain from the use of insulting language [**Digest**, op. cit., para. 154].*
- 132.** *In light of the abovementioned principles, the Committee once again requests the Government to ensure that public officials' trade unions have the possibility to express their views publicly on the wider economic and social policy questions which have a direct impact on their members' interests, including during their meetings, in their publications and in the course of other trade union activities.*
- 133.** *In this regard, noting that 57 public officials were disciplined, including 18 dismissed due to their participation at the 19 July national rally and/or their publication of a newspaper advertisement; 29 union officials were disciplined (among them, eight faced heavy discipline) because of their involvement in the advertising of a union ballot on the integration of the unions; 90 KGEU officials were charged and about to be dismissed for their violation of the Political Party Act and the Political Fund Act; and that charges were*

*brought against 273 labour union officials (KGEU 90, KCTU 183) following an investigation conducted by the Government during the month of January 2010, the Committee recalls from the previous examination of this case its statement that the criminalization of industrial relations is in no way conducive to harmonious and peaceful industrial relations [see 346th Report, para. 774]. The Committee requests the Government and the complainants to keep it informed of the situation of these employees and of any appeal filed against these decisions before the courts.*

### **Case No. 2450 (Djibouti)**

**134.** The Committee examined this case at its March 2011 meeting and on that occasion made the following recommendations [see 359th Report, para. 394]:

- (a) The Committee notes the efforts made by the Government to respond to certain questions which have been under examination in the present case for many years. The Committee notes visible progress in the form of the legislative amendments that have been requested by the ILO supervisory bodies, and urges the Government to inform it when the legislative text amending sections 41, 214 and 215 of the Labour Code enters into force and to send a copy of the said text.
- (b) The Committee notes with great concern, however, that questions remain regarding a number of serious issues. The Committee firmly expects the Government to show real willingness to improve the situation in this case by making specific and definitive responses to its recommendations. The Committee therefore firmly urges the Government once again to take specific steps towards this end without delay and thus facilitate transparent and sustainable social dialogue in Djibouti.
- (c) As regards the issue of the workers dismissed in 1995 following a strike who have not yet been reinstated, the Committee requests the Government to supply information on the situation of Ms Mariam Hassan Alin and Mr Habib Ahmed Doualeh, whose reinstatement it claims to be under negotiation. As regards the workers whose names have been supplied by the complainant organizations and concerning whose situation it claims to have no information, the Committee expects the Government to take all necessary steps to resolve their situation without delay, at least for those who reside within the national territory or have indicated their wish to be reinstated. As regards the question of payment of wage arrears, the Committee requests the Government to reconsider its position.
- (d) The Committee requests the Government to supply detailed information without delay on the situation of Mr Adan Mohamed Abdou and Mr Kamil Diraneh Hared, concerning whom it indicates, on the one hand, that it agrees to their reinstatement in their original department or another government department together with payment of their social security contributions and, on the other hand, that these two men have declined to be reinstated. If the Government maintains that they have declined to be reinstated, the Committee expects it to provide details accordingly.
- (e) The Committee repeats once again its request to the Government to launch an inquiry without delay into the circumstances of the September 2006 dismissal of Mr Hassan Cher Hared and to inform it of the results and of any follow-up action taken.
- (f) The Committee firmly expects the Government to guarantee the right to hold free and transparent elections to all trade unions in the country, particularly the UDT and its affiliated organizations. Such elections will enable the workers to choose their representatives in full freedom, without interference by the public authorities, whether it be deciding the terms of eligibility for union officers or holding the actual elections. Thus, in a framework which fully respects the capacity of workers' organizations to act in total independence, the Government will be in a position to determine, together with these organizations, objective and transparent criteria for nominating worker representatives to national tripartite bodies and to the International Labour Conference.
- (g) Taking into account the history of this case and the questions still pending, the Committee requests the Government to accept a tripartite mission.

- 135.** In a communication dated 16 June 2011, the General Union of Djibouti Workers (UGTD), through its General Secretary Mr Kamil Diraneh Hared, condemned the organization of a “clone” trade union congress in August 2010 with the support of the Government and an international trade union organization.
- 136.** In a communication dated 29 August 2011, the complainant organizations, the Djibouti Labour Union (UDT) and the UGTD, draw attention to the situation with regard to the outstanding issues in this case. With regard to the legislative amendments requested by the ILO supervisory bodies, they indicate that three sections of the Labour Code have been amended as requested. However, in their opinion, the Labour Code remains highly antisocial and violates the continental and international legal instruments by which the country is bound. With regard to the reinstatement of the workers dismissed in 1995 who have not yet been reinstated, the complainants indicate that the Government continues to refuse to take the necessary steps to reinstate them as it had undertaken to do. Furthermore, the complainants condemn the Government’s creation of social institutions such as the National Council for Labour, Employment and Vocational Training in which workers’ representatives are nominated by the Government, which undermines social and tripartite dialogue. The complainants indicate that the physical punishment and harassment of trade union leaders continues, and regret the assistance given to the Government by international and regional trade union organizations and the ILO, despite the fact that the UDT and the UGTD continue to be prevented from organizing their activities normally and that their leaders and their leaders’ friends and families continue to be harassed. Lastly, the complainants report that the proceedings brought in 2006 against Mr Mohamed Ahmed Mohamed, Legal Affairs Officer for the Union of Port Workers (UTP), Mr Djibril Ismael Egueh, General Secretary of the Maritime and Transit Services Staff Union (SP-MTS), Mr Hassan Cher Hared and Mr Adan Mohamed Abdou for “delivering information to a foreign power” remain pending in court.
- 137.** In its communication dated 20 October 2011, the Government refutes the allegations of the UGTD concerning the organization of the congress of the trade union confederation led by Mr Abdou Sikieh Dirieh. The Government states that the UGTD, led by Mr Sikieh Dirieh, organized its congress in a fully transparent manner before an international trade union delegation consisting of observers from the World Federation of Trade Unions (WFTU), the Arab Labour Organization (ALO), the Trade Union of the Community of Sahelo-Saharan States and trade union confederations from Sudan and Yemen. The Government states that the congress took place without any interference whatsoever on its part. Lastly, the Government indicates that Mr Kamil Diraneh Hared has no mandate to speak on behalf of the UGTD and is, in fact, merely a militant from an opposition party.
- 138.** With regard to the amendments to the Labour Code, the Government provided a copy of Act No. 109/AN/10/6 L, partially amending sections 41, 214 and 215 of the Labour Code, promulgated on 16 February 2011. As regards the issue of the reinstatement of the workers dismissed in 1995 who have not yet been reinstated, the Government provides the same list as it provided previously, mentioning workers reinstated between 2002 and 2005, two workers whose reinstatement is under negotiation (Ms Mariam Hassan Ali and Mr Habib Ahmed Doualeh), two workers who refuse to be reinstated (Mr Adan Mohamed Abdou and Mr Kamil Diraneh Hared) and workers about whose situation the Government has no information (Mr Abdoufathah Hassam Ibrahim, Mr Houssien Dirieh Gouled, Mr Moussa Waiss Ibrahim, Mr Abdillahi Aden Ali, Mr Bouha Daoud Ahmed, Mr Souleiman Mohamed Ahmed and Mr Mohamed Doubad Waiss), to which the name of Mr Hassan Cher Hared has been added. As on earlier occasions, the Government indicates that it is willing to accept the recommendation made by the direct contacts mission of 2008 concerning the reinstatement of the following persons who are present in the country to their original department, and that it agrees to pay contributions to the National Social Security Fund to enable them to qualify for, or receive, a standard retirement pension



(Mr Adan Mohamed Abdou, Mr Kamil Diraneh Hared, Mr Habib Ahmed Doualeh and Mr Ahmed Djama Egueh). The Government also points to the need to devise ways of covering gaps in annuities payable to Mr Ahmed Djama Egueh and Mr Kamil Diraneh Hared, who have reached retirement age. However, as regards the mission's recommendation concerning the payment of salary in arrears backdated to 1995, the Government reiterates that it definitively rejects this request.

- 139.** As regards the situation of Mr Hassan Cher Hared, the Government provides information concerning the circumstances of his dismissal. It points out that Mr Cher Hared, who at that time was staff delegate and leader of the postal workers' union, and the then Director of the Post Office were guilty of abuse of power and misuse of company funds in a dispute that had become personal. The decision to dismiss them was taken by the Post Office Governing Board after all other statutory disciplinary measures had been exhausted. Furthermore, the Government adds that there are no legal proceedings against Mr Cher Hared whatsoever, contrary to his claim, and that he is therefore free to move and engage in all legal activities, except in public service and semi-public service activities.
- 140.** The Government again indicates that it issues a written invitation to recognized organizations to appoint their representatives to participate in the International Labour Conference. With regard to employers' representation, there is only the Business Federation of Djibouti (FED). With regard to workers' representation, the Government states that there are two confederations, namely, the UGTD led by Mr Sikieuh Dirieuh, which held its congress in August 2010, and the UDT. The Government indicates that the UDT is going through a serious internal crisis and that none of its representatives has a clear and unambiguous mandate obtained through free elections. In these circumstances, the Government states that until the UDT organizes free, transparent and open elections, it could be excluded from all national and international meetings and will not be able to take part in the International Labour Conference.
- 141.** *The Committee takes note of the complainants' new allegations and of the Government's new observations. The Committee welcomes the adoption of Act No. 109/AN/10/6 L, partially amending sections 41, 214 and 215 of the Labour Code, promulgated on 16 February 2011. It expects the Government to show the same will to comply with the requirements of the Conventions that it has ratified on freedom of association and the right to collective bargaining by taking, without delay, the necessary steps to amend its legislation with regard to the other matters that have been raised by the supervisory bodies of the ILO for many years.*
- 142.** *The Committee has taken note of the information provided by the Government with regard to the reinstatement of the workers dismissed in 1995 who have not yet been reinstated. In this respect, the Committee observes that the situation remains unchanged. It therefore requests the Government once again to provide information, if any, on the outcome of the negotiations with Ms Mariam Hassan Ali and Mr Habib Ahmed Doualeh. As regards the workers concerned whose situation the Government claims to have no information, the Committee expects the Government to take all necessary steps to resolve their situation without delay, at least for those who reside within the national territory or have indicated their wish to be reinstated. Lastly, the Committee notes that the Government provides the same contradictory information concerning Mr Adan Mohamed Abdou and Mr Kamil Diraneh Hared, in respect of whom it indicates, on the one hand, that it agrees to their reinstatement in their original department and to pay their social security contributions and, on the other hand, that they have declined to be reinstated. The Committee once again requests the Government to indicate the current employment situation of Mr Adan Mohamed Abdou and, if he has declined to be reinstated, to specify the date of the negotiations and his reasons for declining. As regards Mr Kamil Diraneh Hared, the*

*Committee asks the Government to indicate whether the issue of the gap in annuities has been resolved so that he can draw his retirement pension.*

- 143.** *The Committee once again recalls that the Government had stated to the direct contacts mission of 2008 that it was not opposed to the principle of paying compensation to the workers, since they had agreed to be reinstated in their posts and, accordingly, the Ministry of Employment and National Solidarity had been instructed to conduct individual negotiations. The Committee notes, once again, with deep regret the Government's categorical rejection of the recommendation of the direct contacts mission concerning the payment of salary arrears since 1995. The Committee is bound to recall that, in cases of the dismissal of trade unionists on account of their trade union membership or activity, the Committee invariably calls for their reinstatement in their posts without loss of earnings in addition to the appropriate legal penalties to prevent such a situation from recurring in future. Moreover, should reinstatement prove impossible, steps should be taken to ensure that they receive adequate compensation for the damage suffered that would represent a sufficiently dissuasive sanction. The Committee firmly expects the Government to reconsider its position.*
- 144.** *The Committee has taken due note of the additional information provided by the Government concerning the circumstances of the dismissal of Mr Hassan Cher Hared from the Post Office in September 2006. The Committee notes the statement to the effect that he was guilty of abuse of power and misuse of company funds, in view of which the Post Office Governing Board had decided to dismiss him, having exhausted all statutory disciplinary measures. The Committee further notes the statement to the effect that there are currently no legal proceedings against Mr Hassan Cher Hared and that he is therefore free to move and engage in all legal activities, except in public service and semi-public service activities. The Committee requests the Government to provide all pertinent documents (reports, correspondence, judicial decisions) in support of its claims with regard to the dismissal of Mr Hassan Cher Hared and his present situation.*
- 145.** *The Committee asks the Government to provide information on the situation concerning the proceedings brought, since 2006, against Mr Hassan Cher Hared, Mr Adan Mohamed Abdou, Mr Mohamed Ahmed Mohamed and Mr Djibril Ismael Egueh for "delivering information to a foreign power".*
- 146.** *The Committee notes that the Government merely indicates once again in its communication that it invites recognized organizations to freely choose their representatives to the International Labour Conference. It notes that, according to the Government, there are two confederations: the first of these is the UGTD, led by Mr Abdou Sikieh Dirieh, which held its congress in August 2010 in the presence of numerous international observers; and the second is the UDT, which is going through a serious leadership crisis involving its President, Mr Mohamed Youssouf Mohamed, and General Secretary, Mr Adan Mohamed Abdou, which is bringing it to a standstill. The Committee notes that the Government states once again that if the UDT does not hold free, transparent and open elections in the immediate future it may be excluded from all tripartite bodies and will no longer be able to take part in national and international meetings. Recalling that one of the outstanding issues relates to interference by the Government in the affairs of the UDT, the Committee is bound to express its deep concern at the persistent allegations of Government interference in and harassment of the UDT, which it is considering in the context of another case [see Case No. 2753, paras 468–486 of the present report].*
- 147.** *Moreover, taking into account the allegations of the UGTD, expressed through its General Secretary, Mr Kamil Diraneh Hared, and the observations of the Government, the Committee is bound to recall the history of this case with regard to the dispute between the*

*UGTD and the Government concerning its legitimate leaders: the organization, by the Government, of the UDT and UGTD congresses in 1999, bypassing their leaders; the fact that the former leaders of the UDT regained leadership of the confederation in 2002, unlike in the case of the UGTD; the coexistence since the 1999 congress of two confederations with the same name, the UGTD, the first being the complainant in the present case, led by Mr Kamil Diraneh Hared, which the Government does not recognize as legitimate, and the second being the confederation recognized as legitimate by the Government, the leadership of which emerged at the congress of 1999 and the General Secretary of which was confirmed as Mr Sikieh Dirieh at the congress of August 2010.*

- 148.** *In this regard, the Committee is bound to insist once again on the need for the Government to guarantee the right to hold free and transparent elections to all trade unions in the country, particularly the UDT and its affiliated organizations or, as appropriate, the UGTD led by Mr Diraneh Hared and its affiliated organizations. These elections must enable workers to designate their representatives freely, in accordance with their own statutes and without interference by the public authorities, whether in determining eligibility requirements for the leadership or in the conduct of the elections themselves. It is only in a framework which fully respects the capacity of workers' organizations to act in total independence that the Government will be in a position to determine, with these organizations, objective and transparent criteria for nominating workers' representatives to national and international tripartite bodies and to the International Labour Conference.*
- 149.** *Recalling with concern, that it has referred to the outstanding issues in the present case in its recommendations for many years without any effective measures having been taken to resolve them, the Committee firmly expects the Government to provide specific replies without delay indicating that they have been resolved.*

### **Case No. 2680 (India)**

- 150.** The Committee last examined this case, which concerns disciplinary action taken against union members of All India Audit and Accounts Association, Kerala (AIAAK) for having participated in demonstrations, sit ins and marches, at its June 2011 meeting [see 360th Report, paras 55–61]. On that occasion, the Committee: (i) recalling its conclusions with respect to certain provisions of the CCS (RSA) Rules, 1993, requested the Government to keep it informed of the measures taken to amend section 5 (which restricts membership in a service association to a distinct category of civil servant having a common interest), section 6 (according to which a service association shall not espouse or support the cause of individual government servants relating to service matter), and section 8 (which provides for the possibility of withdrawal of recognition for failure to comply with rules that are themselves not in conformity with freedom of association principles, and apparently without a right of appeal) in order to ensure the rights of civil servants, in accordance with freedom of association principles; (ii) requested the Government to provide specific information on the current status of the cases of appeal by Messrs Balachandran, Vijayakumar, and Santhoshkumar and the hundreds of other employees that have been sanctioned and to keep it informed of any rulings handed down; and (iii) as regards the ratification of Conventions Nos 87 and 98, firmly recalled that the technical assistance of the Office remains available to the Government in its future consideration of the ratification of Conventions Nos 87, 98 and 151.
- 151.** In its communication dated 9 September 2011, as regards sections 5, 6 and 8 of the CCS (RSA) Rules, 1993, the Government indicates that central government servants are not permitted to participate in the activities of the trade unions. The conduct and services conditions of the Central Government servants are governed by the (CCS) (Conduct) Rules, 1964 and the Central Civil Services (Classification, Control and Appeal) Rules, 1965. Further, a comprehensive scheme of consultation between the Government and the

employees already exists in the form Joint Consultative Machinery (JCM) and Compulsory Arbitration. In addition, the employees have the liberty to form and join any association. According to the Government, government employees have an exceptionally high degree of job security flowing from article 311 of the Constitution of India. Moreover, the Government grants recognition to the various service associations formed by the employees under the Central Civil Services (Recognition of service association) Rules, 1993. In view of the exceptionally high degree of job security flowing from article 311 of the Constitution of India, and in order to ensure smooth functioning of the service association, and also to preclude the possibility of misuse of the position by holders of various posts in the service associations as well as other members of the service associations, certain conditions have been imposed vide Rules 5, 6 and 8 of the CCS (RSA) Rules, 1993. According to the Government, these conditions are not only desirable but also necessary, to some extent, to ensure that the conduct of the service associations is in line with the CCS (Conduct) Rules, 1964. Moreover, as it is necessary to exercise some degree of control/supervision over the activities of the service associations, these conditions have been imposed. Further, similar conditions were imposed vide Rules 4, 5 and 7 of the CCS (RSA) Rules, 1959 which have merely been reiterated in the CCS (RSA) Rules, 1993. Thus, these rules have been in vogue for about 50 years now and have withstood the test of time. Therefore, there appears to be no need to amend them. Accordingly, it cannot be construed that conditions imposed by these sections of the CCS (RSA) Rules, 1993 impede the freedom of association rights of the civil servants. Therefore, it may not be possible to agree with the recommendations of the Committee on Freedom of Association to amend Rules 5, 6 and 8 of the CCS (RSA) Rules, 1993.

**152.** As regards the ratification of Conventions Nos 87, 98 and 151, the Government indicates that it is not possible to ratify Conventions Nos 87 and 98 as ratification would involve granting certain rights to government employees against the statutory rules, namely the right to strike; to openly criticize government policies, freely accept financial contribution, freely join foreign organizations, etc. This matter has been considered from time to time, the last being in November 1997 by the Committee of Secretaries, where it was decided that while status quo may be maintained, the position may be suitably explained to the ILO about the domestic laws and regulations through which the Government has already implemented the spirit behind this Convention in an effective manner. This Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pensions has also taken a consistent stand that the government employees should not be covered under these two Conventions Nos 87 and 98, for the reason that they have an exceptionally high degree of job security flowing from article 311 of the Constitution of India as compared to industrial workers, in addition to the facility of negotiation machinery under the JCM and administrative tribunals for the redress of their grievances. According to the Government, the central government employees also have the right to form and join any association. As far as Convention No. 98 is concerned, the Government indicates that it has not been able to ratify it on account of technical reasons mentioned above. The Government indicates that it is in regular discussions with the ILO on the possibility of ratifying Convention No. 98. An inter-ministerial meeting to discuss the possibility of ratifying ILO Convention Nos 87 and 98 was also held under the chairmanship of Shri A.C. Pandey, Joint Secretary, Ministry of Labour and Employment on 11 May 2011.

**153.** As regards the current status of the cases of appeal by Messrs Balachandran, Vijayakumar, and Santhoshkumar and the hundreds of other employees that have been sanctioned, the Government reiterates that the service associations in the Government Department are not trade unions and, as such, no rights of the trade unions have been infringed. The Government further indicates that every government servant is required to adhere to the rules and regulations prescribed by the Government and are liable for disciplinary action under the CCS (CCA) Rules, 1965 for any misconduct under CCS (Conduct) Rules, 1964. The CCS (CCA) Rules, 1965 constitute a self-contained body of rules governing

departmental inquiries and provide for appeal, review and revision against the orders passed under the Rules. Further right for redress of grievances through the Central Administrative Tribunal and other courts of law is also available to a government servant. In the Office of the Accountant-General (A&E), Kerala, the aggrieved employees are exercising the above rights. Therefore, no further action is required to be taken by the Accountant-General (A&E), Kerala. More specifically, as regards Mr Balachandran, an assistant accounts officer, the Government indicates that the appellate authority upheld the decision of the disciplinary authority but reduced the penalty of withholding increments for a period of three years instead of five. As regards Messrs Santhoshkumar, a senior accountant, the appellate authority also upheld the decision of the disciplinary authority. He was therefore demoted to the position of accountant and imposed a penalty of withholding salary increments for a period of three years. The appellate authority also upheld the decision of the disciplinary authority in the case of Mr Vijayakumar. He was also demoted to a lower position for three years but the decision on the penalty is yet to be rendered.

- 154.** *The Committee notes that the Government reiterates the information previously provided on a number of points. As regards its recommendations of a legislative nature, the Committee notes with deep regret that the Government reiterates that central government servants are not permitted to participate in the activities of the trade unions, but they can form and join service associations and enjoy a comprehensive scheme of consultations and compulsory arbitration. According to the Government there appears to be no need to amend the CCS (RSA) Rules which have been in vogue for about 50 years, as has been requested, and it considers that the conditions established for the services associations in the Government Department are not only necessary but also desirable. The Committee is bound to once again recall, in this respect, that the denial of the right of workers in the public sector to set up trade unions, where this right is enjoyed by workers in the private sector, with the result that their “associations” do not enjoy the same advantages and privileges as “trade unions”, involves discrimination as regards government-employed workers and their organizations as compared with private sector workers and their organizations. Such a situation gives rise to the question of compatibility of these distinctions with Article 2 of Convention No. 87, according to which workers “without distinction whatsoever” shall have the right to establish and join organizations of their own choosing without previous authorization, as well as with Articles 3 and 8, paragraph 2, of the Convention [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 222]. The Committee therefore once again recalls its conclusions with respect to certain provisions of the CCS (RSA) Rules and expects that the Government will take without delay the necessary measures to amend sections 5, 6 and 8 in order to ensure the rights of civil servants, in accordance with freedom of association principles.*
- 155.** *As regards the ratification of Conventions Nos 87 and 98, the Committee does not consider satisfactory the Government’s indication that it is not possible to ratify these Conventions as it would involve granting certain rights to government employees against the statutory rules. The Committee notes however the Government’s indication that it is in constant discussions with the ILO on the possibility of ratifying Convention No. 98 and that an inter-ministerial meeting to discuss the possibility of ratifying Conventions Nos 87 and 98 was also held under the chairmanship of Shri A.C. Pandey, Joint Secretary, Ministry of Labour and Employment, on 11 May 2011. Firmly recalling once again the obligation of all member States to respect and promote freedom of association and the effective recognition of the right to collective bargaining, as fundamental rights under the 1998 ILO Declaration on Fundamental Principles and Rights at Work, the Committee strongly encourages the Government to pursue the dialogue and reminds the Government that the technical assistance of the Office remains available to it in its consideration of the ratification of Conventions Nos 87, 98 and 151.*

**156.** *As regards the current status of the cases of appeal by Messrs Balachandran, Vijayakumar and Santhoshkumar and the hundreds of other employees, the Committee notes with concern the severity of the disciplinary and monetary sanctions (penalty of withholding salary increments for three years, demotion and loss of seniority in the higher post) upheld by the Appellate Tribunal against trade union leaders Balachandran, Vijayakumar and Santhoshkumar and the serious dampening effect such action may have on trade union activity. Moreover, noting with regret that the Government, in its reply only refers to the three abovementioned leaders, giving details on the procedures but not on the merit of the cases, and does not indicate the basis for the numerous and severe sanctions imposed on the hundreds of other employees, the Committee requests the Government to undertake a full and independent investigation into all the allegations of anti-union discrimination and keep it informed of the outcome. If the investigation finds that the parties concerned were sanctioned for having carried out peaceful demonstrations, the Committee requests the Government to ensure that they are fully redressed for the penalties imposed upon them.*

### **Case 2453 (Iraq)**

**157.** The Committee last examined this case, which concerns alleged acts of interference by the Government, including the seizure of organizational funds and interference in the trade unions' elections process, at its June 2006 meeting [see 342nd Report, paras 698–721]. On that occasion, the Committee invited the authorities to repeal Decree No. 875 that allows the Government to take control of the finances of existing federations and unions, and to enter into full discussions with all concerned parties so that a solution may be found that is satisfactory to all, and keep it informed of any progress in this respect. The Committee also requested the Government to reply to the allegation of interference concerning trade union elections.

**158.** In a communication dated 28 April 2011, the Government indicates that a meeting was held by the Ministry of Labour and Social Affairs, in cooperation with the General Federation of Iraqi Trade Unions (GFTU) and the Preparatory Committee for Workers' Elections, and in the presence of the President of the Committee of Civil Society Organizations of the Parliament. The Government further indicates that, during the meeting, a number of issues were discussed, including: (i) the relation between the Ministry and the trade unions, and the Ministry's concern about the implementation of the legal and technical content of the International Labour Organization Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); (ii) the GFTU's concerns about the realities and difficulties of the trade union activity and the ways of promoting such an activity; and (iii) the proposed mechanism for the holding of the GFTU's elections, on the basis of the Trade Union Organization Act No. 52 of 1987 and the statutes of the GFTU, and in accordance with national and international standards which would ensure an impartial, transparent and democratic electoral process. The Government adds that another meeting was organized with the Executive Bureau of the GFTU, trade unions' leaders, and the Ministry of the Affairs of Civil Society Organizations, during which agreement was found on the modalities and dates for the elections. However, the Committee understands that the elections, which were scheduled, according to the Government's indication, to take place on 21 May 2011, have still not been held.

**159.** *While noting with interest the existence of a dialogue between the Government and trade unions' representatives, the Committee wishes to insist once again on the importance it places on the right of workers to exercise freely their trade union rights and the right of workers' organizations to elect their representatives in full freedom.*

160. *The Committee observes that it is examining similar issues at its current session in relation to the Iraqi Federation of Industries' complaint in Case No. 2740.*
161. *The Committee recalls that it concluded, in its previous examination of Case No. 2740 [see 358th Report, para. 657], that a regulation which provides for the election of members of a preparatory committee for preparing permanent elections to the executive committee of a trade union, a federation, an association or an occupational organization is inconsistent with the principles of freedom of association, and constitutes a clear interference in the election process. Thus, the Committee urges the Government to annul the regulations concerning the appointment of members of preparatory committees of federations, trade unions, associations and occupational organizations and to ensure in the future that the GFTU can conduct elections of its leaders in accordance with its statutes, without intervention by the authorities. The Committee requests the Government to keep it informed of any progress in this respect.*
162. *The Committee regrets the absence of a response from the Government on the issue of restrictions on the use of trade union funds. In this regard, it urges the Government to indicate the steps taken to annul Decree No. 875 that allows the Government to take control of the finances of existing federations and unions, and strongly urges the Government to return without delay all funds to the GFTU. The Committee requests the Government to keep it informed of any developments in this regard.*

### **Case No. 1991 (Japan)**

163. The Committee last examined this case, which concerns allegations of anti-union discrimination arising out of the privatization of the Japanese National Railways (JNR) taken over by the Japan Railway Companies (the JRs), at its March 2009 meeting [see 353rd Report, paras 128–132]. On that occasion, recalling that it had dealt with this case in some depth since 1998, and observing that it was apparently not possible at the time to bring the parties together with a view to rapidly finding a negotiated solution to these matters that had been pending for two decades, the Committee once again expressed its hope that the courts would bring a rapid resolution to this long-standing dispute. It once again requested the Government to keep it informed of developments in this respect, and to transmit copies of the court judgments in the various pending cases as soon as they were handed down.
164. In a communication dated 29 August 2011, the Government indicates that a compromise solution has eventually been found between 904 out of the 910 plaintiffs and the defendant to bring this case to a satisfactory conclusion for all parties concerned.
165. The Government indicates that, on 9 April 2010, four Japanese political parties offered a proposal to the Government for a political resolution of the conflict covering 910 plaintiffs belonging to the unions concerned. The outline of this proposal was as follows: (i) the defendant would pay compromise money of about ¥15.63 million to each plaintiff; (ii) the defendant would pay the plaintiffs as a group additional money of ¥5.8 billion; (iii) employment by the JRs would be requested; and (iv) the defendant and plaintiffs would enter into a judicial compromise and withdraw all lawsuits.
166. The Government further indicates that 904 out of the 910 plaintiffs and the JRs agreed to this proposal on 28 June 2010, with the understanding that the settlement money would be conclusive, and that re-employment by the JRs would be sought but could not be enforced.
167. The Government adds that, on 13 June 2011, it conducted mediations by submitting to each of the JRs concerned the list of plaintiffs who were seeking employment. The Government indicates that the JRs did not accept to employ the workers concerned.

- 168.** With respect to the lawsuits concerning three workers out of the six among the 910 plaintiffs who did not consent to the compromise solution and continued the lawsuits, the Government indicates that the Supreme Court confirmed the judgment of the Tokyo High Court (which awarded “consolation money” to the plaintiffs).
- 169.** In a communication dated 26 October 2011, the National Railway Workers’ Union-Kokuro indicates that it had decided at its Extraordinary National Conference held on 26 April 2010 to accept the political agreement reached on 9 April 2010. It adds that consequently a settlement was reached at the Supreme Court and all pending cases involving KOKURO were dropped. It had further urged the Government to play an active role in the implementation of the political agreement, with a view to obtaining the re-employment of the dismissed workers. When the JRs expressed their intention not to accept the re-employments, the issue was discussed with the Democratic Party of Japan’s Diet members, but it was understood that it would be extremely difficult to change this position. After long consideration of the matter, KOKURO decided to close the dispute, following the decision of the workers not to further seek re-employment. KOKURO adds that, while regretting that it was not possible to obtain the requested re-employment of the dismissed workers, it decided, at its 80th Annual National Conference in July 2011, taking due account of the compromise solution which had been reached, to officially confirm the end of the dispute. KOKURO underlines that support from the ILO greatly contributed to the settlement of the case and expresses its appreciation.
- 170.** *The Committee wishes to underline that it has been dealing with this case in some depth since 1998, with two detailed examinations on the merits [318th and 323rd Reports] and seven follow-ups [325th, 327th, 331st, 334th, 343rd, 349th and 353rd Reports]. Since its first examination, and on almost every occasion throughout its treatment of this case, the Committee had urged the parties concerned to engage in serious and meaningful consultations with a view to reaching a satisfactory solution to the underlying dispute. The Committee therefore wishes to recognize the efforts made by all the parties concerned and to express its satisfaction at the fact that it has eventually been possible to find a compromise solution to this long-standing dispute, essentially through an important financial compensation for 904 out of the 910 workers concerned. The Committee also notes that, concerning three of the six workers who did not accept the compromise solution, the case has been judicially settled by a final decision of the Supreme Court confirming the judgment of the Tokyo High Court which awarded “consolation money” to the workers concerned.*

### **Case No. 2301 (Malaysia)**

- 171.** The Committee last examined this case, which concerns the Malaysian labour legislation and its application which, for many years, have resulted in serious violations of the right to organize and bargain collectively, including: discretionary and excessive powers granted to authorities as regards trade union registration and scope of membership; denial of workers’ rights to establish and join organizations of their own choosing, including federations and confederations; refusal to recognize independent trade unions; interference of authorities in internal union activities, including free elections of trade union representatives; establishment of employer-dominated unions; and arbitrary denial of collective bargaining, at its June 2011 meeting [see 360th Report, paras 62–71].
- 172.** On that occasion, the Committee recalled that it has commented upon the extremely serious matters arising out of the fundamental deficiencies in the legislation on many occasions over a period spanning 18 years. As concerns union recognition and collective bargaining, the Committee noted with interest the Government’s indication that it had taken steps to amend the Industrial Relations Act 1967 and the Trade Union Act 1959, and that it proposed to amend certain provisions in the relevant labour laws in order to make it



easier and faster to establish trade unions and expedite claims for recognition, thus facilitating the process of collective bargaining. In these circumstances, the Committee once again urged the Government to address rapidly the issues raised in its previous examination and summarized below and invited the Government to have recourse to the technical assistance of the ILO in this regard, should it so desire, to ensure that:

- all workers, without distinction whatsoever, enjoy the right to establish and join organizations of their own choosing, both at primary and other levels, and for the establishment of federations and confederations;
- employers do not express opinions which would intimidate workers in the exercise of their organizational rights, such as claiming that the establishment of an association is unlawful, or warning against application with a higher level organization, or encouraging workers to withdraw their membership;
- no obstacles are placed, in law or in practice, to the recognition and registration of workers' organizations, in particular through the granting of discretionary powers to the responsible official;
- workers' organizations have the right to adopt freely their internal rules, including the right to elect their representatives in full freedom;
- workers and their organizations enjoy appropriate judicial redress avenues over the decisions of the minister or administrative authorities affecting them; and
- the full development and utilization of machinery for voluntary negotiation between employers or employers' and workers' organizations, with a view to regulating terms and conditions of employment by means of collective agreements is encouraged and promoted by the Government.

**173.** As regards sections 9(5) and 9(6) of the Industrial Relations Act providing that the Minister's decision on trade union recognition "shall be final and shall not be questioned in any court", the Committee expected the Government to introduce without delay legislation to amend the Trade Unions Act and the Industrial Relations Act, to bring it into full conformity with freedom of association principles, by ensuring that the appeals to the courts against all decisions made by administrative authorities allow a substantive examination of the issues raised.

**174.** Finally, as regards the situation of 8,000 workers in 23 manufacturing companies whose representational and collective bargaining rights were allegedly denied (in these companies, unions had accepted members but, based on objections raised by the companies, the Director-General of Trade Unions (DGTU) ruled that the unions were not permitted to represent the workers; as a result the unions' right to bargain collectively was denied), recalling that it considers the decisions of the DGTU to be rooted in the legislative framework's restrictions on trade union rights that it has extensively commented upon and that questions of trade union structure and organization are matters for the workers themselves, the Committee requested the Government and the complainant to indicate if these workers are currently represented by one or more trade unions and, if so, if they are able to exercise their rights to collective bargaining and conclude collective agreements.

**175.** In its communication dated 20 October 2011, the Government indicates, as regards the 8,000 workers whose representational and collective bargaining rights have been denied, that it is not in a position to provide the information requested as there are no record on this matter. Pertaining to the Committee's invitation to have recourse to the technical assistance of the ILO, the Government indicates that for the time being, it is more incline

to embark on engagement sessions with social partners to further improve the Industrial Relations Act (IRA) and the Trade Union Act (TUA).

- 176.** *As concerns the legislative issues raised by the Committee, the Committee, noting that the Government has referred to engagement sessions with social partners to further improve the IRA and the TUA legislation, the Committee trusts that social dialogue has already begun with a view to addressing the Committee's long-standing recommendations, and requests the Government to keep it informed of any progress in this regard.*
- 177.** *Finally, as regards the situation of 8,000 workers in 23 manufacturing companies whose representational and collective bargaining rights were allegedly denied, noting that the Government indicates that it is not in a position to provide the information requested as there are no record on this matter, the Committee once again requests the complainant to indicate if these workers are currently represented by one or more trade unions and, if so, if they are able to exercise their rights to collective bargaining and conclude collective agreements. The Committee trusts that this very situation will be addressed without delay so as to ensure that these 8,000 workers are duly represented by the union of their choice and can exercise their right to collective bargaining.*

### **Case No. 2717 (Malaysia)**

**178.** The Committee last examined this case at its June 2011 meeting [see 360th Report, paras 845–859]. On that occasion, the Committee made the following recommendations:

- (a) The Committee, recalling once again that all measures should be taken so as to ensure that: (1) the definition of managerial and supervisory staff is limited to those persons who genuinely represent the interests of employers, including, for example, those who have the authority to appoint or dismiss; and (2) managerial and supervisory staff have the right to establish their own associations for the purpose of engaging in collective bargaining, and expects the Government to inform it in the near future of concrete measures taken to amend the IRA in view of the above principles.
- (b) The Committee requests the Government to make every effort to consult with the company and the trade union concerned so as to determine the supervisory staff genuinely representing the interests of employers which could be excluded from BATEU's union membership, pending the introduction of the legislative reform which would clarify the different categories of workers falling under union representation. The Committee requests the Government to keep it informed of the outcome of such consultations. In the meantime, the Committee expects that the trade union will be able to work and function freely.
- (c) The Committee expects the Government to inform it without delay of concrete amendments to the TUA that ensure that all workers, without distinction whatsoever, enjoy the right to establish and join organizations of their own choosing, both at primary and other levels.
- (d) The Committee expects that workers in BAT Malaysia's wholly owned subsidiaries are able to exercise the right to form and join the organization of their own choosing, whether at primary level or by grouping together workers from different workplaces or cities.
- (e) The Committee invites the Government to have recourse to the technical assistance of the ILO with regard to the legislative reforms under way, should it so desire.

**179.** The Government submitted its observations in a communication dated 20 October 2011. With regard to the Committee's requests to amend the Industrial Relations Act (IRA) so as to ensure that the definition of managerial and supervisory staff is limited to those persons who genuinely represent the interests of employers and to ensure that managerial and supervisory staff have the right to establish their own associations for the purpose of

engaging in collective bargaining, the Government indicates that the process of determining the excluded categories is done by way of a thorough investigation by the Director-General of Industrial Relations (DGIR) and guidelines provided in case laws. It is feared that defining the excluded categories in the Act may result in rigidity as the issue of determining scope of unions to represent workers is complex and very technical in nature. Thus, the Government is not in favour of defining the four categories of employment excluded from being represented by trade unions (other than their own trade union). The Government adds that the Ministry has consulted the social partners and received inputs from them on the definition of the four categories of workers. However, further discussions with the social partners reveal that not all of them are keen on defining the “excluded categories” in the Act. Further to this, a decision has been made to maintain the present arrangement as status quo.

**180.** With regard to the Committee’s request to inform it without delay of concrete amendments to the Trade Union Act of 1959 (TUA) to ensure that all workers, without distinction whatsoever, enjoy the right to establish and join organizations of their own choosing, both at primary and other levels, the Government indicates that it is of the position that the TUA is adequate and suitable within the peculiarities of the Malaysian environment and pivotal in sustaining industrial harmony as well as facilitating growth for the country. With regard to the right of workers in British American Tobacco (BAT) Malaysia’s wholly owned subsidiaries to form and join the organization of their own choosing, whether at primary level or by grouping together workers from different workplaces or cities, the Government indicates that the TUA does not in any way deny the right to form and join trade unions except that the trade unions must confine themselves to particular establishment, trade, industry, or occupations, within Peninsular Malaysia, Sabah or Sarawak. The Government indicates that the Court of Appeal, on 27 July 2011, has affirmed and upheld the High Court’s decision that the British American Tobacco (Malaysia) Employees Union (BATEU) cannot represent workers employed by the subsidiaries of BAT Malaysia. These trade unions must still go through the recognition process in order to be able to exercise the right to begin the collective bargaining process. Finally, the Government indicates that it declines the technical assistance offered by the Office.

**181.** *Concerning the request for measures to be taken to amend the IRA so as to ensure that: (1) the definition of managerial and supervisory staff is limited to those persons who genuinely represent the interests of employers, including, for example, those who have the authority to appoint or dismiss; and (2) managerial and supervisory staff have the right to establish their own associations for the purpose of engaging in collective bargaining, the Committee notes the Government’s indication that the Ministry has consulted the social partners and received inputs from them on the definition of the four categories of workers. However, further discussions with the social partners revealed that not all of them were keen on defining the “excluded categories” in the Act. Further to this, a decision has been made to maintain the present arrangement as status quo. The Committee notes with regret that the Government has decided to maintain the present arrangement (section 9 of the IRA: process of determining the excluded categories is done by way of a thorough investigation by the DGIR and guidelines provided in case laws) as status quo. In these circumstances, the Committee urges the Government to take the necessary measures so as to ensure that: (1) the definition of managerial and supervisory staff is limited to those persons who genuinely represent the interests of employers, including, for example, those who have the authority to appoint or dismiss; and (2) managerial and supervisory staff have the right to establish their own associations for the purpose of engaging in collective bargaining, and firmly expects the Government to inform it in the near future of concrete measures taken to amend the IRA in view of the above principles.*

- 182.** *As concerns the consultations with the company and the trade union concerned so as to determine the supervisory staff genuinely representing the interests of employers which could be excluded from BATEU's union membership, the Committee notes with regret that the Government did not provide any information in this regard. The Committee urges the Government to make every effort to consult with the company and the trade union concerned so as to determine the supervisory staff genuinely representing the interests of employers which could be excluded from BATEU's union membership.*
- 183.** *With regard to its long-standing recommendations on legislative reform (previously raised in Case No. 2301), the Committee notes with regret that despite previous indication that it had taken steps to amend the IRA and the TUA, and that it had proposed to amend certain provisions in the relevant labour laws in order to make it easier and faster to establish trade unions and expedite claims for recognition, thus facilitating the process of collective bargaining, the Government now indicates that it is of the position that the TUA is adequate and does not in any way deny the right to form and join trade unions, except that the trade unions must confine themselves to particular establishment, trade, industry, or occupations, within Peninsular Malaysia, Sabah or Sarawak. The Committee further notes that the Court of Appeal, on 27 July 2011, has affirmed and upheld the High Court's decision that BATEU cannot represent workers employed by the subsidiaries of British American Tobacco (Malaysia) Berhad. The Committee considers the decisions of the Courts to be rooted in the legislative framework's restrictions on trade union rights that it has extensively commented upon in Case No. 2301. Recalling that questions of trade union structure and organization are matters for the workers themselves and that it sees the situation faced by these workers as a concrete example of the fundamental deficiencies of the legislation which, in the end, prevent these workers from exercising their organizational and collective bargaining rights, the Committee once again urges the Government to take the measures to amend the TUA so as to ensure that all workers, without distinction whatsoever, enjoy the right to establish and join organizations of their own choosing, whether at primary level or by grouping together workers from different workplaces or cities. In the meantime, the Committee expects that the trade union will be able to work and function freely.*

### **Case No. 2575 (Mauritius)**

- 184.** The Committee last examined this case, which concerns allegations of violations of ILO Conventions in the setting up, composition, and appointment of members of the National Wages/Pay Council (NPC), at its March 2011 meeting. On that occasion, the Committee requested the Government to provide, as it had indicated its intention to do, detailed information on the establishment and functioning of the commission dealing with the question of annual pay within the National Tripartite Forum. The Committee expected that the Trade Union Common Platform (TUCP) would be fully consulted in this process [see 359th Report, paras 96–98].
- 185.** In its communication dated 14 October 2011, the Government states that the quantum of the salary compensation for year 2011 was determined at the level of a subcommittee of the National Tripartite Forum which was set up on 25 October 2010, following various meetings held with both workers' and employers' organizations. At one of the meetings chaired by the Deputy Prime Minister and Minister of Finance and Economic Development on 18 November 2010, it was decided that for 2011 the inflation rate be the only criterion used to determine the quantum of the annual salary compensation. Despite the fact that the inflation rate was only 2.7 per cent in 2010, the Government made a special effort to compensate workers at the lowest rungs of the ladder by giving them a 3.2 per cent increase. In addition, the minimum salary on which full compensation was payable, was raised from 4,000 Mauritian Rupees (MUR) to MUR5,000. To give effect to

this decision, the Additional Remuneration (2011) Act 2010, Act. No. 11 of 2010 was passed by the National Assembly on 14 December 2010.

- 186.** *The Committee welcomes this information. Noting, however, that the Government did not provide information on the establishment, composition, appointment and functioning of the commission dealing with the question of annual pay within the National Tripartite Forum, it requests the Government to provide this information. The Committee further requests the Government to ensure that consultations take place within this framework with the TUCP.*

### **Case No. 2616 (Mauritius)**

- 187.** The Committee last examined this case, which concerned alleged use of repressive measures against the trade union movement, including criminal prosecutions, in violation of the right to strike and engage in protests, at its November 2010 meeting [see 358th Report, paras 64–67]. On that occasion, the Committee had requested the Government to take steps to review the Public Gathering Act (PGA) and its application, in full consultation with the social partners concerned, so as to ensure that sections 7, 8 and 18 are not applied in practice such as to impede the legitimate exercise of protest action in relation to the Government’s social and economic policy; and expected that the Government would facilitate a speedy resolution of the case concerning Toolsyraj Benydin and Radhakrishna Sadien and that the court would issue its ruling without further delay. Moreover, in light of the previously raised concerns to the effect that the prosecution of the two trade unionists commenced nearly one and a half years after the protests, thus leading one to query its rationale (ensuring public order or repressing the trade union movement as contended by the complainants) and observing that the appeal proceedings were initiated more than two years ago, the Committee once again asked the Government to raise to the competent authorities the possibility of giving a favourable review to this matter. It requested the Government to keep it informed in this regard and to provide it with a copy of the judgment as soon as it is handed down.
- 188.** In a communication dated 31 October 2011, the Government indicates that it is reconsidering the review of the relevant sections of the PGA. Pursuant to the views expressed by the Commissioner of Police to the effect that these sections do not contravene the principles of freedom of association and that consequently no amendments need to be brought to the Act, the State Law Office is being consulted on the matter. As regards the appeal lodged by Mr Benydin and Mr Sadien against the intermediate court judgment, the Government indicates that the case is still pending before the Supreme Court and that it is not in a position to facilitate a speedy resolution of the case in view of the fact that the Constitution of Mauritius embodies the concept of separation of powers.
- 189.** *As regards the PGA, the Committee notes the Government’s indication that in light of the previous observation of the Committee, it is reconsidering the review of the relevant sections of the PGA. In these circumstances, the Committee trusts that the Government will take steps to review the PGA and its application, in full consultation with the social partners concerned, so as to ensure that sections 7, 8 and 18 are not applied in practice such as to impede the legitimate exercise of protest action in relation to the Government’s social and economic policy. The Committee requests the Government to keep it informed of any development in this regard.*

**190.** *As regards the appeal lodged by the trade unionists, Mr Benydin and Mr Sadien, the Committee notes the Government's indication that the case is still pending before the Supreme Court and that it is not in a position to facilitate a speedy resolution of the case in view of the fact that the Constitution of Mauritius embodies the concept of separation of powers. Observing that the appeal proceedings were initiated almost four years ago and that at the time, a prohibition order was also issued stipulating that the two men would not be allowed to leave Mauritius without prior authorization from the Supreme Court and in this regard, their passports were confiscated, the Committee is bound to deplore this excessive delay, the negative impact on their trade union rights and freedoms and wishes to recall once again that justice delayed is justice denied [see **Digest of decisions and principles of the Committee on Freedom of Association**, fifth (revised) edition, 2006, para. 105]. Recalling that the ultimate responsibility for ensuring respect for the principles of freedom of association lies with the Government, the Committee once again expects that the competent authorities will facilitate a speedy resolution of the case and that the court will issue its ruling without further delay. Moreover, in light of the previously raised concerns to the effect that the prosecution of two trade unionists commenced nearly one and a half years after the protests, thus leading one to query its rationale (ensuring public order or repressing the trade union movement as contented by the complainants) [see 358th Report, para. 67], the Committee once again asks the Government to raise to the competent authorities the possibility of giving a favourable review to this matter. It requests the Government to keep it informed in this regard and to provide it with a copy of the judgment as soon as it is handed down. Finally, the Committee requests the Government to indicate whether the passports have been returned to Messrs Benydin and Sadien.*

#### **Case No. 2591 (Myanmar)**

**191.** The Committee last examined this case at its March 2011 meeting [see 359th Report, paras 111–113]. On that occasion, the Committee deplored that the Government had failed to implement its recommendations. It therefore referred to its previous examination of this case and firmly urged the Government to provide detailed and specific information on the situation of Thurein Aung, Wai Lin, Nyi Nyi Zaw, Kyaw Kyaw, Kyaw Win and Myo Min and to take the necessary measures to ensure their immediate release as well as their access to legal and medical assistance while detained; to immediately undertake real and concrete steps to ensure full respect for freedom of association in law and in practice; and to fully implement as a matter of urgency its previous recommendations.

**192.** As regards the need to ensure full respect for freedom of association in law and in practice, the Government indicates, in its communication dated 30 August 2011, that the Labour Organization Bill has been discussed in detail with the ILO consultation team on 25 and 26 July 2011 and amended with the experts' advice. The Bill has already been submitted to Cabinet and has been discussed and approved by the First Amyotha Hluttaw (upper house of Parliament) on 29 August 2011. The Government states that, in practice, tripartite consultations are undertaken in that worker delegates elected by the workers of an establishment negotiate directly with the employer before the Government representative to reach conclusion.

**193.** With respect to the six named prisoners, the Government indicates, in its communication dated 22 February 2012, that Thurein Aung, Wai Lin, Nyi Nyi Zaw, Kyaw Kyaw, Kyaw Win and Myo Min have been released under the amnesty granted by the President on 12 January 2012.

**194.** The Committee welcomes the information provided by the Government according to which Thurein Aung, Wai Lin, Nyi Nyi Zaw, Kyaw Kyaw, Kyaw Win and Myo Min have been released from prison under the amnesty granted by the President on 12 January 2012.

- 195.** *The Committee further notes with interest that the Labour Organizations Act was adopted by Parliament on 16 September 2011, signed and enacted on 11 October 2011. It also notes with interest that the Labour Organizations Act provides for the repeal of the 1926 Trade Union Act and observes that, generally speaking, the law marks a positive step forward, as it recognizes the right to establish and join trade unions as well as the right to strike. However, the Committee, like the Committee of Experts, expresses its concern at some of the provisions of the Labour Organizations Act, which need to be brought in line with Convention No. 87 and collective bargaining principles. The Committee expects that the Labour Organizations Act will come into force without delay and be applied in practice so as to provide to all workers in the country the long-awaited legal framework to exercise their freedom of association rights. It reminds the Government that it may avail itself of the technical assistance of the Office if it so wishes.*
- 196.** *The Committee firmly expects the Government to ensure that no person will be punished for exercising his or her rights to freedom of association, opinion and expression in the future; and to refrain in practice from any acts preventing the free operation of any form of organization of collective representation of workers, freely chosen by them to defend and promote their economic and social interests, including the Federation of Trade Unions – Burma (FTUB), and to issue instructions to that effect to its civil and military agents.*

### **Case No. 2669 (Philippines)**

- 197.** The Committee last examined this case at its March 2010 meeting [see 356th Report, paras 1226–1262], at which time it made the following recommendations:
- (a) The Committee expects that the Government will carry out expeditiously an independent investigation of all alleged cases of interference in trade union affairs, as well as the threats and harassment of trade unionists by the state authorities and the military, and ensure a full and appropriate redress and, in particular, requests the Government to ensure that the IWSWU members are no longer harassed due to their union membership. It further expects that the Government will take the necessary measures to prevent in the future any cases of threats and harassment of trade unionists and their families, as well as cases of interference in trade union affairs by the state officials and the personnel of the AFP and the PNP.
  - (b) The Committee encourages the Government, in collaboration with the social partners and the ILO, to hold further trainings on human rights, civil liberties and trade union rights so as to assist the state authorities, the AFP and PNP personnel in better understanding the limits of their role in respect of freedom of association rights and to ensure the full and legitimate exercise by workers of these rights and liberties in a climate free from fear.
  - (c) The Committee further encourages the Government to pursue its efforts in strengthening the relevant state institutions for combating impunity and, in particular, establishing a high-level tripartite case-monitoring committee within the framework of the NTIPC.
- 198.** In communications dated 15 November 2010, 30 May 2011 and 5 March 2012, the Government indicates that the awareness-raising and capacity-building programme on human rights, trade union rights and civil liberties for the military and the police was conducted on 26 and 27 April 2010. The “Tripartite seminar on freedom of association, civil liberties and the enforcement of labour law in the Philippine economic zones” (third such activity after the High-level Mission) focused on Tarlac and the military and was attended by tripartite constituents from Tarlac, Bataan, Subic Bay Metropolitan Authority and Clark. Government participants constituted regional representatives of the Armed Forces of the Philippines (AFP) and Philippines National Police (PNP), the Department of Labor and Employment (DOLE), the Department of Interior and Local Government

(DILG), concerned Local Government Units (LGUs), the Philippine Economic Zone Authority (PEZA) to include economic zone managers, and the Commission on Human Rights (CHR). According to the annexes supplied by the Government, one of the outputs of the above tripartite seminar was to pursue a memorandum of agreement with the AFP, LGU, DOLE and PEZA to de-link the legitimate exercise of trade union rights and the AFP's counter-insurgency programme, and that it was also agreed upon to expand the Hacienda Luisita coverage of the National Tripartite Industrial Peace Council (NTIPC) to Tarlac, with the active involvement of the International Wiring Systems of Workers Union (IWSWU). In its communication of 30 May 2011, the Government indicates that, with respect to the AFP, there is already agreement in principle on: (i) its participation in the Regional Tripartite Industrial Peace Council for better appreciation of social dialogue, freedom of association and civil liberties; (ii) the conduct of capacity-building seminars on freedom of association as it relates to civil liberties and human rights; and (iii) the crafting of a memorandum of agreement or social accord with the DOLE, labour groups and employers that would clarify their engagement in the community and set the parameters on non-engagement in unions and workplaces. Moreover, the Government indicates that the newly created Tarlac-wide Tripartite Industrial Peace Council (TTIPC), which carried out localized seminars on international labour standards, is expected to implement follow-up actions identified in the above seminar.

- 199.** In its communication dated 5 March 2012, the Government refers to the signing of the Manifesto of Commitment between DOLE, the Labour Sector and the AFP on 21 July 2011. It further indicates that several tripartite meetings with the AFP, PNP and PEZA have been held by the Technical Executive Committee of the TIPC as the drafting committee of the DOLE–DILG–PNP–DND–AFP *Joint Guidelines on the Conduct of the AFP/PNP Relative to the Exercise of Workers' Rights to Freedom of Association, Collective Bargaining, Concerted Actions and Other Trade Union Activities*. The Government also indicates that the draft Guidelines to be adopted on 8 May 2012 are currently undergoing regional consultation and are expected to, inter alia, prohibit the deployment of military personnel in any labour-related mass actions and disputes or the intervention of local chief executives in labour disputes except written request from DOLE due to the security situation.
- 200.** The Government also informs that, in a letter dated 16 April 2010, the HR manager of the International Wiring Systems (Phils) Corporation informed the DOLE that a collective bargaining agreement had been concluded with the IWSWU on 9 December 2009 effective until 30 June 2011, and that it was therefore hoped that concerns about the relationship of union and management could be laid to rest. In its communication dated 5 March 2012, the Government further states that, on 6 September 2011, the IWSWU filed a notice of strike on account of a bargaining deadlock, and that after two conciliation–mediation meetings, the parties agreed on 15 September 2011 to an economic package of 2.8 billion Philippine pesos (PHP) for their collective bargaining agreement covering the period 1 July 2011 to 30 June 2014.
- 201.** *The Committee notes with interest the outputs agreed upon in the tripartite seminar and the progress made in this regard, in particular the creation of the TTIPC and the signing of the Manifesto of Commitment between the DOLE, the labour sector and the AFP on 21 July 2011. The Committee notes with interest that the signatories of the Manifesto of Commitment committed themselves, inter alia: to promote and protect human rights and workers' rights; to engage in social dialogue to immediately craft guidelines on the conduct of the AFP relative to the exercise of trade union rights and to establish a mechanism to allow joint implementation and monitoring of the said guidelines; and to conduct other joint activities to further achieve the goals of the Manifesto. The Committee further notes with interest that tripartite work on the draft DOLE–DILG–PNP–DND–AFP Joint Guidelines on the Conduct of the AFP/PNP Relative to the Exercise of Workers'*



*Rights to Freedom of Association, Collective Bargaining, Concerted Actions and Other Trade Union Activities is already well advanced, and that the draft Guidelines to be adopted on 8 May 2012 are expected to prohibit the deployment of military personnel or intervention in labour disputes except written request from DOLE due to the security situation. The Committee also takes due note of the specific information supplied concerning the IWSWU, in particular the recent conclusion of a collective bargaining agreement between the complainant and the management covering the period of 1 July 2011 to 30 June 2014.*

### **Case No. 2291 (Poland)**

- 202.** The Committee last examined this case, which concerns numerous acts of anti-union intimidation and discrimination, including dismissals, lengthy proceedings and non-execution of judicial decisions, at its meeting in March 2011 [see 359th Report, paras 150–154]. On that occasion, the Committee urged the Government to indicate whether Mr Jedrejek, member of the NSZZ “Solidarnosc” Inter-Enterprise Organization from SIPMA SA, had been reinstated following the decision of the District Court and, if not, it urged the Government to take the necessary steps to ensure his full reinstatement pursuant to the Court’s decision. The Committee also firmly expected that the judicial proceedings in the case against 19 senior managers of SIPMA SA would be concluded without any further undue delay and once again requested the Government to keep it informed of its final outcome.
- 203.** With regard to the case against 19 senior managers of SIMPA SA, the Government indicates, in its communication dated 26 July 2011, that the District Court in Lublin rendered its judgment on 20 December 2010. The judgment became final for one of the defendants, who was found not guilty. The other defendants were found guilty and lodged an appeal before the Court of Appeal. The Government further indicates that the hearing dates have not been set yet. Moreover, the case will be supervised by the Minister of Justice until its final outcome. The Government provides no information regarding Mr Jedrejek’s reinstatement.
- 204.** *The Committee notes the information provided by the Government. With regard to the issue of reinstatement of Mr Jedrejek, the Committee once again regrets that the Government did not provide any information in this regard. The Committee recalls from its previous examination of the case that the District Court in Lublin ordered the reinstatement of Mr Jedrejek and that this decision became final after the appeal filed by the enterprise had been dismissed by the Regional Court. The Committee reiterates its requests to the Government and the complainant organization to indicate whether Mr Jedrejek was reinstated, and, if not, it once again urges the Government to take the necessary steps to ensure his full reinstatement pursuant to the Court’s decision.*
- 205.** *With regard to the case against 19 senior managers of SIMPA SA (on 14 October 2003, accusations were brought against 19 senior managers charged with offences under the Act of 23 May 1991 on the settlement of collective disputes, the Penal Code and the Act of 23 May 1991 on trade unions), the Committee notes the Government’s indication that 18 of the 19 managers were found guilty by the District Court in Lublin on 20 December 2010 and lodged an appeal before the Court of Appeal. However, no hearing dates have been set yet. The Committee recalls that the penal case has been pending since 2003 and once again emphasizes that justice delayed is justice denied [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 105]. Therefore, the Committee firmly expects that the proceedings before the Court of Appeal will be concluded without any further undue delay and once again requests the Government to keep it informed of progress made and to transmit a copy of the judgment once handed down.*

**Case No. 2474 (Poland)**

- 206.** The Committee last examined this case at its meeting in March 2011 [see 359th Report, paras 155–158]. On that occasion, expecting that the judicial proceedings in the case of dismissal of Mr Zagrajek would be concluded without further delay, the Committee once again requested the Government to keep it informed of its final outcome. The Committee further requested the Government to indicate whether Mr Zagrajek was reinstated pending the appellate proceedings, and if not, it urged the Government to take the necessary steps to ensure his full reinstatement without loss of pay.
- 207.** In its communication dated 25 July 2011, the Government indicates that Mr Zagrajek and his former employer signed a settlement agreement, according to which the contract of employment was terminated by mutual agreement and Mr Zagrajek was to be paid the gross amount of 8,829 Polish Zloty (PLN) on account of compensation, within 14 days of the signature of the agreement. Mr Zagrajek withdrew his statement of 14 December 2005 on the termination of his contract of employment without notice. Therefore, the judicial proceedings are closed.
- 208.** *The Committee notes this information. It observes that six years after the dismissal of Mr Zagrajek, the judicial proceedings came to an end with the signature of a monetary settlement agreement between this trade unionist and the enterprise. Taking into account the length of the judicial proceedings, the Committee requests the Government to examine with the most representative organizations of workers and employers ways to guarantee expeditious judicial proceedings.*

**Case No. 2611 (Romania)**

- 209.** The Committee last examined this case which concerns obstacles to collective bargaining in a public administration (Court of Audit) at its March 2010 meeting [see 356th Report, approved by the Governing Body at its 307th Session, paras 168–179]. On that occasion, noting the attempt at conciliation by the Ministry of Labour, which had not yielded results, the Committee had urged the Government to take all the steps necessary to settle the dispute between the trade union LEGIS–CCR and the management of the Court of Audit as quickly as possible and in accordance with the established procedures, and to promote collective bargaining in the Court. With regard to its recommendations concerning the need to amend section 12 of Act No. 130/1996 on collective labour agreements, the Committee had once again requested the Government to take all the steps necessary to ensure that base salaries, pay increases, allowances, bonuses and other entitlements of public service employees are no longer excluded from the scope of collective negotiations. With regard to its recommendations concerning the need to amend Act No. 188/1999 on the status of civil servants so that it does not limit the scope of negotiation of collective agreements in the public service, the Committee had once again requested the Government to take the necessary steps to amend the law so that it does not restrict the range of matters that may be negotiated, in particular those that normally pertain to conditions of work or employment. The Committee had encouraged the Government to draw up guidelines on collective bargaining with the social partners concerned and to define the scope of bargaining, in accordance with Conventions Nos 98 and 154 which it has ratified.
- 210.** In its communications dated 7 February and 27 May 2011, and 19 January 2012, the Government reports a positive development with regard to the dispute between the trade union LEGIS–CCR and the management of the Court of Audit. Once the Ministry of Labour, Family and Social Protection had notified the Court of its obligation, under the legislation, to engage in collective bargaining, the management of the Court had notified the union that negotiations on the collective agreement of the institution's employees would commence on 9 February 2011. The trade unions concerned responded positively to

the invitation to hold discussions, and these were held over several sessions, the minutes of which have been transmitted by the Government. Furthermore, a special committee was established to monitor relations between the Court and the trade unions. The Government considers that, by engaging in these negotiations, the Court of Audit has fulfilled its obligations under Act No. 130/1996.

- 211.** However, the Government specifies that under Act No. 284/2010 on the unitary remuneration of staff paid out of public funds, the salaries of civil servants and contract employees cannot be negotiated collectively and is established solely by law. The Government states that, according to the principles of equity and non-discrimination, the same regulations must apply to the salary entitlements of civil servants and contract employees. Nevertheless, according to the Government, collective bargaining could cover all other subjects related to the employment and working conditions of these two categories of public employee. Lastly, the Government points out that neither Act No. 130/1996 nor Act No. 188/1999 provides for any limitations on the conditions of employment or work that may be subject to negotiation, and that under Romanian law the parties are not obliged to conclude a collective agreement. The conclusion of such an agreement depends entirely on the will of the parties to collective bargaining.
- 212.** *The Committee notes with interest the information to the effect that, at the initiative of the Court of Audit, meetings have been held since February 2011 between the Court and the trade unions active within it, namely, LEGIS-CCR and the Trade Union of the Court of Audit of Romania (SCCR), on modalities for the negotiation of a collective labour agreement. The Committee requests the Government to continue to keep it informed of any new developments in this regard.*
- 213.** *Nevertheless, the Committee notes with regret that the Government's report does not contain any indication of the measures taken or envisaged to amend Act No. 130/1996 on collective labour agreements and Act No. 188/1999 on the status of civil servants, which have been the subject of recommendations for many years. The Committee once again recalls that, in general, limitations on the scope of negotiation of collective labour agreements in the public service are contrary to the principles of the collective bargaining Conventions ratified by the Government, which encourage and promote the development and use of collective bargaining machinery on terms and conditions of employment [see 351st Report, approved by the Governing Body at its 303rd Session, paras 1241–1283]. The Committee is bound to remind the Government once again that all public servants who are not engaged in the administration of the State should enjoy the guarantees provided for in Article 4 of Convention No. 98 with regard to the promotion of collective bargaining.*
- 214.** *Moreover, the Committee notes that the Government refers to Act No. 284/2010 on the unitary remuneration of staff paid out of public funds, under which the salaries of civil servants and contract employees cannot be negotiated collectively and are established solely by law. The Committee is therefore bound to request the Government once again to take all the steps necessary to amend section 12(1) of Act No. 130/1996, so that it no longer excludes from the scope of collective bargaining base salaries, pay increases, allowances, bonuses and other related entitlements of public service employees. Similarly, with regard to Act No. 188/1999, the Committee once again urges the Government to take all the necessary steps to amend the Act so that it no longer limits the scope of matters that can be negotiated in the public administration, in particular those that normally pertain to conditions of work and employment. The Committee once again encourages the Government to draw up guidelines on collective bargaining with the social partners concerned and to define the scope of collective bargaining, in accordance with Conventions Nos 98 and 154 which it has ratified. In any event, if the legislation or Constitution requires that agreements concluded be subject to a budgetary decision by*

*Parliament, the system should in practice ensure full respect for provisions that have been negotiated freely. The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.*

### **Case No. 2634 (Thailand)**

- 215.** The Committee last examined this case, which concerns obstruction and violation of the right to organize and bargain collectively, at its March 2011 session [see 359th Report, paras 198–201]. On that occasion, the Committee requested the complainant organization, the Federation of Thailand Automobile Workers' Union (TAW), to provide information on the reasons why the 178 trade unionists who had resigned from their jobs at Thai Summit Eastern Seaboard Autoparts Industry Co. Ltd (TSESA) decided not to file a complaint against the acts of their employer. As to the other allegations, the Committee once again requested the Government to provide information on whether the labour court, in its hearing of the dismissal of the ten trade unionists (No. 780-787/2008), was in full possession of all the material facts referred to in the Committee's previous conclusions, including the report of the Thailand National Human Rights Commission, and requested the Government to transmit a copy of the judgment once handed down. It also requested once again, the Government to initiate discussions in order to review the possible reinstatement of the ten workers or, if reinstatement is not possible, the payment of adequate compensation. Finally, the Committee requested the Government to take the necessary measures to ensure that the union and the employer engage in good faith negotiations, with a view to concluding a collective agreement on terms and conditions of employment. The Committee requested the Government to keep it informed of any developments in respect of all these issues.
- 216.** In a communication dated 19 August 2011, the Government indicates, as regards the 178 trade unionists who had resigned from their jobs, that they did not submit their case to the Labour Relations Committee but had rather submitted them to the Labour Court. With regard to the promotion of collective bargaining, the Government indicates that the department of labour protection and welfare is considered primarily as a mediator to encourage employees and employers to engage in good faith negotiations. To promote collective bargaining, the department of labour protection and welfare has taken measures to ensure good faith negotiations between the employer and the employees. It has also created several educational materials to promote the principle of good faith negotiation, such as CD-ROM and guideline books distributed in the Bangkok metropolitan area and the provinces.
- 217.** In a communication dated 22 September 2011, the Government forwarded the decision of the Supreme Court (No. 3801-3824/2553 dated 27 May 2010), concerning the non-respect by the company of the Order No. 329-577/2007 of the Labour Relations Committee which ordered the company to reinstate 239 union members. The Government indicates that the complainant organization had brought an action before the Second Regional Labour Court in this regard but that the action was dismissed by that court. The complainant appealed this case to the Supreme Court but the latter sustained the decision of the Second Regional Labour Court. The Supreme Court held that the company complied with the order of the Labour Relations Committee.
- 218.** *The Committee notes the information provided by the Government. As to the situation of the 178 trade unionists, the Committee notes the Government's indication that these workers have apparently submitted their case to the Labour Court. The Committee observes that this information seems to contradict the Government's previous indication that the employees had not exercised their rights before the Labour Court [see 359th Report, para. 199]. The Committee therefore requests the Government and the complainant organization to clarify whether the 178 trade unionists who had resigned*

from their jobs (not the employees still working at the enterprise and concerned by the decision No. 3801-3824/2553 of the Supreme Court) have filed a complaint before the Court and if not, it requests the complainant organization to indicate the reasons why these employees decided not to exercise their right to file a complaint against the acts of their employer.

- 219.** *As to the dismissal of the ten trade unionists, the Committee regrets that the Government did not provide any information in this regard and urges the Government to provide without delay information on whether the Labour Court, in its hearing of the dismissal of the ten trade unionists (No. 780-787/2008), was in full possession of all the material facts referred to in the Committee's previous conclusions, including the report of the Thailand National Human Rights Commission, and requests the Government to transmit a copy of the judgment once handed down. It also requests the Government once again to initiate discussions in order to review the possible reinstatement of the ten workers or, if reinstatement is not possible, the payment of adequate compensation.*
- 220.** *Finally, as regards the measures taken by the Government to ensure that the union and the employer engage in good faith negotiations, the Committee notes that the Government indicates, in a general manner, that the department of labour protection and welfare has taken measures to ensure and promote good faith negotiations between the employer and the employees. However, the Committee does not know the concrete measures taken by the department of labour protection and welfare and is not in a position to assess if they concern directly the parties in the present case. In these circumstances, the Committee requests the Government to ensure that specific measures are taken so that the union and the employer concerned can engage in good faith negotiations, with a view to concluding a collective agreement on terms and conditions of employment. The Committee requests the Government to keep it informed of any developments in respect of all these issues.*

### **Case No. 2760 (Thailand)**

- 221.** The Committee last examined this case at its March 2011 meeting [see 359th Report, paras 1135–1176]. On that occasion, the Committee made the following recommendations:
- (a) As to the dismissal of Ms Kotchadej, Chairperson of the Triumph International (Thailand) Labour Union, the Committee:
    - (i) concludes that the dismissal of Ms Kotchadej may indeed have been linked to the exercise of legitimate trade union activities;
    - (ii) requests the Government to take all necessary measures to seek her immediate reinstatement with full pay for back wages. If her reinstatement is found not to be possible for objective and compelling reasons, the Committee requests the Government to ensure that Ms Kotchadej is paid adequate compensation which would constitute a sufficiently dissuasive sanction against anti-union dismissals. The Committee requests the Government to keep it informed without delay in this respect.
  - (b) The Committee further requests the Government:
    - (i) to keep it informed of the final outcome of the judicial proceedings and of all measures of redress taken;
    - (ii) to supply a copy of the two judicial decisions authorizing the dismissal of Ms Kotchadej and to take the necessary measures to ensure that these decisions will be shortly revised in the framework of a procedure which will fully ensure her participation in the hearings, her right to a due process and the respect of her rights of defence;

- (iii) requests the Government and the complainant to provide additional information on the appeal lodged by Ms Kotchadej against the decision of the Court dated 27 November 2008 confirming her dismissal (as alleged by the complainant but as contested by the Government).
- (c) As regards the dismissal of the 1,959 workers, the Committee:
  - (i) requests the Government to inquire into whether anti-union criteria were applied when identifying the employees to be dismissed;
  - (ii) requests the Government to provide a copy of the decision of the Supreme Court on the appeal introduced by the dismissed board members of the union, as soon as it is handed down, as well as of any other relevant judicial decisions;
  - (iii) requests the complainant organization to provide a copy of the relevant provisions of the collective agreement, including article 6, which allegedly stipulates that if the company needs to restructure its workforces, the decision concerning a lay-off has to be collectively agreed.
- (d) As to the dispersion of the demonstration, which took place on 27 August 2009, noting that the Government does not deny the use of Long Range Acoustic Devices (LRADs) to disperse the strikers, the Committee:
  - (i) urges the Government to undertake appropriate investigations into this matter, including the impact of the use of LRADs on the striking workers and to take the necessary measures to ensure that police forces or other government authorities do not intervene in demonstrations with excessive force and in a manner that is likely to cause injury to the striking workers;
  - (ii) further requests the Government to ensure the strict observance of due process guarantees in the context of any surveillance operations of workers' activities by the army, in order to guarantee that the legitimate rights of workers' organizations can be exercised in a climate that is free from violence, pressure or threats of any kind against their leaders and members. The Committee urges the Government to keep it informed in this respect.
- (e) The Committee expresses its concern at the arrests of the three trade union leaders, particularly given that the sections of the Criminal Law Codes 215–216 referred to could also encompass legitimate trade union activities. The Committee further:
  - (i) urges the Government to provide updated information on their present situation, including on the specific charges filed against them. Should these charges be related to their legitimate trade union activities and bearing in mind the Memorandum of Agreement concluding the dispute, it urges the Government to ensure that the charges are immediately dropped;
  - (ii) requests the Government to ensure that their lawyers will be allowed to have full access to the arrest warrants as well as to any other relevant information for their proper defence;
  - (iii) requests the Government to provide a copy of any relevant judicial decision in this respect, in particular, a copy of the appeal decision on the request made by the lawyers to receive a copy of the arrest warrants.
- (f) Noting that the interference of the Department of Labour Protection and Welfare in the elections of the Triumph International (Thailand) Labour Union Chairperson is in direct contradiction of the freedom of association principles, the Committee:
  - (i) urges the Government to take the necessary measures to ensure, should this not already be the case, that the newly elected Chairperson is recognized by the authorities and the employer so that the right of workers to elect their representatives freely is fully ensured;
  - (ii) requests the Government to take steps so that, in the future, the authorities refrain from any interference in the exercise of the right of workers' organizations freely to elect their representatives, as guaranteed by Convention No. 87;
  - (iii) requests the Government to keep it informed in this respect.

- (g) The Committee expects that the Government will make all efforts to provide the information requested including by seeking information from the employer through the relevant employers' organizations concerned.
- (h) Finally, as to the alleged assaults against Ms Kotchadej, the Committee requests the complainant organization to provide detailed information on the date and circumstances of these assaults and, once this information is provided, requests the Government to take the appropriate steps to investigate these allegations and to provide information on the outcome.
- 222.** In its communications dated 10 June and 19 August 2011, the Government sent its observations in reply to the Committee's recommendations. As regards recommendations (a) and (b), the Government indicates that the employer obtained a permission to dismiss Ms Kotchadej from the Labour Court, as prescribed by law. The Labour Court also latterly rejected her appeal and held that it was inadmissible because the application for leave to appeal was made on grounds of facts. The appeal on questions of fact is inadmissible according to the Establishment of Labour Court and Labour Procedure Act B.E. 2522 (article 54, paragraph 1). Ms Kotchadej then appealed to the Supreme Court, but the Supreme Court concluded that the Labour Court lawfully rejected such appeal. According to the Government, all litigations procedures were conducted in compliance with the laws.
- 223.** As regards recommendation (c)(i), the Government reiterates that the employer provided severance pay and other legal benefits to 1,959 employees who were dismissed, which amounted to 207 million baht (THB). The Department of Labour Protection and Welfare also launched a measure to provide additional monetary benefit amounting to THB55 million as well as 250 sewing machines to those employees. The employees were clearly informed that, in case of illegal dismissal, they could file a complaint to the Labour Relations Committee, but they did not submit the case to the Labour Relations Committee. As regards recommendation (c)(ii), the Government indicates that the case of the dismissed board members of the union is still pending before the Supreme Court.
- 224.** As regards recommendation (d), the Government indicates that the activities of the trade union were against the law. The union members illegally blocked a public road without permission, and such illegal action violated rights of civilians. The police negotiated with the union members to unblock the road, but the negotiation failed because the union members did not cooperate with the police. The police therefore took an action in order to open the road for passers-by and civilians. The Government reiterates that the police did not use violence to disperse union members.
- 225.** As regards recommendation (e), the Government indicates that the case of the three trade union leaders arrested is still pending for examination of evidence and witnesses.
- 226.** As regards recommendation (f), the Government reiterates that the Department of Labour did not interfere in the trade union election and it did not intervene in trade union management and trade union activities.
- 227.** *The Committee takes note of the information provided. The Committee recalls that this case concerns five allegations of violations of the principles of freedom of association and trade union rights: (i) the individual dismissal of a leader of the Triumph International (Thailand) Labour Union in violation of the fundamental principle of freedom of expression, following a judicial procedure which took place in violation of the rights of the defence; (ii) the collective dismissal of 1,959 workers, including 13 union board members, in the framework of a restructuring process, allegedly in violation of a collective agreement in force; (iii) the use of dangerous sound devices by the police forces to disperse strikers who gathered in the aftermath of the collective dismissal; (iv) the arrest of three union leaders in the framework of a strike, on the basis of unsubstantiated*

criminal charges; and (v) the interference by authorities in the elections of the union. The Committee notes with regret that although it had made extensive recommendations, the Government did not provide full information in this regard. The Committee firmly expects that the Government will make all efforts to provide the information requested including by seeking information from the employer through the relevant employers' organizations concerned, as requested in its previous recommendation.

### **Recommendations (a), (b) and (h)**

**228.** *As regards recommendations (a) and (b), the Committee notes the Government's indication that Ms Kotchadej lodged an appeal against the decisions authorizing her dismissal to the Labour Court which rejected her appeal and held that it was inadmissible because the application for leave to appeal was made on questions of fact, which is inadmissible according to the Establishment of Labour Court and Labour Procedure Act B.E. 2522 (article 54, paragraph 1). Ms Kotchadej then appealed this decision to the Supreme Court, but the Supreme Court concluded that the Labour Court lawfully rejected such appeal. In this respect, the Committee wishes to once again underline that the Government: (i) has not provided any information on the legal grounds and facts invoked on the basis of which the Court authorized the dismissal to take place, both during the first hearing and during the retrial procedure; (ii) has not commented upon the anti-union character of the dismissal alleged by the complainant; and (iii) has not denied the complainant's assertion that the dismissal was invoked by the Court as being a breach of the "Thai national spirit". As indicated before, on the basis of the elements in its possession, the Committee cannot conclude that the dismissal of Ms Kotchadej was in no way influenced by her activities as chair of the union and that, while the statement on her T-shirt may have been considered as offensive by some, the Committee has difficulty in understanding the relationship between this event and her employment, and once again expresses its deep concern that it gave rise to the dismissal of a trade union leader, impacting also upon the defence of the workers' interests at the enterprise. The Committee notes with deep concern that, while reviewing the case of Ms Kotchadej, the Supreme Court refused to hear her arguments on the basis that they were questions of fact and therefore inadmissible.*

**229.** *In light of the above considerations, the Committee once again urges the Government to take all necessary measures to seek the immediate reinstatement of Ms Kotchadej with full pay for back wages and requests to be kept informed in this respect. If her reinstatement is found not to be possible for objective and compelling reasons, the Committee requests the Government to ensure that Ms Kotchadej is paid adequate compensation which would constitute a sufficiently dissuasive sanction against anti-union dismissals. The Committee requests to be kept informed without delay of all measures of redress taken.*

**230.** *Finally, as regards recommendation (h) concerning the alleged assaults against Ms Kotchadej, noting that the complainant organization did not provide information in this regard, the Committee reiterates its previous recommendation and expects that the complainant organization will be in a position to provide detailed information on the date and circumstances of these assaults in the near future in order for the Government to take the appropriate steps to investigate these allegations and to provide information on the outcome.*

### **Recommendation (c)**

**231.** *As regards the dismissal of 1,959 workers, the Committee observes that the Government did not indicate if it has inquired whether anti-union criteria were applied when identifying the employees to be dismissed. The Committee therefore urges the Government*



to inquire whether anti-union criteria were applied when identifying the employees to be dismissed. Noting that the case of the dismissed board members of the union is still pending before the Supreme court, the Committee once again requests the Government to provide a copy of the decision of the Supreme Court on the appeal introduced by the dismissed board members of the union, as soon as it is handed down, as well as of any other relevant judicial decisions. The Committee trusts that the Supreme Court will take into account the principle according to which no person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities, whether past or present [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 770]. On the other hand, noting that the complainant organization did not provide a copy of the relevant provisions of the collective agreement, including article 6, which allegedly stipulates that if the company needs to restructure its workforces, the decision concerning a lay-off has to be collectively agreed, the existence of such a clause being contested by the Government, the Committee expects that the complainant organization will be in a position to provide such documentation in the near future.

### **Recommendation (d)**

**232.** As regards the dispersion of the demonstration, which took place on 27 August 2009, the Committee regrets that the Government confines itself to indicating that the police did not use violence to disperse union members and makes no reference to the use of LRADs. In these circumstances, the Committee once again: (i) urges the Government to undertake appropriate investigations into this matter, including the use of LRADs on the striking workers and to take the necessary measures to ensure that police forces or other government authorities do not intervene in demonstrations with excessive force and in a manner that is likely to cause injury to the striking workers; and (ii) further requests the Government to ensure the strict observance of due process guarantees in the context of any surveillance operations of workers' activities by the army, in order to guarantee that the legitimate rights of workers' organizations can be exercised in a climate that is free from violence, pressure or threats of any kind against their leaders and members. The Committee urges the Government to keep it informed of the measures taken in this respect.

### **Recommendation (e)**

**233.** As regards the arrest of three trade union leaders, the Committee notes with regret that the Government confines itself to indicating that the case is still pending before the court for examination of evidence and witnesses. In these circumstances, the Committee once again: (i) urges the Government to provide updated information on their present situation, including on the specific charges filed against them. Should these charges be related to their legitimate trade union activities and bearing in mind the Memorandum of Agreement concluding the dispute, it urges the Government to ensure that the charges are immediately dropped; (ii) requests the Government to ensure that the lawyers of the trade union leaders will be allowed to have full access to the arrest warrants as well as to any other relevant information for their proper defence and to keep it informed in this regard; and (iii) requests the Government to provide a copy of any relevant judicial decision in this respect, in particular, a copy of the appeal decision on the request made by the lawyers to receive a copy of the arrest warrants.

### **Recommendation (f)**

**234.** As regards the elections of the Triumph International (Thailand) Labour Union Chairperson, where the Committee observed that there had been interference by the Department of Labour Protection and Welfare, the Committee notes that the Government

*confines itself to indicating that there was no interference. In these circumstances, the Committee urges the Government to indicate if the newly elected Chairperson of the union is recognized by the authorities and the employer so that the right of workers to elect their representatives freely and to bargain collectively is fully ensured.*

\* \* \*

**235.** Finally, the Committee requests the governments concerned to keep it informed of any developments relating to the following cases.

<b>Case</b>	<b>Last examination on the merits</b>	<b>Last follow-up examination</b>
1962 (Colombia)	November 2002	June 2008
2086 (Paraguay)	June 2002	November 2011
2096 (Pakistan)	March 2004	March 2011
2153 (Algeria)	March 2005	November 2011
2169 (Pakistan)	June 2003	June 2011
2228 (India)	November 2004	November 2011
2257 (Canada)	November 2004	November 2011
2292 (United States)	November 2006	November 2011
2304 (Japan)	November 2004	November 2010
2361 (Guatemala)	November 2011	–
2382 (Cameroon)	November 2005	November 2011
2384 (Colombia)	June 2008	June 2009
2399 (Pakistan)	November 2005	June 2011
2422 (Bolivian Republic of Venezuela)	June 2011	–
2460 (United States)	March 2007	November 2011
2478 (Mexico)	March 2010	March 2011
2547 (United States)	June 2008	November 2011
2614 (Argentina)	March 2010	June 2011
2630 (El Salvador)	March 2010	November 2011
2667 (Peru)	March 2010	November 2011
2676 (Colombia)	June 2010	June 2011
2678 (Georgia)	June 2010	November 2011
2685 (Mauritius)	November 2009	November 2011
2695 (Peru)	March 2010	March 2011
2705 (Ecuador)	November 2009	June 2011
2710 (Colombia)	November 2011	–
2741 (United States)	November 2011	–
2750 (France)	November 2011	–
2772 (Cameroon)	June 2011	–
2777 (Hungary)	June 2011	–
2781 (El Salvador)	November 2011	–
2787 (Chile)	June 2011	–
2788 (Argentina)	November 2011	–

Case	Last examination on the merits	Last follow-up examination
2790 (Colombia)	June 2011	–
2791 (Colombia)	June 2011	–
2793 (Colombia)	November 2011	–
2795 (Brazil)	November 2011	–
2804 (Colombia)	November 201	
2818 (El Salvador)	June 2011	–
2825 (Peru)	November 2011	–
2831 (Peru)	November 2011	–
2834 (Paraguay)	November 2011	–
2836 (El Salvador)	November 2011	–
2838 (Greece)	November 2011	–
2841 (France)	November 2011	–
2842 (Cameroon)	November 2011	–
2843 (Ukraine)	November 2011	–

**236.** The Committee hopes these governments will quickly provide the information requested.

**237.** In addition, the Committee has just received information concerning the follow-up of Cases Nos 2241 (Guatemala), 2268 (Myanmar), 2362 (Colombia), 2383 (United Kingdom), 2400 (Peru), 2423 (El Salvador), 2428 (Bolivarian Republic of Venezuela), 2430 (Canada), 2434 (Colombia), 2488 (Philippines), 2512 (India), 2527 (Peru), 2533 (Peru), 2557 (El Salvador), 2559 (Peru), 2590 (Nicaragua), 2594 (Peru), 2595 (Colombia), 2603 (Argentina), 2613 (Nicaragua), 2616 (Mauritius), 2637 (Malaysia), 2638 (Peru), 2639 (Peru), 2652 (Philippines), 2654 (Canada), 2658 (Colombia), 2664 (Peru), 2674 (Bolivarian Republic of Venezuela), 2677 (Panama), 2679 (Mexico), 2690 (Peru), 2697 (Peru), 2698 (Australia), 2699 (Uruguay), 2703 (Peru), 2719 (Colombia), 2722 (Botswana), 2724 (Peru), 2725 (Argentina), 2730 (Colombia), 2733 (Albania), 2735 (Indonesia), 2736 (Bolivarian Republic of Venezuela), 2737 (Indonesia), 2744 (Russian Federation), 2746 (Costa Rica), 2747 (Islamic Republic of Iran), 2754 (Indonesia), 2755 (Ecuador), 2757 (Peru), 2764 (El Salvador), 2771 (Peru), 2775 (Hungary) and 2832 (Peru), which it will examine at its next meeting.

CASE NO. 2660

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Argentina  
presented by**

- **the Confederation of Argentine Workers (CTA) and**
- **the Association of State Workers (ATE)**

*Allegations: The complainant organizations  
allege the temporary abduction of the Deputy  
Secretary-General of the CTA and  
Secretary-General of the ATE by armed persons  
with the aim of causing intimidation*

- 238.** The Committee last examined this case at its November 2010 meeting and on that occasion presented an interim report to the Governing Body [see 358th Report, approved by the Governing Body at its 309th Session (November 2010), paras 158–171].
- 239.** The Government sent its observations in communications of May 2011 and 5 March 2012.
- 240.** Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

- 241.** At its November 2010 meeting, when it examined the allegations of temporary abduction with the aim of causing intimidation because of the trade union activity of Mr Pablo Micheli, a trade union leader of the CTA and the ATE, the Committee made the following recommendations [see 358th Report, para. 171]:

The Committee urges the complainant organization to provide precise information about the complaint lodged with the Prosecutor's Office, and further details, in order to enable it to communicate information about any progress in the investigation that is said to be under way regarding the temporary abduction of the trade union leader, Mr Pablo Micheli. Moreover, the Committee further requests the Government to carry out an investigation concerning the allegations and expects that those responsible for planning and perpetrating the abduction will be severely punished. Moreover, should Mr Micheli request it, the Committee requests the Government to provide him with the protection deemed necessary to guarantee his personal safety.

**B. The Government's reply**

- 242.** In its communications of May 2011 and 5 March 2012, the Government indicates that it has expressly ordered an investigation into the complaint, and the Ministry of Labour of Buenos Aires Province has provided a detailed report in the form of a note indicating the following:

I have the pleasure of addressing this report to you in response to your request (DAI note No. 1405) received by this office on 29 March this year.

Please be advised that a professional staff member of this office was commissioned to gather information from the Judicial District of Lomas de Zamora, with the following result:

- (1) Investigative Unit (UFI) No. 1: An electronic search yielded no results with the search parameters used. Nevertheless, it was possible to confirm that the shift did match the date of the alleged event.
- (2) Criminal Court No. 18: There is no such court in the Judicial District of Lomas de Zamora.
- (3) UFI No. 18: An electronic search yielded no results with the search parameters used.
- (4) General registry of the district: An electronic search yielded no results with the search parameters used. Nevertheless, staff reported that, in 2008, cases in which the offence of abduction was investigated were received via the federal courts.
- (5) Federal Court No. 1: A manual search of the records yielded no results with the search parameters used.
- (6) Federal Court No. 2: A manual search of the records yielded no results with the search parameters used.

**243.** Lastly, the Government requests that the complainant trade union be asked for more specific information than that previously supplied, and reiterates the Government's desire to achieve satisfactory clarification of the facts and conduct the corresponding investigation.

### **C. The Committee's conclusions**

**244.** *The Committee recalls that, in the present case, the complainant organizations alleged that Mr Pablo Micheli, a trade union leader of the CTA and the ATE, was temporarily abducted (for an hour and a half) on 23 June 2008 with the aim of causing intimidation because of his trade union activity, and that the Committee, at its November 2010 meeting, requested the complainant organizations to provide precise information about the complaint lodged with the Prosecutor's Office, and further details, to enable the Prosecutor's Office to communicate information about any progress made in any investigation into the abduction. It also requested the Government to carry out an investigation concerning the allegations and expected that those responsible for planning and perpetrating the abduction would be severely punished.*

**245.** *The Committee notes that the Government indicates that it asked the Ministry of Labour of Buenos Aires Province to carry out an investigation concerning the complaint referred to by the complainant organizations and that the provincial Government reported that: (1) an electronic search did not locate the complaint in Investigative Unit (UFI) No. 1 or in UFI No. 18; (2) there is no Criminal Court No. 18 in the Judicial District of Lomas de Zamora; and (3) the complaint was not found in the general registry of the district or in the records of Federal Courts Nos 1 and 2. The Committee also notes that the Government again requests that the complainant organizations be asked for more specific information than that previously supplied, and that it reiterates its desire to achieve satisfactory clarification of the facts.*

**246.** *The Committee notes this information and urges the Government to do everything within its power to ensure that the complaint lodged with the Prosecutor's Office is retrieved and that the competent investigating authorities initiate an immediate investigation concerning the alleged temporary abduction with the aim of causing intimidation, on 23 June 2008, of Mr Pablo Micheli, trade union leader of the CTA and the ATE, because of his trade union activity. It requests the complainant organizations to provide the authorities with as much information as possible. The Committee requests the Government to keep it informed of the outcome of the investigation.*

**The Committee's recommendation**

**247.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:*

*The Committee urges the Government to do everything within its power to ensure that the complaint lodged with the Prosecutor's Office is retrieved and that the competent investigating authorities initiate an immediate investigation concerning the alleged temporary abduction with the aim of causing intimidation, on 23 June 2008, of Mr Pablo Micheli, trade union leader of the CTA and the ATE, because of his trade union activity. It requests the complainant organizations to provide the authorities with as much information as possible. The Committee requests the Government to keep it informed of the outcome of the investigation.*

CASE NO. 2702

INTERIM REPORT

**Complaint against the Government of Argentina  
presented by  
the Confederation of Argentine Workers (CTA)**

***Allegations: The complainant organization alleges acts of anti-trade union harassment were committed and dismissal of a trade union officer***

**248.** The Committee last examined this complaint at its March 2011 meeting and on that occasion presented an interim report to the Governing Body [see 359th Report, approved by the Governing Body at its 310th Session (March 2011), paras 214–226].

**249.** The Government sent its observations in a communication dated 2 November 2011.

**250.** Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

**251.** In its previous examination of the case, the Committee made the following recommendations [see 359th Report, para. 226]:

- (a) The Committee urges the Government to conduct the requested investigation immediately into all the allegations of discrimination and anti-union dismissals (14 trade union members and one union officer according to the complainant; 11 workers according to the company) and to keep it informed in this regard. Furthermore, while noting the company's statement that the judicial authority rejected an *amparo* appeal filed by the representatives of the union being established, the Committee requests the Government to inform it whether the dismissed workers, including trade union officer Mr Rubén Óscar Godoy, have taken legal action. In addition, the Committee invites the CTA to forward any additional information.

- (b) As regards the allegation that on 18 April 2008, the day of the strike, the police used force against the strikers, leaving seven injured (one of them, Mr José Lagos, seriously), the Committee urges the Government to take steps to ensure that an investigation is launched into this matter, to send information on its outcome and to send information on the outcome of the complaints against these acts filed with the Public Prosecutor's Office of Mar del Plata, Buenos Aires Province.

## **B. The Government's reply**

- 252.** In its communication dated 2 November 2011, the Government sends the reply from the administrative authority of Buenos Aires Province (hereinafter referred to as the provincial authority). The provincial authority states that the complainant organization considered that a judicial situation has arisen that is prejudicial to the workers, who consider that it constitutes a failure to comply with internationally accepted principles which, inasmuch as they have been incorporated into Argentina's own legislation, guarantee freedom of association and the right to strike. Nevertheless, in the opinion of the provincial authority, the complainant organization has failed, in its complaint, to identify any specific action taken by Buenos Aires Province that might have violated freedom of association, and the provincial Ministry of Labour intervened within the limits of its own powers of conciliation and restoration of social peace.
- 253.** The provincial authority outlines the facts set forth in previous examinations of the case. It also states that it intervened in the dispute involving the Supermercados Toledo SA enterprise as soon as it was informed of it through a complaint lodged by the workers and the Confederation of Argentine Workers (CTA). It emphasizes the important role played by the provincial labour authority, which offered the parties a conciliation procedure, summoned them to conciliation hearings, and constantly sought a peaceful settlement to the dispute.
- 254.** The provincial authority adds that in this context, the intervention by Ministry of Labour of Buenos Aires Province had a positive effect from the complainant organization's point of view since it led to an administrative procedure that provided an opportunity for dialogue within the framework established by law. It was a lawful and appropriate intervention, within the limits of the powers of the body to which the party had appealed; this does not preclude any intervention at the national level by the Ministry of Labour, Employment and Social Security, which is the authority responsible for enforcing Act No. 23551, and before which the parties could have filed their complaints.
- 255.** The provincial authority points out that, notwithstanding the above, the dispute lay outside the competence of the provincial Ministry of Labour, since the complaint referred to unfair practices, applicability issues and violations of trade union rights – matters which should be resolved at the national level by the Ministry of Labour, Employment and Social Security, which is the authority responsible for enforcing Act No. 23551, and/or the judiciary. That being so, and given the fact that the employer party had repeatedly declined to take part in the procedure, and that the dispute involved issues in respect of which the provincial labour authority was not competent to intervene, the provincial Ministry of Labour merely organized the abovementioned hearings and attempted to reach a peaceful settlement between the parties.
- 256.** According to the provincial authority, it is clear from the above that credence should not be given to the suggestion that the Government was reluctant to exercise its legislative capacity as the body responsible for guaranteeing the minimum rights of freedom of association contained in ILO Conventions Nos 87 and 98. As described above, freedom of association is guaranteed, and any discrimination sanctioned, by the legislative framework in force – articles 14bis, 16 and 75(22) of the National Constitution; and Acts Nos 23551

and 23592. Furthermore, it states that Act No. 23551 applies, under article 14bis of the National Constitution, and in accordance with ILO doctrine, the mechanisms of state control and regulation do not in any way restrict the powers inherent in freedom of association, since they provide objective and predetermined criteria serving to prevent rights abuses and promote collective bargaining. The provincial authority states that national legislation provides sufficient guarantees for the exercise of freedom of association and that the complainant had the opportunity to apply for judicial review of the dismissals ordered by the employer, and for enforcement of the applicable statutory penalties.

257. The provincial authority recalls that the Argentine legal system guarantees the freedom to establish trade unions without prior authorization.

### **C. The Committee's conclusions**

258. *The Committee recalls that in the present case the complainant organization alleged acts of discrimination, specifically the anti-union dismissal of 14 trade union members and one trade union officer in the Supermercados Toledo SA enterprise. It further alleged that the police had used force against the strikers and seven persons had been injured. In its previous examination of the case, the Committee urged the Government to conduct the requested investigation immediately into all the allegations of discrimination and anti-union dismissals; it also requested the Government to inform it whether the dismissed workers, including trade union officer Mr Rubén Óscar Godoy, had taken legal action. Furthermore, it urged the Government to take steps to ensure that an investigation was launched into the use of force by police against the strikers (leaving seven injured, one of them seriously).*
259. *The Committee observes that the Government has sent the reply from the administrative authority of Buenos Aires Province. In this regard, the Committee notes that the provincial authority states that: (1) it intervened in the dispute between the enterprise and the complainant when it was informed of the complaint lodged by the workers and the CTA, and offered the parties a conciliation procedure; (2) it summoned them to conciliation hearings and constantly sought a peaceful settlement to the dispute; (3) the intervention had a positive effect since it led to an administrative procedure that provided an opportunity for dialogue; (4) the dispute lay outside the competence of the provincial labour authority, since the complaint referred to unfair practices, applicability issues and violations of trade union rights – matters which should be resolved at the national level by the Ministry of Labour, Employment and Social Security and/or the judiciary; (5) given that the employer party had declined to take part in the dialogue procedure, and that the dispute involved issues outside the remit of the provincial labour authority, it confined itself to holding the abovementioned hearings and attempting to reach a peaceful settlement between the parties; and (6) freedom of association is guaranteed and any discrimination was sanctioned by the National Constitution and Acts Nos 23551 and 23592.*
260. *While noting the observations of the provincial administrative authority (particularly in so far as they relate to its intervention in the dispute, which involved complaints of violations of trade union rights, with a view to offering a conciliation procedure), the Committee regrets that the Government has failed to report on the specifically requested investigations or transmit the requested information. In these circumstances, the Committee once again urges the Government to: (1) conduct the requested investigation immediately into all the allegations of anti-union dismissals (14 trade union members and one union officer according to the complainant; 11 workers according to the company) and to keep it informed in this regard; (2) inform it whether the dismissed workers, including trade union officer Mr Rubén Óscar Godoy, have taken legal action; and*



(3) conduct an investigation into the allegation that on 18 April 2008, the day of the strike, the police used force against the strikers, leaving seven injured (one of them, Mr José Lagos, seriously), and send information on the outcome of the investigation as well as on the outcome of the complaints against these acts filed with the Public Prosecutor's Office in Mar del Plata, Buenos Aires Province.

### The Committee's recommendation

**261.** *In the light of the foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendation:*

*The Committee once again urges the Government to: (1) conduct the requested investigation immediately into all the allegations of anti-union dismissals in the Supermercados Toledo SA enterprise (14 trade union members and one union officer according to the complainant; 11 workers according to the company) and to keep it informed in this regard; (2) inform it whether the dismissed workers, including trade union officer Mr Rubén Óscar Godoy, have taken legal action; and (3) conduct an investigation into the allegation that on 18 April 2008, the day of the strike, the police used force against the strikers, leaving seven injured (one of them, Mr José Lagos, seriously), and send information on the outcome of the investigation as well as on the outcome of the complaints against these acts filed with the Public Prosecutor's Office of Mar del Plata, Buenos Aires Province.*

CASE No. 2743

INTERIM REPORT

### **Complaint against the Government of Argentina presented by the Confederation of Argentine Workers (CTA)**

***Allegations: The complainant organization alleges acts of violence, intimidation and anti-trade union discrimination against workers belonging to the Association of State Workers (ATE) in the National Institute of Statistics and Censuses (INDEC)***

**262.** The Committee last examined this case at its June 2011 meeting, when it presented an interim report to the Governing Body [see 360th Report, paras 154–223, approved by the Governing Body at its 311th Session (June 2011)].

**263.** The Government sent its observations in communications dated 4 November 2011 and 5 March 2012.

**264.** Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

**A. Previous examination of the case**

**265.** In its previous examination of the case at its June 2011 meeting, the Committee made the following recommendations [see 360th Report, para. 223]:

- (a) The Committee urges the Government to take the necessary steps to ensure that an investigation is carried out without delay into the allegations relating to the intervention and violent repression by the PFA to prevent the erection of a protest stand at the INDEC entrance on 22 August 2007 and that if it is found that the police overstepped the mark in the exercise of their functions, to take measures to remedy the situation. The Committee requests the Government to keep it informed of developments.
- (b) With regard to the allegations of attacks against the ATE trade union office in the INDEC main building on 21 May and 15 July 2008 (according to the ATE, during the last attack damage was caused to the office), the Committee requests the Government to take the necessary measures to ensure that an investigation is carried out into these allegations and to keep it informed of its outcome.
- (c) The Committee requests the Government to keep it informed of the final result of the court proceedings against the ATE delegate, Mr Luciano Osvaldo Belforte, for defrauding the public administration. The Committee also requests the Government to inform it whether the delegate in question can freely enter the ATE trade union office in INDEC.
- (d) Given that, according to the information supplied by the complainant organization, the judicial decisions ordered the reinstatement in their functions of the trade union official, Ms Liliana Haydee Gasco, and the worker Vanina Micello, the Committee requests the Government, should this be the case, to ensure compliance with the relevant judicial decisions and to keep it informed in this regard.
- (e) The Committee urges the Government to send without delay its detailed observations relating to the following allegations: (1) the transfer of workplace of ATE member, Mr Emilio Platzer; (2) the dismissal of ATE member, Ms Gabriela Soroka; (3) the removal from her post of ATE delegate, Ms Cynthia Pok; and (4) the dismissal of 13 workers from the CPI and EPH Department on 1 November 2007.
- (f) The Committee invites the Government, with a view to achieving harmonious labour relations in the organization, to set up a forum for dialogue in which, among other things, the questions raised in this complaint can be dealt with.

**B. The Government's reply**

**266.** In its communication of 4 November 2011, the Government indicates that it has sent the report drafted by the National Institute of Statistics and Censuses (INDEC) on the case.

**267.** The INDEC indicates that its report contains updated information relating to the points on which the Committee requested information from the State of Argentina. The INDEC adds that the report focuses in particular on paragraphs (c), (d) and (e) of the recommendations contained in paragraph 223 of the Committee's 360th Report, as these are matters directly related to the Institute's remit. Specifically:

- as regards paragraph (c), the INDEC indicates that the court proceedings in “Luciano Belforte et al. in re: defrauding the public administration”, instituted under file No. 128/8 in Criminal and Correctional Court No. 7, office 4, is still in progress. The court stayed the proceedings on 31 May 2011. This stay was appealed by the prosecutor and the appeal is currently pending a decision from the Criminal Cassation Division of the Supreme Court of Justice. The INDEC has recently joined the proceedings as a complainant. Mr Belforte freely enters the central headquarters of the Institute on a daily basis. Furthermore, he was in office as a trade union delegate

until 27 October 2011 and, given that he enjoyed unrestricted movement within the Institute, it is assumed that he was able to perform his functions normally;

- as regards paragraph (d), the INDEC indicates that Ms Vanina Micello and Ms Liliana Hydee Gasco are currently working in the Consumer Price Index (CPI) Department pursuant to the court order to that effect;
- as regards paragraph (e)(1), the INDEC indicates that Mr Emilio Platzer performed tasks in the Institute under service provider contracts. The last of these ended in July 2007. Since then, Mr Platzer no longer works in the INDEC; he was thus not transferred, but left at the end of his contract;
- as regards paragraph (e)(2), the INDEC indicates that Ms Gabriela Soroka was in a contractual relationship with the Institute under a cooperation agreement concluded between the INDEC and the Government of the city of Buenos Aires. Her employment relationship came to an end in November 2007, not as a result of dismissal but because her contract had ended;
- as regards paragraph (e)(3), the INDEC indicates that Ms Cynthia Pok, an employee of the Institute, has not been removed from her post and is still a trade union delegate, an office which she took up in the exercise of her trade union rights;
- as regards paragraph (e)(4), the INDEC indicates that the information provided by the Confederation of Argentine Workers (CTA) is false or incorrect. According to the Institute's records, the only agreement implemented by an act meeting the aforementioned description dates from 31 October 2007 and was signed by the individuals referred to in the Committee's Report. An examination of its provisions provides only a generic description of the obligations undertaken by the parties, which makes it impossible to supply information on the situation of the workers referred to by the Committee. Moreover, the Committee does not mention the names of the workers in question, making it impossible to supply information on their current situation.

**268.** By its March 2012 communication, the Government transmits a report of the INDEC in which it is stated in respect of paragraph (a), that it has no jurisdiction to account for the action of the federal police of Argentina (the Government indicates that it will conduct consultations to provide relevant information on this issue), and with regard to paragraph (b), that the allegations have prompted the opening of an administrative proceeding which resulted in no disciplinary liability being imposed on any agent of the State.

### **C. The Committee's conclusions**

**269.** *The Committee recalls that in this case the complainant organization alleged acts of violence (the intervention and violent repression by the Argentine federal police to prevent the erection of a protest stand at the entrance to the INDEC on 22 August 2007; attacks on workers at the meeting of 15 May 2008, causing various injuries to the deputy secretary of Association of State Workers (ATE-Capital), Mr Luis Opromolla and two other workers, and striking Ms Cynthia Pok), intimidation by means of police presence and prevention of the exercise of trade union activity, attack against a trade union office and anti-union discrimination (initiation of legal proceedings for participating in the dispute between the ATE and the INDEC authorities, reprisals and modification of conditions of employment, etc.) against workers belonging to the ATE in the INDEC.*

Paragraphs (a) and (b)

**270.** *Regarding the investigation into the allegations of the intervention and violent repression by the federal police of Argentina aimed at preventing the installation of a protest stand outside the INDEC entrance on 22 August 2007, the Committee notes the INDEC statement that it has no jurisdiction to account for the action of the infantry forces of the federal police of Argentina. It further notes the Government's indication that in order to provide information on this issue it will conduct consultations with the relevant actors. The Committee expects to receive the information referred to by the Government.*

**271.** *As regards the allegations of break-ins into the ATE trade union office in the INDEC main building on 21 May and 15 July 2008 (according to the ATE, during the last attack, damage was caused to the office), the Committee notes the INDEC's indication that these statements have prompted the opening of an administrative proceeding, which resulted in no disciplinary liability being imposed on any agent of the State. The Committee notes this information.*

Paragraph (c)

**272.** *As regards the court proceedings against the ATE delegate Mr Luciano Osvaldo Belforte for defrauding the public administration and free access by the delegate to the ATE trade union office in the INDEC, the Committee takes note of the information provided by the INDEC to the effect that: (1) the court proceedings are still in progress before Criminal and Correctional Court No. 7; and (2) Mr Belforte freely enters the central headquarters of the Institute on a daily basis and was in office as a trade union delegate until 27 October 2011. In this regard, the Committee requests the Government to keep it informed of the final result of the court proceedings against the ATE delegate, Mr Luciano Osvaldo Belforte.*

Paragraph (d)

**273.** *As regards the judicial decisions that allegedly ordered the reinstatement of the trade union official Ms Liliana Haydee Gasco, and the worker Ms Vanina Micello, with which the Committee had requested the Government to ensure compliance should this be the case, the Committee notes with interest that the INDEC indicates that the workers in question are currently working in the CPI Department pursuant to the court order to that effect.*

Paragraph (e)(1)

**274.** *As regards the alleged transfer of workplace of ATE member Mr Emilio Platzer, the Committee takes note of the INDEC's statement to the effect that: (1) the worker in question performed tasks in the Institute under service provider contracts; (2) the last of these contracts ended in July 2007 and since then, Mr Platzer no longer works in the INDEC; and (3) he was thus not transferred, but left at the end of his contract. The Committee takes note of this information and will not pursue the examination of this allegation, unless the complainant organization transmits additional information in this regard.*

Paragraph (e)(2)

**275.** *As regards the alleged dismissal of ATE member Ms Gabriela Soroka, the Committee takes note of the INDEC's statement to the effect that: (1) the worker was in a contractual relationship with the Institute under a cooperation agreement concluded between the INDEC and the Government of the city of Buenos Aires; and (2) her employment*

*relationship came to an end in November 2007, not as a result of dismissal but because her contract had ended. The Committee takes note of this information and will not pursue the examination of this allegation.*

*Paragraph (e)(3)*

**276.** *As regards the alleged removal from her post of ATE delegate Ms Cynthia Pok, the Committee takes note of the INDEC's statement to the effect that the worker in question has not been removed from her post and is still a trade union delegate, an office which she took up in the exercise of her trade union rights. In the light of this information, the Committee will not pursue the examination of this allegation.*

*Paragraph (e)(4)*

**277.** *As regards the alleged dismissal of 13 workers from the CPI and EPH Department on 1 November 2007 for having participated in meetings and direct action organized by the trade union, the Committee takes note of the INDEC's statement to the effect that the information provided by the complainant organization is false or incorrect and that the names of the workers in question are not mentioned, making it impossible to supply information on their current employment situation. In this regard, the Committee requests the CTA to send without delay the names of the workers who were allegedly dismissed so as to enable the Government to send concrete information on these allegations.*

### **The Committee's recommendations**

**278.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) With regard to the allegations relating to the intervention and violent repression by the Argentine federal police to prevent the installation of a protest stand at the INDEC entrance on 22 August 2007, the Committee expects to receive the information referred to by the Government.*
- (b) The Committee requests the Government to keep it informed of the final result of the court proceedings against the ATE delegate Mr Luciano Osvaldo Belforte.*
- (c) As regards the alleged dismissal of 13 workers from the CPI and EPH Department on 1 November 2007 for having participated in meetings and direct action organized by the trade union, the Committee requests the CTA to send without delay the names of the workers who were allegedly dismissed so as to enable the Government to send concrete information on these allegations.*

CASE NO. 2809

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Argentina  
presented by  
the Association of Banks' Senior Staff Officers (APJBO)**

***Allegations: The complainant organization  
objects to the decision of the administrative  
authority to refuse to grant it trade union status***

- 279.** The Committee last examined this case at its May 2011 meeting [see 360th Report, approved by the Governing Body at its 311th Session, paras 246–262].
- 280.** The Government sent its observations in a communication dated 23 August 2011.
- 281.** Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

- 282.** In its previous examination of the case, the Committee made the following recommendations [see 360th Report, para. 262]:

The Committee hopes that the judicial authority will shortly pronounce its judgment in the appeal filed by the APJBO against the administrative decisions which refused trade union representative status and, for the purposes of pronouncing on the substance of the case, requests the Government to send it a copy of the judgment as soon as it is issued.

**B. The Government's reply**

- 283.** In its communication dated 23 August 2011, the Government reports that the case (*Ministry of Labour v. Association of Banks' Senior Staff Officers* concerning the Trade Union Associations Act) is currently before the Supreme Court of Justice of the Nation. The case was examined by the Third Chamber of the National Labour Appeals Tribunal, which handed down Final Judgment No. 92396 dated 30 November 2010 (the National Labour Appeals Tribunal dismissed the appeal filed by the complainant organization).
- 284.** The Government adds that the complainant organization filed an extraordinary federal appeal against this judgment. This appeal was granted on 10 May 2011 and the case was brought before the Supreme Court of Justice of the Nation on 30 May 2011.

**C. The Committee's conclusions**

- 285.** *The Committee recalls that, in the present case, the complainant organization (which states that it has 1,813 members) challenged the decision of the administrative authority to refuse its application for trade union representative status (a status which confers certain exclusive rights such as the conclusion of collective agreements, special protection of union officials, payment of trade union dues through deductions from wages by the*

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employer, and so on), (application of 23 March 2004) in the Bank of the Argentine Nation, in order to be able to bargain collectively.

- 286.** *At its May 2011 meeting, the Committee regretted the long period of time that had passed (over five years) since the complainant organization had requested trade union representative status and emphasized the importance of reaching decisions in such matters within a reasonable length of time. With regard to the substance of the question, to grant or not to grant the trade union representative status to the complainant organization (which requires a comparison of the representativeness of the trade unions existing in the Bank), given that the procedure for determining the representativeness of the trade union concerned via the comparison of its relevant affiliates had not been completed, the Committee indicated that it would examine the substance of the question when it has the judgment issued by the National Labour Appeals Tribunal where the appeal filed by the complainant organization is being heard.*
- 287.** *In this regard, the Committee notes that, according to the Government: (1) the National Labour Appeals Tribunal dismissed the appeal filed by the complainant organization against Decision No. 659/2010 by the administrative authority, which rejected the application for trade union status; and (2) the complainant organization appealed against this decision in an extraordinary federal appeal, which was granted on 10 May 2011, and as a result the case was brought before the Supreme Court of Justice of the Nation.*
- 288.** *Under these circumstances, regretting that the proceedings (both administrative and judicial) concerning the application by the APJBO for trade union status have been under way for more than eight years (according to the complainant, the application was filed in March 2004), the Committee requests the Government to send it a copy of the judgment of the Supreme Court of Justice of the Nation concerning the appeal filed by the complainant organization, as soon as it is issued.*

### **The Committee's recommendation**

- 289.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:*

*Regretting that the proceedings (both administrative and judicial) concerning the application by the Association of Banks' Senior Staff Officers (APJBO) for trade union status have been under way for more than eight years (according to the complainant, the application was filed in March 2004), the Committee requests the Government to send it a copy of the judgment of the Supreme Court of Justice of the Nation concerning the appeal filed by the complainant organization, as soon as it is issued.*

CASE NO. 2837

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Argentina  
presented by  
the Association of State Workers (ATE)**

***Allegations: The complainant organization alleges bad faith and exclusion from the collective bargaining process in the Teatro Colón autonomous body; declaration of a strike illegal by the administrative authority and termination (dismissal) of eight trade union officers for participating in a strike***

- 290.** The complaint is contained in a communication from the Association of State Workers (ATE) dated 3 February 2011. The ATE sent additional information in a communication dated 5 September 2011.
- 291.** The Government sent its observations in a communication dated 3 November 2011.
- 292.** Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and Labour Relations (Public Service) Convention, 1978 (No. 151).

**A. The complainant's allegations**

- 293.** In its communication dated 3 February 2011, the ATE stated that it was presenting a complaint against the Government of Argentina for violation of ILO Conventions Nos 87, 98, 151 and 154 because of numerous violations of freedom of association committed by the Government of the Autonomous City of Buenos Aires (GCBA), namely: (a) violation of the principle of bargaining in good faith; (b) the declaration by the Office of the Undersecretary of Labour of the Autonomous City of Buenos Aires that the strike at the Teatro Colón autonomous body was illegal; and (c) sanctions and disciplinary proceedings against theatre workers for industrial action and for their participation in trade union activity.
- 294.** The ATE is a first-level trade union active throughout Argentina and an affiliate of the Confederation of Argentine Workers (CTA). The ATE adds that article 14bis of the Argentine Constitution guarantees trade unions the right to collective bargaining and the right to strike as fundamental rights. The second indent of article 75, paragraph 22, accords constitutional status to a number of international human rights treaties, including the 1966 New York Covenants, thereby granting the same status to Convention No. 87 (Article 8, paragraph 3, of the International Covenant on Economic, Social and Cultural Rights and Article 22, paragraph 3, of the International Covenant on Civil and Political Rights). This circle of protection of freedom of association is made complete by the first paragraph of article 75(22) of the national constitution, which grants supra-legal status to other international treaties, including the ILO Conventions. Act No. 471 of the Autonomous City of Buenos Aires guarantees the right of state workers to collective bargaining. Moreover, section 1 of the Act provides that ILO Conventions are a source of regulation of public employment relationships within the Executive of the Autonomous City of Buenos Aires.



- 295.** The ATE states that, despite this formal protection of the right to collective bargaining, the GCBA, during collective wage bargaining with civil servants, practised discrimination, and obstructed and ultimately abandoned collective bargaining with that organization, in addition to imposing sanctions on the workers of the Teatro Colón autonomous body for legitimately exercising their right to strike. The ATE has been seeking a resolution to a dispute over conditions of employment and wage increases in the Teatro Colón autonomous body ever since the theatre reopened on 24 May 2010. In this context, and in the light of the many wage demands to which the employer has failed to respond, the ATE decided to carry out industrial action in the theatre.
- 296.** The ATE adds that on 28 October 2010, compulsory conciliation was ordered by the Office of the Undersecretary of Labour of the Autonomous City of Buenos Aires with a view to holding collective bargaining meetings on working conditions, the requested wage increase, and the new administrative career and grade structure of workers of the Teatro Colón autonomous body. As a result, conciliation hearings were held (as may be seen from the attached records) under file No. 1.493.152/2010 of the Office of the Undersecretary of Labour of the Autonomous City of Buenos Aires, culminating on 15 December 2010 with the failure of GCBA representatives to appear. According to the ATE, the Ministry of Finance of the Autonomous City of Buenos Aires, in an utterly inappropriate attempt to defuse the conflict, while the abovementioned negotiations were under way, and disregarding the principle of bargaining in good faith, issued decision No. 2855/GCBA/MHGC/10 granting a bonus equal to half of the end-of-year bonus, which was rejected by the ATE.
- 297.** The ATE states that, notwithstanding the bargaining process, the representatives of the authorities told a gathering of workers that they did not intend to reach an agreement on the grounds that there were no funds available for wage increases at the theatre. On 3 December 2010, the Office of the Undersecretary of Labour of the Autonomous City of Buenos Aires informed the ATE of decisions Nos 4181/SSSTR/2010 and 4902/SSSTR/2010, under file No. 1.368.320/2010, in which the industrial action on 4 and 30 November 2010 was declared illegal. The ATE promptly appealed against the decisions on the grounds that the Office of the Undersecretary of Labour does not have jurisdiction to declare a strike illegal and this constitutes an act of interference by the State as the employer. Notwithstanding the above, and displaying its willingness to bargain in good faith, the ATE on 15 December 2010 appeared before the Office of the Undersecretary of Labour with the intention of pursuing the negotiations that had begun, but the authorities failed to do likewise and broke off all talks with the ATE.
- 298.** At the same time as the negotiations were being abandoned and the industrial action on 4 and 30 November 2010 was declared illegal, the Director-General and Artistic Manager of Teatro Colón initiated administrative proceedings to determine who was responsible for the industrial action and, pursuant to decision No. 547/EATC/2010, suspended eight workers who were ATE officers, thereby violating their trade union immunity enshrined in Act No. 23551 and article 14bis of the national constitution. As if that were not enough, early in the new year decisions Nos 0627/EATC/2010, 0001/EATC/2011 and 0008/EATC/2011 were issued suspending additional theatre workers and extending the suspensions of the officials who were already suspended.
- 299.** The discriminatory situation subsequently worsened when, on 12 January 2011, representatives of the employer, the GCBA, met with representatives of the Union of State Workers of the City of Buenos Aires (SUTECBA) – the other trade union with official trade union status with regard to the GCBA – and, within the framework of sectoral collective bargaining in Teatro Colón, an agreement was signed whereby a number of workers with permanent contracts were reinstated, excluding the ATE. At the same time, eight of the ten trade union officials on the ATE internal board were suspended for

60 days, the clear intention being to prevent them from working at Teatro Colón while the collective bargaining process was being completed.

- 300.** The ATE reports that appeals were lodged against the suspensions, and intervention by the National Labour Court was requested in order to obtain a stay of execution of the suspensions. Accordingly, four interim measures were issued (with orders for reinstatement) in favour of the trade union officials in the cases of “*Piazza, José Estaban v. GCBA interim measure*” (Case No. 51.442/10), “*Piazza, José Estaban v. GCBA in re interim measure*” (Case No. 53/11), “*Parpagnoli, Máximo v. GCBA in re interim measure*” (Case No. 44/11) and “*Tonazzi, María Sara v. GCBA in re interim measure*” (Case No. 45/11), but the Government and the Teatro Colón autonomous body did not comply with them.
- 301.** At a press conference held by the manager of Teatro Colón on 20 January 2011, a collective agreement with SUTECBA was announced. Under the agreement, there would be a wage increase in line with the theatre’s productivity in 2011, and the theatre undertook to negotiate on the grade and/or administrative career structure in the near future. The ATE points out that the SUTECBA issued an official statement saying that “on 20 January 2011 ... following joint sectoral negotiations within Teatro Colón, and in the absolute conviction that the only valid way to achieve concrete agreements that benefit all colleagues at the theatre is through dialogue in a spirit of mutual respect and collaboration, this trade union delegation is announcing the scope of the points of agreement reached so far. This is a first step towards restoring the reputation of Teatro Colón, and the salaries commensurate with this status ...”.
- 302.** Furthermore, the Director-General and Artistic Manager officially announced the collective agreement from which the ATE had been excluded, and told the media that “this is a groundbreaking agreement because it not only deals with the wage issue but also paves the way for a future where the theatre flourishes and the public can fully enjoy the Colón”. The human resources secretary of the GCBA added that “these people have jeopardized the theatre and tried everything to keep its doors closed, then attempted to discredit each and every one of the actions we have taken”.
- 303.** According to the ATE, the position adopted by the Government constitutes a systematic violation of freedom of association, collective bargaining, the separation of powers and trade union representation in at least the following ways: Firstly, the declaration that the strike was illegal was made without the slightest authority and constituted an attempt to violate recognized constitutional and international law. Secondly, there has been a denial of the right to free collective bargaining with the ATE since an agreement was reached with only one of the trade unions entitled to bargain, thereby violating the principle of bargaining in good faith, and discriminating against one of the representative unions. Thirdly, in the midst of a conflict, sanctions were imposed on the workers and officers of the ATE for participating in the strike.
- 304.** In its communication dated 5 September 2011, the ATE reported that, pursuant to the ruling of 11 August 2011, in the case of “*Association of State Workers et al. v. GCBA in re amparo proceedings*”, the GCBA was fined 50,000 Argentine pesos (ARS) for failing to comply with the ruling concerning the interim measure ordering the Teatro Colón autonomous body to abstain from continuing with collective bargaining. The ATE adds that decision No. 519/EATC/2011 issued by the Teatro Colón autonomous body aggravated the violation of freedom of association since it caused eight officials of that organization to be dismissed as a sanction for having exercised their right to strike (according to the decision, the sanction was imposed because artistic activities had been suspended without justifiable cause; the sanction was enforced by the Attorney-General’s

Office which intervened by filing a judicial application to lift the trade union immunity provided for in the Trade Union Associations Act).

## B. The Government's reply

**305.** In its communication dated 3 November 2011, the Government states that it consulted the Office of the Undersecretary of Labour of the Autonomous City of Buenos Aires, which informed it of the following:

1. Regarding the dispute in the context of collective bargaining and the illegality of the strike, the labour authority of the Government of the Autonomous City of Buenos Aires (GCBA) states that the industrial action paralysed the activities of the Teatro Colón autonomous body, that it did so suddenly and without prior notice, and at a time when collective bargaining was under way and compulsory conciliation had been ordered. The complainant trade union had agreed to comply with it and committed itself to continued dialogue in the record of the hearing. In this context, the workers involved waited until the entire audience was seated in the theatre before occupying the stage and preventing the performance from going ahead. The theatre had to be cleared, tickets had to be refunded and claims for compensation were received from catering franchisees, the artists and their representatives because of the loss of earnings resulting from the cancellation of the performance. It should also be noted that the decisions in question clearly comply with existing national and local law. That being so, the Attorney-General's Office intervened to authorize the dismissal of the trade union representatives involved in the events since they are covered by trade union immunity under Act No. 23551.
2. Sanctions and terminations: the termination of the workers and the corresponding decision are based on the prior administrative proceedings initiated in 2010 to determine the responsibilities of the staff and/or workers directly or indirectly involved in the industrial action that caused the suspension of the activities of the Teatro Colón autonomous body on 4 and 30 November 2010, and/or was prejudicial to the GCBA.
3. Opinion of the Attorney-General's Office: administrative proceedings No. 369/2010. Following an assessment of the facts and evidence, it was concluded that the conduct of one group of workers warranted the sanction of termination, and in other cases the charges were dismissed. The legitimate right of defence guaranteed in the civil service was observed throughout the proceedings. The workers involved remain in their jobs pending a decision on the legal action on lifting trade union immunity.
4. The judicial fine referred to in the supplemental submission is unrelated to the conflict that led to the termination of the workers and is currently being appealed before a higher court.

Lastly, neither the Teatro Colón autonomous body nor any other part of the city Government has violated any ILO Convention or national law. On the contrary, due process has been respected.

## C. The Committee's conclusions

**306.** *The Committee observes that in the present case the ATE alleges bad faith and claims that it was excluded from the collective bargaining process in the Teatro Colón autonomous body. The ATE also objects to the declaration by the GCBA that a strike by the workers of the theatre on 4 and 30 November 2010 was illegal, and to the suspension and subsequent termination of eight ATE officials.*

**307.** *Firstly, the Committee observes that the Government states that in its reply it forwards the information provided by the Undersecretary of Labour of the Autonomous City of Buenos Aires.*

308. *Regarding the allegation of bad faith and exclusion from the collective bargaining process in the Teatro autonomous body (according to the complainant, after the process of negotiation with ATE was abandoned, an agreement was concluded with SUTECBA, from which the ATE was excluded), the Committee notes that the Undersecretary of Labour of the Autonomous City of Buenos Aires states that the complainant trade union took industrial action that paralysed the activities of the Teatro, and that it did so suddenly and without prior notice, and at a time when collective bargaining was under way and compulsory conciliation had been ordered. In this regard, the Committee observes that the Government does not refer to the issue of the exclusion of the ATE from collective bargaining for a sectoral agreement in the Teatro. The Committee observes that, regarding this issue, it appears from the documentation transmitted by the complainant organization that the judicial authorities of the Autonomous City of Buenos Aires: (1) noted that the Sectoral Bargaining Committee of the Teatro held a meeting at which the ATE was not represented and consequently, on 22 February 2011, decided on an interim measure ordering the GCBA and the Teatro to refrain from conducting collective bargaining unless the ATE was included; and (2) having learned that the Teatro had disregarded the interim measure and held a meeting with SUTECBA on 14 June 2011 in order to agree on payment for the maintenance of the orchestra's musical instruments, fined the GCBA 50,000 Argentine pesos (according to the GCBA, an appeal has been lodged against this decision).*
309. *The Committee regrets that the Teatro has failed to comply with the interim measure ordered by the judicial authority and excluded the ATE from the collective bargaining process. The Committee emphasizes the principle that "employers, including governmental authorities in the capacity of employers, should recognize for collective bargaining purposes the organizations representative of the workers employed by them" and also recalls that "it is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties" [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 935]. In these circumstances, the Committee requests the Government to take the necessary steps to ensure that the ATE is not excluded from bargaining on the conditions of employment of workers of the Teatro.*
310. *As regards the alleged declaration by the GCBA that a strike by the workers of the theatre on 4 and 30 November 2010 was illegal, the Committee also notes that it is clear from the documentation transmitted by the complainant organization that the GCBA: (1) instructed the complainant organization to abandon any current or planned direct action throughout the bargaining period; and (2) declared that the industrial action of 4 November 2010 was illegal on the grounds that it had taken place during the bargaining period, and that the industrial action of 30 November 2010 was also illegal on the grounds that it had violated the agreement between the parties under the compulsory conciliation process. The Committee also notes that the Undersecretary of Labour of the Autonomous City of Buenos Aires states that: (1) the industrial action paralysed the activities of the Teatro, and that it did so suddenly and without prior notice, and at a time when collective bargaining was under way and compulsory conciliation had been ordered; (2) the complainant organization had agreed to comply with that order and committed itself to continued dialogue; (3) the workers involved in the strike had waited until the entire audience was seated in the theatre before occupying the stage and preventing the performance from going ahead; and (4) the theatre had to be cleared, tickets had to be refunded and claims for compensation had been received from catering franchisees and the artists. In this regard, while taking note of the criticism of the Undersecretary of Labour of the Autonomous City of Buenos Aires suggesting that the complainant organization failed to obey the law, the Committee recalls that "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” [see *Digest*, op. cit., para. 628]. In these circumstances, the Committee requests the Government to take the necessary steps – including amendments to the legislation if necessary – to ensure that this principle is respected.

- 311.** *Regarding the alleged suspension and subsequent sanction by termination (by decision No. 519/EATC/2011 issued by the Teatro) of eight ATE officers and other workers for participation in the strikes on 4 and 30 November 2010, the Committee notes that the Undersecretary of Labour of the Autonomous City of Buenos Aires states that: (1) the dismissal decisions are based on the prior administrative proceedings initiated in 2010 to determine the responsibilities of the staff and/or workers directly or indirectly involved in the industrial action that caused the suspension of the activities of Teatro; (2) following an assessment of the facts and evidence, it was concluded that the conduct of one group of workers warranted the sanction of termination, and in other cases the charges were dismissed; (3) the legitimate right of defence guaranteed in the civil service was respected throughout the proceedings; and (4) the workers in question remain in their jobs pending a decision on the legal action on lifting trade union immunity (pursuant to an administrative decision, the Attorney-General’s Office intervened by filing a legal action to lift their trade union immunity under Act No. 23551 on trade unions). Observing that, according to the administrative decision in question, it is now incumbent upon the judicial authorities to rule on whether to lift the trade union immunity of the eight ATE officers sanctioned with termination, the Committee requests the Government to keep it informed of the decision taken with regard to this issue, as well as to indicate whether the allegations of suspension of other workers have been subject to judicial proceedings.*

### **The Committee’s recommendations**

- 312.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee requests the Government to take the necessary steps to ensure that the ATE is not excluded from bargaining on the conditions of employment of workers of the Teatro Colón autonomous body.*
  - (b) The Committee requests the Government to take the necessary steps – including amendments to the legislation if necessary – to ensure that responsibility for declaring a strike illegal lies not with the Government but with an independent body which has the confidence of the parties involved.*
  - (c) The Committee requests the Government to keep it informed of the judicial decision with regard to the application for the lifting of the trade union immunity of the eight ATE officers sanctioned with termination and to indicate whether the allegations of suspension of other workers have been subject to judicial proceedings.*

CASE NO. 2867

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government  
of the Plurinational State of Bolivia  
presented by**

- **the Bolivian Workers' Confederation (COB)**
- **the National Federation of Social Security Workers of Bolivia (FENSEGURAL) and**
- **the Departmental Federation of Industrial Workers of La Paz (FDTFLP)**

*Allegations: The complainant organizations allege violence against demonstrators, failure by the Government to comply with agreements, and reprisals against trade unions, union officers and workers who took part in a strike*

- 313.** The complaint is contained in a communication dated 10 May 2011 from the Bolivian Workers' Confederation (COB) and the National Federation of Social Security Workers of Bolivia (FENSEGURAL) and in a communication dated 10 June 2011 from the Departmental Federation of Industrial Workers of La Paz (FDTFLP). The COB sent additional information in a communication dated 14 July 2011.
- 314.** The Government sent its observations in communications dated 7 July, 1 September and 15 November 2011.
- 315.** The Plurinational State of Bolivia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainants' allegations**

- 316.** In its communication dated 10 May 2011, the Bolivian Workers' Confederation (COB) states that because of the Government's lack of response to its demands it organized a protest march from the town of Caracollo to La Paz. On 10 May 2010 the COB, in conjunction with the mobilized union members, had reached an agreement with the Government in the town of Panduro to engage in direct negotiations with a view to settling the collective dispute with the Government. Subsequently, direct negotiations were opened in accordance with the procedure established by the labour legislation, in particular section 105 et seq. of the General Labour Act, and this resulted in the signature of a collective agreement, thereby ending the dispute. One of the points in the collective agreement states that the Government undertakes to promote labour standards in consensus with the COB.
- 317.** The COB indicates that, in the above context and in accordance with the Panduro agreement, the negotiation board was set up in February 2011 with a view to considering the confederation's demands for 2011, including with regard to a pay increase, the revival of production, the repeal of Supreme Decree No. 21060, the General Labour Act and trade union immunity. The COB adds that, after reaching an intermediate stage in the

negotiations and expressly requesting the Government to observe the consensus established in the Panduro agreement whereby it would not take any decisions on pay increases without the agreement of the confederation, the Government violated the agreement and promulgated Supreme Decree No. 809 of 2 March 2011, which establishes a paltry wage increase of 10 per cent for only two sectors (health and education), showing blatant discrimination against all other workers and totally failing to comply with the Panduro agreement.

- 318.** In view of this outrageous failure of the Government to show integrity towards the workers and observe the Panduro agreement, the COB decided in April 2011 on the gradual mobilization of all workers in the direction of La Paz. After 16 days of protest marches, the Government agreed to meet the COB and on 17 April 2011 a new eight-point agreement was signed at the Office of the Vice-President of the Plurinational State, after more than 30 hours of negotiations.
- 319.** The COB states that, in view of the Government's failure to observe the Panduro agreement, it was totally lawful to declare the strike. The COB thus declared an indefinite general strike, which obliged the President to hold meetings for more than 18 hours in order to reach a new agreement.
- 320.** According to the COB, during the demonstrations the country's workers were the victims of brutal repression by the repressive apparatus of the State, in the form of detention, criminal trials and harassment. Trade union immunity and the most basic human rights were violated, since the workers (men and women) were the target of aggression and beatings, gunfire and tear gas, all involving pre-meditated brutality and malice. The COB alleges repression, harassment, detentions and beatings of workers, such as occurred against rural teachers in La Apacheta, and beatings and detentions of workers (men and women) in La Paz and other cities in the country. The COB declares that these acts cannot go unpunished.
- 321.** The COB indicates that on 17 April 2011, continuing the direct negotiation procedure, an agreement was signed at the Office of the Vice-President of the Plurinational State which incorporated the following eight points: (1) an 11 per cent pay increase made retroactive to January 2011, with a further 1 per cent as from August 2011; (2) the repeal of Supreme Decree No. 21060 as from 1 May 2011; (3) revival of the apparatus of production; (4) restructuring of the National Health Fund (CNS); (5) revision of Act No. 2007 and Act No. 2028 as from 20 April 2011 (not complied with); (6) respect for trade union immunity; (7) observance of the Panduro agreements; and (8) keeping the COB informed with regard to food security and stability and accessibility of food prices.
- 322.** The COB alleges that the new agreement of 17 April 2011 with the Government was not honoured either, since Supreme Decree No. 21060 of 1 May 2011 was not repealed; rather, the Government tried to dupe the COB with a speech in which it announced the "elimination" of any legal provision deriving from Supreme Decree No. 21060, which is not the same as repealing that Decree. According to the COB, the Government also failed to implement the 11 per cent pay increase with retroactive effect to January 2011 and instead proceeded to dismiss workers and deduct pay for strike days from teachers, CNS workers and public health workers. In addition, it adopted Criminal Supreme Decree No. 846 as in the times of dictatorship and neo-liberalism, using its absolute power. This was an act of revenge, and it was alleged that the strike was illegal, when it was quite clear that the strike was legal because of the Government's own failure to honour the Panduro agreement. Furthermore, the Government's abuse and arrogance reaches its height in the blatant violation of all the labour legislation and particularly Supreme Decree No. 19637 of 4 July 1983, which states that deductions from pay must serve the workers themselves in the cultural and social activities of the organizations to which they belong, but the

Government used the pay deductions as it saw fit, confiscating and appropriating them for its own political purposes.

- 323.** The COB considers that it has fulfilled the requirements of section 105 et seq. of the General Labour Act and also article 46 et seq. of the Political Constitution of the Plurinational State of Bolivia (Political Constitution), which establishes the right to strike, and finds that the Government has violated the ILO Conventions relating to freedom of association and collective bargaining through its failure to honour the Panduro agreements, with the promulgation of Supreme Decree No. 809 and Supreme Decree No. 846, arbitrary and illegal misuse of deductions from pay, criminal trials and harassment of union officers.
- 324.** In its communication of 14 July, the COB points out that the ministries responsible for the treasury, labour, health and education continue to dock pay in an arbitrary and illegal manner from workers who took part in the strike and that the summary proceedings against them are still in progress. Harassment of union officers has escalated as a result of interference from the Government, which, through the Ministry of Labour, Employment and Social Security (Ministry of Labour), refuses to issue ministerial decisions establishing the right of elected union officers to take trade union leave, as provided for by the General Labour Act. Specifically, the COB makes the following allegations: (1) failure to issue the ministerial decision with respect to the Departmental Workers' Confederation of Santa Cruz; (2) failure to issue the ministerial decision with respect to the Postal Workers' Union of Bolivia (SINDECOBOL) and illegal deductions from workers' wages; (3) illegal deductions from the pay of workers belonging to the National Confederation of Urban Teachers of Bolivia; (4) failure to recognize the Eastern Rail Network Workers' Federation for supporting the strike, failure to issue the ministerial decision concerning the union, illegal pay deductions and dismissal of union officers; and (5) failure to issue the ministerial decision, illegal pay deductions and dismissal of union officers from the Santa Cruz Rail Workers' Union.
- 325.** In its communication of 10 May 2011, the FENSEGURAL states that the dispute involving FENSEGURAL stems from the promulgation of Finance Act No. 62 of 28 November 2010, section 23 of which provides that the social security funds must open fiscal accounts authorized by the Deputy Minister of Economic and Financial Affairs and its Regulatory Decree No. 772 of 18 January 2011, section 8 of which establishes a 60-day period for the social security funds to open their fiscal accounts at a bank authorized by the Deputy Minister of the Treasury, namely the Banco Unión, and to submit to this outrage. FENSEGURAL points out that the CNS has already had fiscal accounts since 1993 and the Government had no reason to demand that such accounts be re-opened, least of all via a bank such as the Banco Unión, which is now run by the State. According to FENSEGURAL, this shows that the Government was aiming to keep the social security assets in its own bank with clearly dubious intentions. The administrative authority issued a circular on 22 February 2011 and sent it to the funds, including the CNS, instructing them to comply with this order, failing which they would be liable to penalties. The funds, together with the COB, issued a statement to the public concerning the attempted confiscation of resources.
- 326.** In view of this situation and other nationwide disputes, such as those concerning non-compliance with the demands submitted by the COB to the Government and the interruption of the dialogue concerning pay increases, which in the first instance was a proposal related to the cost of living to which the Government failed to reply, FENSEGURAL and the other COB member organizations decided to launch a general strike for an indefinite period. With mass participation of more than 3,000 out of the 11,000 national members, most of whom are concentrated in La Paz, FENSEGURAL was at the forefront of the COB demonstrations. Observance of the eight points submitted by



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the COB to the Government was called for, including the repeal of section 23 of Act No. 62 and section 8 of Regulatory Decree No. 772.

- 327.** On 8 April, the Ministry of Labour, via Ministerial Decision No. 42, declared the COB and FENSEGURAL strike to be illegal, as from 4 April. According to FENSEGURAL, the right to strike established in article 53 of the Political Constitution has been violated and the offence of pre-judgement is being committed, since the decision did not even indicate when the strike would end. Moreover, the right to negotiation arising from the dispute between the Government and the COB is being violated. In view of Ministerial Decision No. 42, as is appropriate in response to an administrative act of this nature, FENSEGURAL and other national organizations representing the CNS workers are filing a legitimate appeal with the same Ministry, and this is currently pending. On 11 April, the Minister of Health sent a note to the CNS general manager, to which Ministerial Decision No. 42 was attached, not only declaring the work stoppage supported by the CNS to be illegal but also instructing it to take measures such as dismissing the workers who were involved in the stoppage for more than six days. This was despite the fact that the Ministry of Health does not have the status of employer with regard to the CNS, since the latter is owned by the contributing workers and not by the State, least of all the Government.
- 328.** FENSEGURAL indicates that on 12 April the Government promulgated Supreme Decree No. 841, which provides that all public health establishments, social security management bodies and other non-profit-making establishments subject to agreements shall, on an exceptional and immediate basis, provide health care to persons affiliated to the CNS. It should be noted that all social security funds took part in the indefinite general strike declared by the COB. The complainant also adds that the CNS, being a health entity, did not stop providing emergency care and different shifts were organized to take part in the demonstrations (one group of workers being mobilized one day while others stayed at work, and vice versa the following day).
- 329.** On 13 April 2011, another unconstitutional decree (Supreme Decree No. 846) was promulgated, stating that in order to guarantee the exceptional regime of the previous decree, the revenue generated by the deductions accruing from the strike – which was claimed to be illegal – would be used for the purchase of medical supplies in oncology and paediatrics for the public health system networks. The Ministry of Health has its own budget, which is what it should use for this purpose and not seek to use the workers' money, as provided for by the previous supreme decree.
- 330.** On 17 April, an agreement was signed between the Government and the COB, to the effect that the strike would be suspended on 18 April, the decisions reached to be communicated to the authorities so that everything would return to normal in the country. On 4 May, because of the attempted pay deductions for the strike days and pressure from the Ministry of Labour and the Ministry of Health, FENSEGURAL and the COB met the CNS authorities. It was explained that while Ministerial Decision No. 42 issued by the Ministry of Labour declaring the strike to be illegal was being challenged by an appeal and until such time as administrative labour remedies were exhausted, no deductions could be made until a verdict was issued on the matter or it was overturned in favour of the workers. The lawyers and the authorities concurred and the general manager therefore ordered wages to be paid for April without any deductions, pending review by the Ministry of Labour. On 5 May, the Deputy Health Minister sent a note to the CNS general manager and ordered him to apply Supreme Decree No. 846, disregarding the document signed by the general manager, violating the managerial and administrative autonomy of the CNS and hinting that dismissals would occur at the CNS.

- 331.** On 6 May, the financial manager ordered deductions at three-day intervals as from April from all CNS staff, regardless of the fact that many workers had not taken part in the stoppage, such as those on holiday, those working on the night shift in hospitals, those working emergency shifts, kitchen and laundry workers, porters, ambulance drivers for the emergency networks, surgeons and operating theatre staff, and many others including those on sick leave, as well as FENSEGURAL officers on union leave and others belonging to the various social security unions throughout the country.
- 332.** FENSEGURAL considers that the above is clear evidence of violation of the rights established in the Political Constitution and that the agreement between the COB and the Government is broken. FENSEGURAL requests the Committee to send a commission to the country in connection with these facts.
- 333.** In its communication of 10 June 2011, the FDTFLP alleges the following violations of trade union rights:
- Case of Ms Fidelia Flores Gómez from the LAFAR Laboratorios Farmacéuticos (pharmaceutical laboratories) enterprise: she was elected general secretary of the LAFAR Industrial Workers' Union from 6 February 2009 to 5 February 2010, and was also elected secretary for women's issues and social action from 28 May 2009 to 27 May 2011. Despite enjoying the union immunity established by article 51(VI) of the Political Constitution, she was wrongfully dismissed from her post in June 2009 without regard for section 242 of the Labour Proceedings Code, which states that until such time as a ruling has been issued removing union immunity, the worker concerned shall remain in his/her post. To date, Ms Fidelia Flores Gómez has received no pay for more than two years, which is a clear violation of the right to organize. The background to the case is attached as evidence.
  - Case of Mr Hilder Alarcón Mayta and Mr Marco Antonio Herbas Córdova from the Wiled SRL Patisu Ltda enterprise: the officers were dismissed wrongfully and without due notice despite their union immunity, as recognized by Ministerial Decision No. 208/10 of 24 March 2010 and Ministerial Decision No. 356/10 of 18 May 2010. Further to the illegal dismissals and the issue of reinstatement orders by the Ministry of Labour, which the enterprise refused to implement, an appeal for *amparo* (protection of constitutional rights) was filed, having been declared admissible; despite this, however, the enterprise still refuses to reinstate the workers in their posts and in their union activities. To date, Mr Hilder Alarcón Mayta and Mr Marco Antonio Herbas Córdova have received no pay and been unable to exercise their union activities for a year, which is a clear violation of the right to organize.
  - Case of union officers Mr Mario Chipana Mamani, Mr Genaro Espejo Huanca, Mr Ramiro Saire Lliulli and Mr Lucio Apaza Nina of the Novara SRL enterprise: the workers were elected as officers of the Novara SRL Industrial Workers' Union as from February 2011. Despite having this status, they were wrongfully dismissed on 20 May 2011, their union immunity thus being violated. The Ministry of Labour issued a reinstatement order. However, this public institution does nothing to enforce its decisions, thus failing to discharge its duties. To date, Mr Mario Chipana Mamani, Mr Genaro Espejo Huanca, Mr Ramiro Saire Lliulli and Mr Lucio Apaza Nina have been unable to exercise union activity and have received no pay, which is a clear violation of the right to organize.

## B. The Government's reply

- 334.** In its communication of 7 July 2011, the Government states that the complaint presented by the COB reports the existence of a collective agreement (Panduro agreement) which provides for the possibility of settling collective disputes; however, nowhere does it identify the collective dispute in question, merely stating that there was a failure to comply with the agreement. It is therefore important to make the following clarifications: (a) the underlying basis for the Panduro agreement was the petition to reform the Pensions (Long-Term Insurance) Act, on the basis of contributions from the State and the employers. Honouring and respecting this agreement, the Government decided to set up labour commissions, with the participation of the COB. The discussions were concluded with the promulgation of the Pensions Act (No. 065) of 10 December 2010, in a public ceremony held at the offices of the COB itself, in the presence of the persons who presented the complaint to the International Labour Organization (ILO); and (b) it should be made clear that the Panduro agreement is not a collective labour agreement but a political agreement whereby the Government expresses its willingness to allow the participation of the labour sector in the formulation of preliminary draft legislation. However, this concession should not be construed as the delegation of constitutional powers to labour organizations; it should be made clear that the authority to legislate rests with the legislature of the Plurinational State of Bolivia, in the context of the independence of state bodies, without any interference from the executive authority.
- 335.** The Government adds that its archives and records show that the last set of claims submitted by the COB to the Government was for 2007 and no claims were submitted for 2008–11. The wage increase for 2011 provided for by the Executive of the Plurinational State was authorized under the powers established in article 175(5)(I) of the Political Constitution, in accordance with section 14(I) of Supreme Decree No. 29894 of 7 February 2009 concerning the organization of the Executive. For this purpose, annual inflation of 7.18 per cent in 2010 was taken into account and Supreme Decree No. 0809 of 2 March 2011 was issued, which determines a 10 per cent increase for 2011.
- 336.** Here it should be noted that the fourth point of the Panduro agreement sets out the Government's undertaking not to approve any law that goes against the interests of the labour sectors affiliated to the COB. This wage increase was set at one percentage point above the annual inflation rate, thus setting a real wage increase of benefit to the workers, not to their detriment, as implied by the complaint which was presented; no measures were adopted at any time that involved pay reductions or freezes or an increase below the rate of inflation.
- 337.** With regard to the strike undertaken by certain sectors affiliated to the COB, the Government states that the action was pursued by a number of workers from two sectors affiliated to the COB (health and education) and certain members of the executive committees concerned. The COB states that the procedures concerning legal strikes established by section 105 of the General Labour Act had been exhausted, owing to the fact that the collective agreement signed in Panduro in 2010 had allegedly not been honoured by the Government. Here reference should be made to article 53 of the Political Constitution, which provides that the right to strike is guaranteed as the exercise of the workers' legal entitlement to interrupt work in defence of their rights, in accordance with the law, and also section 105 of the General Labour Act of 8 December 1942, which states that any unscheduled stoppage of work in any enterprise by either employers or workers shall be prohibited until all means of conciliation and arbitration provided for under the present title have been exhausted, otherwise the stoppage shall be deemed illegal. Moreover, article 38(II) of the Political Constitution states that health services shall be provided without interruption, and section 118 of the General Labour Act adds that the suspension of work in public services shall be prohibited. Any breach of the

aforementioned provision shall incur the maximum penalties under the law. The Government indicates that the teachers, CNS workers and public health sector workers took part in the strike in blatant violation of the abovementioned legal provisions.

- 338.** As regards the right to strike, the Government guarantees the exercise thereof under the provisions of the Political Constitution and the General Labour Act. A strike represents an extreme course of action called for by a trade union when it has been unable to settle a dispute by means of conciliation or arbitration and involves a peaceful suspension of work; however, the violent mobilization instigated by the workers concerned violated the provisions of section 117 of the General Labour Act, which states that the concept of the strike means the peaceful suspension of work and any hostile act or demonstration against persons or property shall incur criminal penalties. In this context, the supreme task of the Government is to guarantee the fundamental right to education, health and work as provided for in articles 9(5) and 18(I) of the Political Constitution.
- 339.** As regards the allegation that the workers were the victims of brutality by the repressive apparatus of the State, were tear-gassed, illegally detained, subjected to criminal trials and harassed constantly by government officials, their trade union immunity thus being violated, the Government wishes to make it clear that the Plurinational State of Bolivia, by constitutional mandate, does not have a repressive apparatus but legally established defence and protection institutions. Article 251(I) of the Political Constitution states that the Bolivian police, as a public force, has the specific mission to defend society, preserve public order and enforce the law throughout the national territory. In this case it acted accordingly, protecting public safety, private and public property, the institutional heritage of the State and the national emblems.
- 340.** The Government adds that trade union immunity represents a constitutional guarantee conferred on union officers, in accordance with article 51(6) of the Political Constitution, Legislative Decree No. 38 (raised to the status of Act No. 3352 of 21 February 2006) and Supreme Decree No. 29539 of 1 May 2008. Hence the Government has never disregarded the fundamental right of union immunity. On the contrary, it protects and guarantees it. All in all, the complaint lacks any factual or legal basis; the fulfilment of a constitutional mandate in response to events that violate the most basic principles such as social peace and respect for the state of law cannot be deemed a violation of trade union immunity.
- 341.** Finally, the COB states in its document that as a continuation of the direct negotiation procedure an eight-point agreement was signed on 17 April 2011 at the Office of the Vice-President of the Plurinational State and it claims that the agreement was not honoured, inasmuch as Supreme Decree No. 21060 of 29 August 1985 was not repealed. It is important to note that the second point of the agreement between the Government and the COB states that a Supreme Decree will be drafted by both parties for promulgation on 1 May, providing for the definitive elimination of Supreme Decree No. 21060. Thus Supreme Decree No. 0861 was issued on the said date, “providing for the complete elimination of any legal provision or consideration established by Supreme Decree No. 21060”, with the further establishment of a high-level commission representing both the Executive and the COB.
- 342.** The Ministry of Education, in order to guarantee the continuity and regularity of educational activities and the quality of the education service, in accordance with section 23 of Supreme Decree No. 23968 of 24 February 1995, which established education as a public service whose continuity and regularity is essential for the achievement of quality objectives, determined that any stoppages, strikes or unjustified absences would not be entitled to remuneration under the public education service regulations. Accordingly, with the exception of unionized teachers on union leave, teachers were guaranteed to be paid for days actually worked, on the basis of the procedure established in Ministry Decision

No. 503/04 of 4 April 2004, according to reports written by the departmental and district education directorates which were forwarded to the staff management unit of the Plurinational Education Service attached to the Ministry of Education.

**343.** Finally, the Government emphasizes that the Plurinational State of Bolivia, in the context of ratified international instruments for the protection of the right to work, guarantees freedom of association at all levels, and also unions' right to the free exercise of functions assigned under the Political Constitution for the defence of workers' interests.

**344.** In its communication of 1 September 2011, the Government makes the following statement in relation to the allegations presented by the FDTFLP:

- (1) Case of Ms Fidelia Flores Gómez from the LAFAR Laboratorios Farmacéuticos enterprise: further to checks in the systems and archives regarding claims of violation of trade union immunity, no record was found of the complaint made by Ms Fidelia Flores Gómez regarding union immunity but only a "first summons regarding an occupational accident and a pay reduction". Hence, there is no evidence of presentation of the formal complaint to the Ministry of Labour.
- (2) Case of Mr Hilder Alarcón Mayta and Mr Marco Antonio Herbas Córdova from the Wiled SRL Patisu Ltda enterprise: the Ministry of Labour issued the corresponding reinstatement order to Wiled SRL Patisu Ltda, failure to implement which would incur the corresponding penalty and result in the Labour and Social Security Court being informed.
- (3) Case of Mr Mario Chipana Mamani, Mr Genaro Espejo Huanca, Mr Ramiro Saire Lliulli and Mr Lucio Apaza Nina of the Novara SRL enterprise: given the violation of union immunity, the Ministry of Labour will issue the corresponding reinstatement order to Novara SRL, failure to implement which would incur the corresponding penalty and result in the Labour and Social Security Court being informed.

**345.** The Government wishes to point out that the Plurinational State of Bolivia does not have any sort of complicity with private enterprise; rather, the Ministry of Labour is an institution which is unyielding in the defence and protection of workers' constitutionally established social and labour rights, as expressed by the Political Constitution of the Plurinational State of Bolivia. Trade union immunity is a constitutional guarantee conferred on union officers. The Ministry of Labour has acted in accordance with the labour legislation in force and has followed all due procedures for the reinstatement of the dismissed workers and union officers, bearing in mind that under paragraph IV of Supreme Decree No. 0495 and Ministerial Decision No. 868/2010 the workers have filed for constitutional amparo.

**346.** As regards the allegations made by the FENSEGURAL, the Government makes the following statement:

- (1) As regards the opening of fiscal accounts: section 23 of Finance Act No. 062 of 28 November 2010 establishes that the social security funds must open fiscal accounts authorized by the Deputy Minister of Economic and Financial Affairs; in addition, section 8 of Regulatory Decree No. 772 of 19 January 2011 establishes that the social security funds must open their fiscal accounts at the Banco Unión within 60 days. At no time did the Government seek to confiscate the financial resources of the social security funds; the only intention was to enforce Finance Act No. 062, inasmuch as the CNS and the other funds are public bodies which are subject to the law like any other institutions.

- (2) As regards the indefinite general strike of the CNS: the request from the COB to repeal section 23 of Finance Act No. 062 and section 8 of Regulatory Decree No. 772 was inappropriate, since laws are not subject to negotiation but necessitate compliance. Accordingly, article 53 of the Political Constitution provides that the right to strike is guaranteed as the exercise of the workers' legal entitlement to interrupt work in defence of their rights, in accordance with the law. Moreover, section 105 of the General Labour Act of 8 December 1942 states that any unscheduled stoppage of work in any enterprise by either employers or workers shall be prohibited until all means of conciliation and arbitration provided for under the present title have been exhausted, otherwise the stoppage shall be deemed illegal. Furthermore, article 38(II) of the Political Constitution states that health services shall be provided without interruption, and section 118 of the General Labour Act adds that the suspension of work in public services shall be prohibited. However, the teachers, CNS workers and public health sector workers violated the strike prohibition established by the General Labour Act without exhausting the conciliation and arbitration mechanisms provided for in the General Labour Act. A strike represents an extreme course of action called for by a trade union when it has been unable to settle a dispute by means of conciliation or arbitration and must involve a peaceful suspension of work; however, the violent mobilization instigated by the workers concerned violated the provisions of section 117 of the General Labour Act, which states that the concept of the strike means the peaceful suspension of work and any hostile act or demonstration against persons or property shall incur criminal penalties. In this context, the supreme task of the Government is to guarantee the fundamental right to education, health and work, as provided for in articles 9(5) of the Political Constitution, which indicate that guaranteeing public access to education, health and work forms part of the essential duties of the State.
- (3) As regards the deductions for days not worked: further to the strike being declared illegal, Supreme Decree No. 846 was promulgated, which provides for deductions from all workers and professional staff at the CNS; moreover, it provides that the resources accumulated through these deductions shall benefit the oncological centres of the CNS itself through the purchase of specialist medicines, a situation that benefits the most needy persons affiliated to the social security schemes. For that reason, these resources cannot revert to the workers themselves. Before the deductions were made, the CNS was asked to send a list of staff on the payroll who took part in the strike but the list was never sent, and this resulted in deductions being made from CNS staff who were working shifts, from union officers, etc.

**347.** Finally, the Government states that since 2006 it has adopted various labour provisions and standards in favour of the workers, such as Supreme Decree No. 28699, which promotes the labour stability of workers, raising Legislative Decree No. 38 concerning trade union immunity to the rank of Act No. 3352, and above all the Political Constitution of the Plurinational State of Bolivia, which came into force in February 2009 and is extremely protective of the workers, guaranteeing above all the stability and irremovability of trade union officers.

**348.** In its communication of 15 November 2011, the Government makes the following statement in relation to the additional information supplied by the COB:

- regarding the ministerial decision relating to the Departmental Workers' Confederation of Santa Cruz: the archives of the Ministry of Labour show that Ministerial Decision No. 628/10 of 12 August 2010 extended Ministerial Decision No. 211/09 of 7 April 2010 concerning union recognition and union leave until 30 October 2010, as well as the restructuring of the executive committee of the Departmental Workers' Confederation of Santa Cruz. Consequently, mention should

be made of the provisions of the Political Constitution, since this is the fundamental legal instrument of the State to which all standards of lower rank must be aligned. It should be noted that the Political Constitution maintains its juridical nature, being by definition the supreme and fundamental legal instrument within the Plurinational State of Bolivia. Therefore, when a fundamental instrument comes into force, its provisions must be applied with immediate effect. Accordingly, in line with the mandate established by article 410 of the Political Constitution, since the latter is the supreme instrument of the Bolivian legal system and takes absolute precedence, any other legal standard must be aligned to the new constitutional order in observance of, and coherence with, international human rights treaties and conventions ratified by the country and forming part of the constitutional bloc. In this context, according to the documentation sent by the Departmental Workers' Confederation of Santa Cruz, the existence of objections was initially determined regarding the failure of union officers to comply with the union's own regulations. Firstly, with respect to numbers and functions, it emerges that there are more than 100 elected officers, whereas section 20 of the union regulations stipulates 25 elected officers. Secondly, the leadership presence at its second general assembly does not reflect the class proportional representation that guarantees the hegemony of the proletariat in the structure and management of the confederation, in accordance with sections 4(d), 14 and 15 of the union regulations, approved by Supreme Decree No. 206427. In the light of the above, and in view of the fact that the present request did not come within the scope of article 51(I) of the Political Constitution, ILO Convention No. 87 or the union's own regulations, it was impossible to continue with the procedures concerned inasmuch as the Ministry of Labour is prohibited in law from interfering in the internal and organic disputes of such organizations, in accordance with Article 3(2) of ILO Convention No. 87;

- regarding the ministerial decision relating to the SINDECOBOL: by means of Ministerial Decision No. 895/10 of 8 November 2010, the Ministry of Labour recognizes the leadership of the SINDECOBOL located in La Paz, who were elected to hold office from 26 August 2010 to 25 September 2011. Consequently, on 14 July 2011, the date on which the COB presented the additional information relating to the complaint, Ministerial Decision No. 895/10 was in force until 25 September 2011. Hence this allegation is untrue and groundless since it is clear that Ministerial Decision No. 895/10, which was issued with respect to SINDECOBOL, was in force on 14 July 2011 and was valid until 25 September 2011;
- regarding the ministerial decision relating to the Eastern Rail Network Workers' Federation: by means of Ministerial Decision No. 198/10 of 17 March 2010, the Ministry of Labour recognizes the leadership of the Eastern Rail Network Workers' Federation and their entitlement to union leave during their elected term of office from 18 July 2009 to 17 July 2011. Moreover, on 14 July 2011, the date on which the COB presented the additional information relating to the complaint, Ministerial Decision No. 198/10 was in force until 17 July 2011. Hence this allegation is untrue and groundless since Ministerial Decision No. 198/10 was valid until 17 July 2011 and has not been revoked by the Ministry of Labour;
- regarding the ministerial decision relating to the Santa Cruz Rail Workers' Union: the ministerial decision relating to the Santa Cruz Rail Workers' Union which is valid until August 2012 is still in force and has not been and will not be revoked by the Ministry of Labour.

**349.** With regard to the deductions for taking part in the strike, the Government makes the following statement:

- regarding the deductions from the National Confederation of Urban Teachers of Bolivia: section 23 of Supreme Decree No. 23968 of 24 February 1995 establishes that education is a public service in which the continuity and regularity of educational activities is essential for the achievement of quality objectives. Hence any stoppages, strikes or unjustified absences would not be entitled to remuneration or compensation of any sort under the public education service regulations. Accordingly, with the exception of unionized teachers on union leave, the teachers were paid for days actually worked, on the basis of the procedure established in Ministerial Decision No. 503/04 of 4 April 2004, according to reports written by the departmental and district education directorates which were forwarded to the staff management unit of the Plurinational Education Service attached to the Ministry of Education;
- regarding the deductions from SINDECOBOL in La Paz: with regard to the allegations of unjustified deductions from this union, the Bolivian Postal Service (ECOBOL), by means of communication DENAPER No. 0168/11 of 21 April 2011, asked the Ministry of Labour for information on the arrangements made by the COB and the measures that should be applied to the officials who were absent from work between 6 and 18 April 2011. Accordingly, the Ministry of Labour sent ECOBOL the report of the Departmental Labour Chief of La Paz, attaching three administrative decisions which were issued concerning the strike days called by the COB. The aforementioned administrative decisions do not refer to the ECOBOL workers and hence the enterprise did not make any deductions with respect to the SINDECOBOL members in La Paz. However, ECOBOL, through its national personnel department in mutual agreement with SINDECOBOL in La Paz, allowed workers to leave their posts in groups of no more than 20 persons to enable them to take part in the protest marches called by the COB, without any deduction of pay. It should be noted that ECOBOL worked as normal during the strike days called by the COB;
- regarding the deductions from the Eastern Rail Network Workers' Federation: the National Railways Enterprise (ENFE) comprises two sections, namely the western network, which is a state enterprise, and the eastern network, which has undergone privatization. The trade union within the ENFE western network is the Unified Single Railway Union, which enjoys full respect of its rights to organize and freedom of association, and so ENFE did not make any deductions from the affiliated workers or initiate any proceedings, let alone effect any dismissals, with respect to the strike days called by the COB. Accordingly, ENFE announced, by means of communication P.E./No.460/11 of 5 October 2011, that its eastern network, as a result of the privatization of the Bolivian railways, had ceased operations, assuming a residual function as administrator of the national heritage, not affecting the public rail service, and so the allegation made by the COB is totally untrue, since at no time were deductions made from the workers for the strike declared by the COB. The Ferroviaria Oriental SA enterprise, for its part, made no deductions of any kind from the workers for the dates of the work stoppage called by the COB in April 2011, and the union officers are covered in their rights, benefits and obligations by the legal provisions in force, with no dismissals being effected.

### C. The Committee's conclusions

**350.** *The Committee observes that in the present case the COB alleges that, owing to the Government's failure to comply with an agreement signed by the COB and the Government in the town of Panduro in May 2010, it launched a general strike with protest marches in April 2011 which were the target of brutal repression (involving assaults, gunfire, beatings and detentions) by the repressive apparatus of the State, and that subsequently: (1) a new agreement was reached with the Government on 17 April 2011 with which the Government also failed to comply: (2) the ministerial decisions establishing*



the entitlement to union leave of the elected officers of the Departmental Workers' Confederation of Santa Cruz, the trade union at the ECOBOL enterprise, the Santa Cruz Rail Workers' Union and the Eastern Rail Network Workers' Federation were not issued; (3) illegal deductions were made from the pay of workers who took part in the strike at ECOBOL and of workers belonging to the National Confederation of Urban Teachers of Bolivia, the Eastern Rail Network Workers' Federation and the Santa Cruz Rail Workers' Union; and (4) union officers were dismissed from the Eastern Rail Network Workers' Federation and the Santa Cruz Rail Workers' Union. The Committee further observes that: (1) the FENSEGURAL alleges that the strike undertaken by the workers of the CNS together with the COB was declared illegal and that, although an appeal was filed against the declaration, pay for the strike days was deducted from all staff, regardless of the fact that many workers did not take part in the strike; and (2) the FDTFLP alleges the dismissal of a number of union officers at various enterprises.

#### Allegations from the Bolivian Workers' Confederation (COB)

**351.** *With regard to the alleged repression by the repressive apparatus of the State (involving assaults, gunfire, beatings and detentions) of workers who were taking part in a strike and demonstrations, the Government declares that: (1) the Plurinational State of Bolivia, by constitutional mandate, does not have a repressive apparatus but legitimately established defence and protection institutions; (2) the Political Constitution states that the police, as a public force, has the specific mission to defend society, preserve public order and enforce the law throughout the national territory; (3) in this case, it acted to protect public safety, private and public property, the institutional heritage of the State and the national emblems; and (4) the fulfilment of a constitutional mandate in response to events that violate the most basic principles such as social peace and respect for the state of law cannot be deemed a violation of trade union immunity. Observing that the Government confirms the intervention of the police but does not refer to the alleged violence and that the complainant has not sent any specific information (names of the workers who were reportedly assaulted, injured or taken into custody, etc.), the Committee recalls that it has emphasized on many occasions that “in cases in which the dispersal of public meetings by the police has involved loss of life or serious injury, the Committee has attached special importance to the circumstances being fully investigated immediately through an independent inquiry and to a regular legal procedure being followed to determine the justification for the action taken by the police and to determine responsibilities”. Also, the Committee recalls that “taking part in picketing and firmly but peacefully inciting other workers to keep away from their workplace cannot be considered unlawful. The case is different, however, when picketing is accompanied by violence or coercion of non-strikers in an attempt to interfere with their freedom to work; such acts constitute criminal offences in many countries” [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 49 and 651]. The Committee therefore invites the complainant organization to send to the authorities the names of the persons who were assaulted, injured or taken into custody during the general strike and demonstrations held in April 2011 so that the Government can conduct an investigation without delay to determine responsibilities and, should excessive force prove to have been used, so that the perpetrators can be punished.*

**352.** *With regard to the Government's alleged failure to comply with the agreements signed in Panduro in May 2010 (according to the complainant, the Government failed to comply with what was agreed as regards not taking any decisions on pay increases without the consent of the COB) and on 17 April 2011 (according to the complainant, the Government failed to comply with this agreement by not repealing Supreme Decree No. 21060), the Committee notes the Government's statement that: (1) the Panduro agreement was connected with the petition to reform the Pensions Act and in accordance with this agreement the Government decided to set up labour commissions with the participation of*

the COB and the discussions concluded with the promulgation of the Pensions Act (No. 065) in December 2010 at the COB offices; (2) the Panduro agreement is not a collective labour agreement but a political agreement whereby the Government allowed the participation of the labour sector in the formulation of preliminary draft legislation; (3) the COB did not submit a list of claims; (4) the pay increase for 2011 is in line with the Panduro agreement in that it reflects the Government's undertaking not to approve any law that goes against the interests of the labour sectors affiliated to the COB; and (5) the agreement of 17 April 2011 established that a supreme decree would be drafted by both parties to provide for the definitive elimination of Supreme Decree No. 21060, this occurred in the form of Supreme Decree No. 0861, and a high-level commission representing both the Executive and the COB was established. Observing that the versions of the Government and the complainant differ as regards compliance with the agreements, the Committee recalls "the importance which it attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations" and in particular that "agreements should be binding on the parties" [see *Digest*, *op. cit.*, paras 934 and 939].

- 353.** With regard to the allegations of failure to issue the ministerial decisions establishing the union leave entitlement of the elected officers of the Departmental Workers' Confederation of Santa Cruz, SINDECOBOL, the Santa Cruz Rail Workers' Union and the Eastern Rail Network Workers' Federation, the Committee notes the Government's statement that: (1) with respect to the Departmental Workers' Confederation of Santa Cruz, the existence of objections in the documentation sent by the confederation was established in relation to non-compliance by its officers with the confederation's own regulations and hence it was impossible to continue with the procedures concerned; (2) with respect to SINDECOBOL, the allegation is untrue since Decision No. 895/10 remains in force until 25 September 2011; (3) with respect to the Eastern Rail Network Workers' Federation, Decision No. 198/10 remains in force until 17 July 2011; and (4) with respect to the Santa Cruz Rail Workers' Union, the ministerial decision remains in force until August 2012 and will not be revoked by the Ministry of Labour. The Committee therefore expects that once the objections regarding non-compliance with the regulations of the Departmental Workers' Confederation of Santa Cruz have been settled, the decision will be issued, if appropriate, establishing the union leave entitlement of the union officers concerned.
- 354.** With regard to the alleged illegal deductions of pay from workers who took part in the strike, namely members of the National Confederation of Urban Teachers of Bolivia, the Eastern Rail Network Workers' Federation and the Santa Cruz Rail Workers' Union, the Committee notes the Government's statement that: (1) with respect to the National Confederation of Urban Teachers of Bolivia, section 23 of Supreme Decree No. 23968 of 1995 establishes that education is a public service in which the continuity and regularity of educational activities is essential in order to achieve its quality objectives and hence any stoppages, strikes or unjustified absences will not be entitled to any remuneration or compensation, and accordingly the teachers were paid for days actually worked; (2) with respect to SINDECOBOL, the enterprise did not make any deductions with respect to the union members and allowed them to leave work in order to take part in the protest marches; (3) with respect to the Eastern Rail Network Workers' Federation and the Santa Cruz Rail Workers' Union, no deductions were made from the workers for their participation in the work stoppage. Taking all this information into account, the Committee will not pursue the examination of these allegations.
- 355.** With regard to the allegations concerning the dismissals of officers of the Eastern Rail Network Workers' Federation and the Santa Cruz Rail Workers' Union for taking part in the protests called by the COB, the Committee notes the Government's statement that the union officers are covered in their rights, benefits and obligations by the legal provisions in force and that no dismissals have occurred. Consequently, taking account of the above

and the fact that the complainant organization has not sent any detailed information relating to these allegations (names, dates of the dismissals, etc.), the Committee will not pursue the examination of these allegations unless the complainant provides this information.

#### **Allegations from the National Federation of Social Security Workers of Bolivia (FENSEGURAL)**

- 356.** *With regard to the allegation that the strike undertaken by the workers of the National CNS together with the COB was declared illegal and that, although an appeal was filed against this declaration, wages were deducted from all staff for the strike days, regardless of the fact that many workers did not take part in the strike, the Committee notes the Government's statement that: (1) Supreme Decree No. 846 provided for deductions to be made from all CNS workers and professional staff and for the resources accumulated through these deductions to benefit the oncological centres of the CNS itself; and (2) before the deductions were made, the CNS was asked to send a list of staff on the payroll who took part in the strike but the list was never sent, and so deductions were also made from staff who were working shifts, from union officers, etc. Recalling that "salary deductions for days of strike give rise to no objection from the point of view of freedom of association principles" [see *Digest*, op. cit., para. 654], the Committee considers that such deductions should only apply to workers who take part in a strike or protest action. The Committee therefore requests the Government to take the necessary measures to ensure that the deducted pay is refunded without delay to those workers who did not take part in the strike of April 2011.*
- 357.** *Furthermore, with regard to the strike being declared illegal by means of Ministerial Decision No. 042 (which was appealed against by FENSEGURAL), the Committee recalls that "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" [see *Digest*, op. cit., para. 628]. The Committee therefore requests the Government to take the necessary measures to ensure that this principle is respected and to keep it informed of the outcome of the appeal filed by FENSEGURAL against Ministerial Decision No. 042 whereby the strike in the sector was declared illegal.*

#### **Allegations from the Departmental Federation of Industrial Workers of La Paz (FDTFLP)**

- 358.** *With regard to the alleged dismissal of union officer Ms Fidelia Flores Gómez from the LAFAR Laboratorios Farmacéuticos enterprise, the Committee notes the Government's statement that there was no record in the systems or archives of a formal complaint having been presented to the Ministry of Labour in connection with this allegation. The Committee therefore requests the Government to take steps to ensure that an investigation is conducted into the grounds for the dismissal and to keep it informed of the outcome.*
- 359.** *With regard to the alleged dismissals of union officers Mr Hilder Alarcón Mayta and Mr Marco Antonio Herbas Córdova from the Wiled SRL Patisu Ltda Enterprise, the Committee notes the Government's statement that the Ministry of Labour issued the corresponding reinstatement order to the enterprise and that in the event of failure to implement that order the corresponding penalty would be applied and the Labour Court would be informed. The Committee notes this information and requests the Government to ensure that the order for the reinstatement of the union officers is implemented.*
- 360.** *With regard to the alleged dismissals of union officers Mr Mario Chipana Mamani, Mr Genaro Espejo Huanca, Mr Ramiro Saire Lliulli and Mr Lucio Apaza Nina from the Novara SRL enterprise, the Committee notes the Government's statement that the Ministry of Labour has acted in accordance with the labour legislation in force and has followed all*

*due procedures for the reinstatement of the dismissed workers and union officers (according to the complainant, the administrative authority issued a reinstatement order) and that the latter have filed an appeal for amparo (protection of constitutional rights). The Committee therefore requests the Government to ensure that the order for the reinstatement of the union officers in question is implemented and to keep it informed of the outcome of the appeal for amparo (protection of constitutional rights) reportedly filed by the persons affected.*

## **The Committee's recommendations**

**361. In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:**

- (a) The Committee invites the COB to send to the authorities the names of the persons who were assaulted, injured or taken into custody during the general strike and demonstrations held in April 2011 so that the Government can conduct an investigation without delay to determine responsibilities and, should excessive force prove to have been used, so that the perpetrators can be punished.*
- (b) The Committee expects that once the objections regarding non-compliance with the regulations of the Departmental Workers' Confederation of Santa Cruz have been settled, the decision will be issued, if appropriate, establishing the union leave entitlement of the union officers concerned.*
- (c) The Committee requests the Government to take the necessary measures to ensure that the deducted pay is refunded without delay to those National CNS workers who did not take part in the strike of April 2011. Furthermore, the Committee requests the Government to take the necessary measures to ensure that responsibility for declaring a strike illegal does not lie with the Government but with an independent body which has the confidence of the parties involved, and to keep it informed of the outcome of the appeal filed by FENSEGURAL against Ministerial Decision No. 042 whereby the strike in the sector was declared illegal.*
- (d) With regard to the alleged dismissal of union officer Ms Fidelia Flores Gómez from the LAFAR Laboratorios Farmacéuticos enterprise, the Committee requests the Government to take steps to ensure that an investigation is conducted into the grounds for the dismissal and to keep it informed of the outcome.*
- (e) The Committee requests the Government to ensure the implementation of the order for the reinstatement of union officers Mr Hilder Alarcón Mayta and Mr Marco Antonio Herbas Córdova at the Wiled SRL Patisu Ltda enterprise.*
- (f) The Committee requests the Government to ensure the implementation of the order for the reinstatement of union officers Mr Mario Chipana Mamani, Mr Genaro Espejo Huanca, Mr Ramiro Saire Lliulli and Mr Lucio Apaza Nina at the Novara SRL enterprise and to keep it informed of the outcome of the appeal for amparo (protection of constitutional rights) reportedly filed by the persons affected.*

CASE NO. 2792

DEFINITIVE REPORT

**Complaint against the Government of Brazil  
presented by**

- **the Unitary Centre of Workers (CUT)**
- **the National Confederation of Financial Sector Workers (CONTRAF)**
- **the Federation of Credit Establishment Workers of São Paulo (FETEC/SP) and**
- **the Union of Employees of Bank Establishments of São Paulo**

*Allegations: The complainant organizations allege that in view of obstructing and preventing bank workers in the exercise of the right to strike, FENABAN member banks seek prohibitory injunctions (and the corresponding court restraining orders) from the courts before the beginning of the strike, on the grounds that protection against this situation is needed; they also allege that the police intervene violently to enforce court restraining orders*

- 362.** The complaint is contained in a communication from the Unitary Centre of Workers (CUT), the National Confederation of Financial Sector Workers (CONTRAF), the Federation of Credit Establishment Workers of São Paulo (FETEC/SP) and the Union of Employees of Bank Establishments of São Paulo dated 31 March 2010.
- 363.** The Government sent partial observations in communications dated 11 October and 29 November 2010.
- 364.** Brazil has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but it has ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainants' allegations**

- 365.** In its communication dated 31 March 2010, the CUT, the CONTRAF, the FETEC/SP and the Union of Employees of Bank Establishments of São Paulo state that collective bargaining by trade unions that represent Brazilian bank workers is carried out at a national level. Demands are discussed by a national delegation of workers of the banking sector, and by the National Federation of Banks (FENABAN), which represents the employers. The complainants indicate that the CONTRAF–CUT, the FETEC/SP and the Union of Employees of Bank Establishments of São Paulo, are members of the national delegation of workers of the sector.
- 366.** The complainants indicate that where no agreement is reached between the parties, the workers exercise the right to strike as a way of putting pressure on the employers to reach an agreement to settle the dispute. The complainants indicate that during a strike, the

workers set up “clarification commissions” whereby the bank workers on strike seek to provide information in an ordered and peaceful manner for bank employees and clients, and for the public in general, regarding the suspension of activities and the bank workers’ demands.

- 367.** The complainants allege that, in these circumstances and aiming at obstructing and preventing bank workers from exercising the right to strike, the banks (belonging to FENABAN and listed by name in the complaint) seek prohibitory injunctions from the courts (and the corresponding court restraining orders), on the grounds that protection against this situation is needed. The complainants indicate that prohibitory injunctions are a typical civil law mechanism intended to protect private property against looting and disturbance, and that banks use them routinely to justify police repression or to withdraw bank workers’ right to strike and of demonstration. The complainants add that this protection is sought before the courts as a preventive measure, prior to the interruption of activities, in order to obtain court rulings banning the trade unions from taking such actions. According to the complainants, most court orders authorize the use of police force.
- 368.** The complainant organizations indicate that the prohibitory injunctions requested by the banks ban union leaders from coming within 100 metres of the banks, and ban the use of banners, platforms and vehicles with sound-emitting loudspeakers. According to the complainants, these bans make it impossible to persuade workers peacefully to exercise the right to strike.
- 369.** The trade unions declare that their inability to carry out demonstrations against these banks is compounded by the State’s intervention through the use of police force, with prior court authorization. On various occasions the police arrested union leaders and bank workers on strike, which was enough to hobble the trade union during the strike. The complainant organizations indicate that police intervention tends to involve excessive violence and impinges on the bank workers’ right to peaceful demonstration.
- 370.** The complainant organizations further indicate that last year, members of the bank security sector of the Brazilian Federation of Banks, which includes FENABAN, met with members of the military police division of the state of São Paulo to plan joint actions against ongoing strikes. The government of the state of São Paulo tolerates actions that obstruct bank workers’ right to strike. Moreover, the trade unions indicate that in addition to the violent police repression against strikers, court decisions impose daily fines on the trade unions in the sector that go from 5,000 to 100,000 reais. In practice, these fines paralyse the trade unions and hinder their financial survival. The complainants conclude that these prohibitory injunctions prevent workers from carrying out peaceful actions in the exercise of their right to strike.

## **B. The Government’s reply**

- 371.** In its communication dated 11 October 2010, the Government informs that on 13 September 2010 a mediation session was held in which both government and trade union representatives participated, but which was not attended by any employer representatives. On that occasion a date was set for another session in October. In its communication of 29 November 2010, the Government declares that the Labour Secretariat held a second mediation session between the parties on 19 October 2010, without making any progress. In that session, the employers’ representative requested the compilation of the banks’ replies, and the CUT also requested the compilation of the relevant documents. The Government adds that it sent a communication to the government of the state of São Paulo and to the labour courts notifying them of the date of the mediation session but that there was no response regarding the issues under discussion.

### C. The Committee's conclusions

372. *The Committee notes that, in this case, the complainant organizations allege that in view of obstructing and preventing bank workers in the exercise of the right to strike, the FENABAN member banks seek prohibitory injunctions before the courts (with the corresponding court restraining orders) before the beginning of the strike, on the grounds that protection against looting is needed. The complainants add that the court restraining orders attached to the prohibitory injunctions ban union leaders from coming within 100 metres of the banks and ban the use of banners, platforms and vehicles with sound-emitting loudspeakers, and they authorize the intervention of the police, which frequently uses excessive violence; according to the allegations, the above is compounded by court orders imposing significant fines on the trade unions.*
373. *The Committee notes that the Government declares that: (1) on 13 October a mediation session was held in which both government and trade union representatives participated, but which was not attended by representatives of the employer sector; (2) on that occasion, a date was set for another session in October and the Labour Secretariat held a second mediation session between the parties on 19 October 2010, without making any progress; (3) in that session, the employers' representative requested the compilation of the banks' replies, and the CUT also requested the compilation of the relevant documents; and (4) a communication was sent from the Government to the government of the state of São Paulo and to the labour courts notifying them of the date of the mediation session, but there was no response regarding the issues under discussion.*
374. *In this respect, the Committee observes that, according to the allegations, the prohibitory injunctions and the resulting court restraining orders prohibit the staging of strike pickets against the banks during strikes in the sector. The Committee recalls that on numerous occasions it has stressed that "the action of pickets organized in accordance with the law should not be subject to interference by the public authorities" and that "taking part in picketing and firmly but peacefully inciting other workers to keep away from their workplace cannot be considered unlawful. The case is different, however, when picketing is accompanied by violence or coercion of non-strikers in an attempt to interfere with their freedom to work" [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 648 and 651]. Therefore, the peaceful exercise of the right to stage strike pickets in accordance with the above principles should not be enjoined or subject to sanctions. Under these terms, the Committee requests the Government to ensure that the principles on the staging of strike pickets are respected and to communicate them to the relevant parties in the banking sector and in the Judiciary.*
375. *On the other hand, as regards the alleged intervention of the police to enforce court restraining orders often with use of excessive violence – which the Government has not denied in its reply – the Committee observes that, according to the allegations, the police intervene even when pickets are conducted peacefully. In this respect, the Committee recalls that "the authorities should resort to calling in the police in a strike situation only if there is a genuine threat to public order. The intervention of the police should be in proportion to the threat to public order and governments should take measures to ensure that the competent authorities receive adequate instructions so as to avoid the danger of excessive violence in trying to control demonstrations that might undermine public order" [see **Digest**, op. cit., para. 647]. In light of this, the Committee requests the Government to ensure the respect of this principle.*
376. *More generally, noting that the social partners are collecting information and documents regarding these issues in view of mediation, the Committee stresses the importance of making the issues set out in the complaint the subject of negotiations between the parties and invites the Government to continue taking measures in this respect.*

## The Committee's recommendations

**377.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee requests the Government to ensure the respect of the principles regarding the staging of strike pickets referred to in the conclusions and to communicate them to the parties concerned in the dispute and to the Judiciary.*
- (b) More generally, noting that the social partners are gathering information and documents on the issues in this case, the Committee stresses the importance of making the issues set out in the complaint the subject of negotiations between the parties and invites the Government to continue taking measures in this respect.*

CASE NO. 2655

INTERIM REPORT

### **Complaint against the Government of Cambodia presented by Building and Wood Workers' International (BWI)**

***Allegations: Unfair dismissals, acts of anti-union discrimination and the refusal to negotiate with the trade union concerned by restoration authorities: the Authority for the Protection and Management of Angkor and the Region of Siem Reap (APSARA), the Japan-APSARA Safeguarding Angkor Authority (JASA) and the Angkor Golf Resort***

**378.** The Committee has already examined the substance of this case on two occasions, most recently at its March 2011 meeting where it issued an interim report, approved by the Governing Body at its 310th Session [see 359th Report, paras 303–316].

**379.** Since there has been no reply from the Government, the Committee has been obliged to postpone its examination of this case. At its November 2011 meeting [see 362nd Report, para. 5], the Committee launched an urgent appeal and drew the attention of the Government to the fact that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it may present a report on the substance of this case even if the observations or information from the Government have not been received in due time.

**380.** Cambodia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).



## A. Previous examination of the case

**381.** In its previous examination of the case, the Committee made the following recommendations [see 359th Report, para. 316]:

- (a) Noting the information provided by the Government that it has forwarded the case regarding the dispute involving the APSARA authority and the JASA organization, as well as the case concerning the Angkor Golf Resort, to the Arbitration Council, respectively on 22 December 2009 and 11 January 2010, the Committee requests the Government to keep it informed of any development in this regard and to supply a copy of the decisions of the Arbitration Council once adopted. The Committee expects that a decision will be taken without delay, through an impartial and independent procedure, and that if the proceeding demonstrates the anti-union character of the dismissals, that the dismissed union leaders and activists will be immediately reinstated without loss of pay or benefits. If, while noting the anti-union nature of the dismissals, the Arbitration Council considers that the reinstatement of the dismissed trade union leaders and activists is not possible for objective and compelling reasons, the Committee urges the Government to take the necessary measures to ensure that the workers concerned are paid adequate compensation which would constitute a sufficiently dissuasive sanction against anti-union dismissals.
- (b) The Committee recalls that acts calculated to make the employment of a worker subject to the condition that he or she not join a union or shall relinquish their trade union membership constitutes a violation of Article 1 of Convention No. 98, and urges the Government to ensure that any infringement found in this respect will be sufficiently and appropriately sanctioned.
- (c) As to the elections in the JASA union, the Committee once again requests the Government to take the necessary measures, including the issuance of appropriate on-site instructions, to ensure that the union may elect its representatives in full freedom, and that the workers may participate in these elections free from fear of dismissal or reprisal of any kind, and to indicate the steps taken in this regard and to inform it as to when the elections of the JASA union officers were held.
- (d) Furthermore, the Committee once again requests the Government to take the necessary measures to ensure that both the APSARA and the Angkor Golf Resort engage in good faith negotiations with their respective unions, and to keep it informed in this regard.
- (e) Finally, the Committee once again urges the Government to take steps without delay to adopt an appropriate legislative framework to ensure that workers enjoy effective protection against acts of anti-union discrimination, including through the provision of sufficiently dissuasive sanctions and rapid, final and binding determinations. The Committee invites the Government to further avail itself of the technical assistance of the Office in this respect.
- (f) The Committee draws the Governing Body's attention to the serious and urgent nature of this case.

## B. The Committee's conclusions

**382.** *The Committee deeply regrets that, despite the time that has elapsed since the last examination of the case and given the seriousness of the alleged acts (acts of anti-union discrimination at three workplaces, including dismissals of trade union leaders and activists), the Government has not provided the further information requested, despite being invited to do so, including by means of an urgent appeal. The Committee urges the Government to be more cooperative in providing the further information requested.*

**383.** *Under these circumstances and in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body], the Committee finds itself obliged to present a further report on the substance of the case without the benefit of the additional information which it had hoped to receive from the Government.*

384. *The Committee recalls that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to promote respect for this freedom in law and in fact. The Committee remains confident that, if the procedure protects governments from unreasonable accusations, governments on their side will recognize the importance of formulating, for objective examination, detailed replies concerning allegations made against them.*
385. *From the information available on the Arbitration Council's website, the Committee notes that the Arbitration Council has issued awards with regard to the disputes involving the JASA authority and the APSARA authority, respectively on 22 January and 5 February 2010. In Case No. 177/09-JASA, the Arbitration Council considered that the workers' case was not sufficient for it to determine that the enterprise did not recruit them due to anti-union discrimination and rejected their demand for re-employment. The Committee also notes that, in a dissenting opinion annexed to this award, one of the arbitrators underlined that the employer did not appear at the hearing or provide a proper reason for this failure, and did not provide any evidence to oppose the workers' claim, and set out the reasons for considering that the evidence provided by the workers was sufficient to establish that anti-union discrimination occurred. In this regard, the Committee wishes to recall that it may often be difficult, if not impossible, for workers to furnish proof of an act of anti-union discrimination of which they have been the victim, and that, besides preventive machinery to forestall anti-union discrimination, a further means of ensuring effective protection could be to make it compulsory for each employer to prove that the motive for the decision to dismiss a worker has no connection with the worker's union activities [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 819 and 831]. In Case No. 175/09-APSARA, the Arbitration Council found that the authority did not comply with the procedure stipulated by the Labour Law when dismissing two of the workers concerned, and determined that the dismissal of another worker involved union discrimination. It therefore ordered the authority to reinstate the three workers concerned; it further decided that wages for paid holidays, which it did not provide in the past, from the date of their commencement until the date of their dismissal, should be back paid to them. The Committee requests the Government and the complainant to provide information on the implementation of the Arbitration Council's award in relation to the APSARA authority, as well as on any appeal that may have been made to the courts by the workers in relation to the JASA arbitration decision.*
386. *In the absence of any information from the Government on the other matters pending, the Committee deeply regrets that it must once again reiterate most of the recommendations it made when it examined this case at its meeting in March 2011 [see 359th Report, para. 316], and urges the Government to provide information without delay on the measures taken to implement these recommendations.*

## **The Committee's recommendations**

387. *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee deeply regrets that the Government has not provided the information requested or adopted the measures requested, and urges the Government to be more cooperative in the future and to provide information without delay on the measures taken to implement the Committee's recommendations.*

- (b) *The Committee requests the Government and the complainant to provide information on the implementation of the Arbitration Council's award issued on 5 February 2010 in relation to the dispute involving the APSARA authority, as well as on any appeal that may have been made to the courts by the workers in relation to the JASA arbitration decision of 22 January 2010. With regard to the case concerning the Angkor Golf Resort, the Committee once again requests the Government to keep it informed of any development regarding the examination by the Arbitration Council of the dispute, and to supply a copy of the decision of the Arbitration Council once adopted. The Committee expects that a decision will be taken without further delay, through an impartial and independent procedure, and that, if the proceeding demonstrates the anti-union character of the dismissals, the dismissed union leaders and activists will be immediately reinstated without loss of pay or benefits. If, while noting the anti-union nature of the dismissals, the Arbitration Council considers that the reinstatement of the dismissed trade union leaders and activists is not possible for objective and compelling reasons, the Committee once again urges the Government to take the necessary measures to ensure that the workers concerned are paid adequate compensation which would constitute a sufficiently dissuasive sanction against anti-union dismissals.*
- (c) *The Committee once again recalls that acts calculated to make the employment of a worker subject to the condition that he or she not join a union or shall relinquish their trade union membership constitutes a violation of Article 1 of Convention No. 98, and strongly urges the Government to ensure that any infringement found in this respect will be sufficiently and appropriately sanctioned.*
- (d) *As to the elections in the JASA union, the Committee urges the Government to take the necessary measures, including the issuance of appropriate on-site instructions, to ensure that the union may elect its representatives in full freedom, and that the workers may participate in these elections free from fear of dismissal or reprisal of any kind, and to indicate the steps taken in this regard and to inform it as to when the elections of the union officers were held.*
- (e) *Furthermore, the Committee urges the Government to take the necessary measures to ensure that both the APSARA and the Angkor Golf Resort engage in good faith negotiations with their respective unions, and to keep it informed in this regard.*
- (f) *Finally, the Committee once again urges the Government to take steps without delay to adopt an appropriate legislative framework to ensure that workers enjoy effective protection against acts of anti-union discrimination, including through the provision of sufficiently dissuasive sanctions and rapid, final and binding determinations. The Committee invites the Government to further avail itself of the technical assistance of the Office in this respect.*

CASE NO. 2704

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Canada  
presented by  
United Food and Commercial Workers' Union –  
Canada (UFCW Canada)  
supported by  
Canadian Labour Congress (CLC) and UNI Global Union**

*Allegations: The complainant organization  
alleges that the Agricultural Employees  
Protection Act, 2002 (AEPA), of the Province of  
Ontario denies collective bargaining rights to all  
agricultural employees*

- 388.** The Committee last examined this case at its November 2010 meeting, when it presented an interim report to the Governing Body [358th Report, paras 335–361 approved by the Governing Body at its 309th Session (November 2010)].
- 389.** The Government sent its observations in communications dated 21 April and 18 May 2011 and 8 February 2012.
- 390.** Canada has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

- 391.** At its November 2010 session, in the light of the Committee's interim conclusions, the Governing Body approved the following recommendations:
- (a) The Committee continues to consider that the absence of any machinery for the promotion of collective bargaining of agricultural workers constitutes an impediment to one of the principal objectives of the guarantee of freedom of association: the forming of independent organizations capable of concluding collective agreements. The Committee requests the Government to take the necessary measures to ensure that the Provincial Government puts in place appropriate machinery and procedures for the promotion of collective bargaining in the agricultural sector and requests it to keep it informed of the progress made in this respect. Appropriate machinery can be adapted to national circumstances provided the principles reflected in the conclusions are fully respected.
  - (b) The Committee requests the Government to provide the decision of the Supreme Court of Canada concerning the constitutionality of the AEPA as soon as it is handed down and to indicate any implications this decision may have on the question of bargaining rights in the agricultural sector of Ontario.

**B. The Government's reply**

- 392.** In its communication dated 21 April 2011, the Government transmits a communication from the Provincial Government of Ontario which indicates that the key issue before the Supreme Court is whether the Agricultural Employees Protection Act, 2002 (AEPA)

infringes freedom of association under section 2(d) of the Canadian Charter of Rights and Freedoms. According to the Provincial Government, since the issues raised before the Supreme Court are very closely related to the present case, the outcome of the proceedings before the Supreme Court may affect the nature of the Government of Ontario's response to this case and possibly its approach to the issue in general. The Provincial Government was, therefore, not in a position to provide further comments nor to respond to the Committee's recommendation to put into place appropriate machinery and procedures for the promotion of collective bargaining in the agricultural sector.

- 393.** In its communication dated 18 May 2011, the Government transmits a copy of the decision of the Supreme Court of Canada with respect to the constitutionality of Ontario's AEPA. It also indicates that the Provincial Government is examining the implications of the Supreme Court decision and will provide additional details at a later date. In a communication dated 8 February 2012, the Provincial Government refers to the Supreme Court decision and states that, under the AEPA, as properly interpreted, agricultural employers are also obliged to consider workers' representations, issues and concerns in good faith. The Provincial Government indicates that at this time there are no plans to amend the current legislation.

### C. The Committee's conclusions

- 394.** *The Committee notes that this case concerns the alleged exclusion of agricultural workers from access to collective bargaining through the adoption of the AEPA, of the Province of Ontario.*
- 395.** *The Committee notes that the Provincial Government indicates, prior to the release of the ruling with respect to the constitutionality of Ontario's AEPA, that since the issues raised before the Supreme Court are very closely related to the present case, the outcome of the proceedings before the Supreme Court may affect the nature of the Government of Ontario's response to this case and possibly its approach to the issue in general. The Committee also notes that, after examining the implications of the Supreme Court decision, which was handed down on 29 April 2011, the Provincial Government concluded that, under the AEPA, as properly interpreted, agricultural employers are obliged to consider workers' representations, issues and concerns in good faith and indicates that at present there are no plans to amend the current legislation.*
- 396.** *At the outset, the Committee wishes to emphasize that it does not have the mandate to assess the application by the national courts of the national legislation and the Canadian Charter of Rights and Freedoms; but that its mandate rather consists in determining whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 6]. In this regard, the Committee has been called upon to set out its considerations in relation to the conformity of the AEPA with internationally recognized principles and not in relation to its constitutionality. The Committee trusts that its examination of the present case can be of assistance in the national and provincial consideration of the issues in question.*
- 397.** *The Committee notes that, in its ruling of 29 April 2011, the Supreme Court of Canada rejected the Ontario Court of Appeal's position that the AEPA is unconstitutional and that section 2(d) of the Charter requires that enactment of laws that set up a uniform model of labour relations imposing, inter alia, a statutory recognition of the principles of exclusive majority representation. The Supreme Court ruled, firstly, that the AEPA does not infringe the freedom of association guaranteed by the Canadian Charter of Rights and Freedoms holding that section 2(d) of the Charter protects the right to associate to achieve collective*

goals, that in the labour relations context this requires a meaningful process of engagement that permits employee associations to make representations to employers which employers must consider in good faith, and that the AEPA, properly interpreted, meets these requirements. Secondly, the Supreme Court found, in relation to the Ontario Appeal judgment, that the Ontario legislature is not required to provide a particular form of collective bargaining rights to agricultural workers in order to secure the effective exercise of their associational rights.

- 398.** *The Committee wishes to highlight that, while finding that the AEPA does not infringe freedom of association under section 2(d) of the Canadian Charter of Rights and Freedoms, the Supreme Court has also indicated that “the AEPA does not expressly refer to a requirement that the employer consider employee representations in good faith; however, by implication, it includes such a requirement”, and that “any ambiguity in s.5 should be resolved by interpreting it as imposing a duty on agricultural employers to consider employee representations in good faith, as a statute should be interpreted in a way that gives meaning and purpose to its provisions and Parliament and legislatures are presumed to intend to comply with the Charter”. In this regard, the Committee welcomes the finding of the Supreme Court that agricultural employers have the duty to consider employee representations in good faith, but it is of the opinion that this duty, whether implied or explicit, is insufficient to ensure the collective bargaining rights of agricultural workers under the principles of freedom of association. In this respect, the Committee recalls that collective bargaining implies an ongoing engagement in a give-and-take process, recognizing the voluntary nature of collective bargaining and the autonomy of the parties. In the Committee’s view, the duty to consider employee representations in good faith, which merely obliges employers to give a reasonable opportunity for representations and listen or read them – even if done in good faith, does not guarantee such a process. The Committee also wishes to recall the importance which it attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations, and recalls that it is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover, genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties [see **Digest**, op. cit., paras 934–935]. In this regard, and with reference to its previous conclusions [see 358th Report, paras 357–360], the Committee emphasizes once again that “one of the main objects of the guarantee of freedom of association is to enable employers and workers to form organizations independent of the public authorities and capable of determining wages and other conditions of work by means of freely concluded collective agreements” [see **Digest**, op. cit., para. 882]. The Committee therefore concludes that the AEPA would need to be amended to ensure respect of these principles.*
- 399.** *The Committee expresses its particular concern over the relevancy of the simple provisions permitting representations in the AEPA, given that there does not appear to exist any successfully negotiated agreement since the Act’s adoption in 2002, nor has there been any indication of good faith negotiations. The Committee therefore continues to consider that the absence of any express machinery for the promotion of collective bargaining of agricultural workers constitutes an impediment to one of the principal objectives of the guarantee of freedom of association. The Committee also observes that there appears to be no provisions recognizing the right to strike of agricultural workers, which would inevitably impact on the ability of agricultural workers to bring about a meaningful negotiation on a list of claims. In this regard, the Committee recalls that it has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests and highlights that the agricultural sector does not constitute an essential service in the strict sense of the term [see **Digest**, op. cit., paras 521 and 587].*

**400.** *The Committee therefore requests the Government to take the necessary steps so that the Provincial Government of Ontario review the AEPA in full consultation with the social partners concerned with a view to providing the measures or machinery appropriate for full and meaningful collective negotiations in the agricultural sector, including by guaranteeing that agricultural workers may take industrial action without sanction. To this end, and while emphasizing that there are many different collective bargaining systems around the world which are compatible with freedom of association principles, the Committee invites the parties concerned to identify the unique characteristics and circumstances of this particular sector that have a bearing on collective bargaining and to review the measures taken in other provinces when considering the appropriate measures necessary to promote collective bargaining in the agricultural sector in Ontario. The Committee requests to be kept informed of the views of the social partners and of the progress made in this respect.*

### **The Committee's recommendation**

**401.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:*

*The Committee requests the Government to take the necessary steps so that the Provincial Government of Ontario review the AEPA in full consultation with the social partners concerned with a view to providing the measures or machinery appropriate for full and meaningful collective negotiations in the agricultural sector, including by guaranteeing that agricultural workers may take industrial action without sanction; to this end, and while emphasizing that there are many different collective bargaining systems around the world which are compatible with freedom of association principles, the Committee invites the parties concerned to identify the unique characteristics and circumstances of this particular sector that have a bearing on collective bargaining, and to review the measures taken in other provinces when considering the appropriate measures necessary to promote collective bargaining in the agricultural sector in Ontario. The Committee requests to be kept informed of the views of the social partners and of the progress made in this respect.*

CASE NO. 2761

INTERIM REPORT

**Complaints against the Government of Colombia  
presented by**

- **the International Trade Union Confederation (ITUC)**
- **The World Federation of Trade Unions (WFTU)**
- **the Single Confederation of Workers of Colombia (CUT) and**
- **the National Union of Food Workers (SINALTRAINAL)**

*Allegations: The complainant organizations  
allege the murder of and threats against various  
trade union officials and members*

**402.** The complaint is contained in a communication from the International Trade Union Confederation (ITUC) dated 8 February 2010. ITUC sent additional information in communications dated 22 March 2010 and 16 May, 17 June 2011 and 25 January 2012. The World Federation of Trade Unions (WFTU), in communications dated 9 April 2010 and 1 September 2011, the Single Confederation of Workers of Colombia (CUT) in communications dated 12 April and 4 May 2010, and the National Union of Food Workers (SINALTRAINAL), in a communication dated 10 June 2010, presented allegations related to the complaint.

**403.** The Government sent its observations in communications dated 21 April, 5 September and 29 November 2010 and 21 February, 10 May, 27 May, 3 June, August and 29 September 2011, February and 1 March 2012.

**404.** Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainants' allegations**

***Murders of trade union officials and members***

**405.** In communications dated 8 February, 22 March, 9 April, 12 April, 4 May and 10 June 2010 and 16 May, 17 June, 1 September 2011 and 25 January 2012, ITUC, WFTU, CUT and SINALTRAINAL allege that, against a backdrop of ongoing anti-union harassment, the trade union officials and members listed below were murdered between January 2009 and July 2011.

Trade union officials

1. Benito Díaz Álvarez, trade union official of the Córdoba Teachers' Association (ADEMACOR), was found at his home on 25 April 2010 with his throat cut.
2. Hernán Abdiel Ordóñez Dorado, treasurer of the Trade Union Association of Employees of the National Prison Service (ASEINPEC) in Cali, was killed by gunmen on a motorbike, who shot him four times. The victim had denounced alleged acts of corruption involving the management of the women's prison in the capital of the department of El Valle. He had previously received threats and had been the victim of an attack.



3. Luis Germán Restrepo Maldonado, treasurer of the General Confederation of Labour (CGT), was murdered on 12 August 2010 by a hit man in the city of Medellín.

## Members

2009

1. Walter Escobar.
2. Luis Franklin Vélez Figueroa, member of the National Trade Union of University Workers of Colombia (SINTRAUNICOL), was murdered at 6 a.m. on 31 January in the municipality of Quibdó by two youths on a motorbike, while he was sitting on his doorstep.
3. Jorge Alberto García, member of the Risaralda Teachers' Union (SER), was murdered on 21 April by two hooded men on a motorbike. According to witnesses, the killers were waiting to shoot the teacher as he was getting out of a taxi. One of the theories put forward by the family is that the hit men might have arranged to meet the victim at the place where they killed him, as he lived some 20 blocks away from the neighbourhood in question.
4. María Rosabel Zapata, member of the El Valle Single Trade Union of Education Workers (SUTEV), was murdered on 7 May in the municipality of Cali. According to witnesses, the teacher got off a bus and was heading towards the school kiosk when a man stood in her way and shot her in the head. General Gustavo Ricaurte has said that, while the motives of the crime are still unknown, a minor was caught fleeing the scene.
5. Pablo Rodríguez Garavito, member of the Arauca Teachers' Association (ASEDAR), was murdered on 9 June in a classroom in the Cuiloto indigenous community in the Marrera district in the municipality of Puerto Rondón. It seems that he was shot several times by unknown gunmen.
6. Rafael Antonio Sepúlveda Lara, who was killed on 20 June, was a member of the Santander North branch of the National Association of Hospital Workers of Colombia (ANTHOC) and sat on the institutional committee of the Trade Union Association at the Rudesindo Soto psychiatric hospital and on the national executive board of the National Federation of Public Servants (FENASER-CTC). The killer was seen walking around the neighbourhood with a woman minutes before shooting the victim, and the pair were picked up in a red vehicle in which they made their escape.
7. Hebert González Herrera, member of the Single Agricultural Trade Union Federation (FENSUAGRO), was murdered on 25 July. At approximately 2 p.m., the trade unionist was tricked by an unknown person and taken to an unidentified place. He was found dead with seven gunshot wounds. It is thought that the shooting was carried out by an emerging group known as "Los Rastrojos", which is operating in the municipality.
8. Jacinto Herrera, member of the Guajira Teachers' Association (ASODEGUA), was murdered on 26 July at around 7.15 p.m. by unidentified men on a motorbike.
9. Miguel Ángel Guzmán, member the SER, was murdered at his home on 6 August.
10. Diego Cobo, member of ADEMACOR, was murdered on 11 August at approximately 6.30 p.m. as he was on his way home. He was shot by two hit men on a motorbike.

11. Gustavo Gómez was murdered on 21 August. He was an employee of Nestlé – Comestibles la Rosa S.A. and a member of SINALTRAINAL in the municipality of Dosquebradas. At approximately 6.30 p.m., unidentified assailants turned up at his house and knocked on the door. When Mr Gómez opened it, they shot him ten times.
12. Fredy Díaz Ortiz was murdered on 22 August in the city of Valledupar. He was a member of ASEINPEC, which is affiliated to the CGT. The trade unionist was going out to work when he was shot by two hit men.
13. Abel Carrasquilla, member of FENSUAGRO, was shot dead by armed paramilitaries on 23 August.
14. Oscar Eduardo Suárez Suescún, member of the North Santander Teachers' Trade Union Association (ASINORT), was murdered on 11 September. The authorities are investigating the motives for the crime and trying to identify the perpetrators. The victim was dumped with his head in a plastic bag taped around his neck. He had been killed with sharp weapon.
15. Zuly Rojas, member of the National Health and Social Security Union (SINDESS), was killed on 9 October when he arrived home in the municipality of Saravena.
16. Honorio Llorente Meléndez, member of the National Union of Farm Workers (SINTRAINAGRO), was killed on 17 October by an armed man while he was chatting with a group of friends in a public establishment. After having changed his shirt, the killer was picked up by two motorcyclists.
17. Rafael Antonio Cantero Ceballos, member of ADEMACOR, was murdered on 27 October. He received three gunshot wounds.
18. Mauricio Antonio Monsalve Vásquez.
19. Paulo Suárez, member of the Arauca Rural Workers' Association (ACA), was murdered in his home on 28 October. The perpetrators belonged to the National Liberation Army (ELN) guerrilla group.
20. Ramiro Israel Montes Palencia, member of ADEMACOR, was attacked and killed on 29 October as he was on his way to the school at which he worked.
21. Raúl Medina Díaz, member of the ACA, was murdered at 6.30 a.m. on 5 November, on his way to the EMSAR healthcare company.
22. Apolinar Herrera, member of the ACA, was murdered at his home on 12 November by two hit men who identified themselves as members of the ELN.
23. Zoraida Cortés López, member of the SER, was murdered on 13 November by two drive-by hit men. She was a professional in the arts and worked in the Higher Technical Institute in Periera, the capital of the department of Risaralda.
24. Fabio Sánchez, member of the ACA, was murdered on 13 November in the municipality of Saravena.
25. Fredy Fabián Martínez Castellanos, a member of the ADE, was murdered on 15 November. He disappeared on 13 July after leaving his home and his body was found buried in Barranquilla. He was a so-called “false positive” victim.
26. Armando Cáceres Álvarez.

27. Lenny Yanube Rengifo Gómez was found on 24 November 2009 in a rural area north of Popayán in the department of Cauca. He had disappeared after leaving his home at around 3 p.m. on Thursday 12 November. He was a teacher and trade union activist and belonged to the Association of Teachers and Education Workers of Cauca (ASOINCA).
28. Iván Edgardo Tovar Murillo, member of the Tolima Teachers' Union (SIMATOL), disappeared for two days and was found dead with multiple stab wounds.
29. Manuel Alfonso Cuello Valenzuela, member of the Bolívar United Teachers' Union (SUDEB), died on 26 November of gunshot wounds to the neck, inflicted by two motorcyclists.
30. Alberto Jaimes Pabón, member of FENSUAGRO, was murdered on 27 November at 1.30 p.m. when he was shot six times.
31. Jorge Reinaldo Ramírez.

## 2010

32. Norberto García Quinceno, member of SUTEV, was murdered on 2 January 2010.
33. Carlos Andrés Cheiva, member of the Single Union of Education Workers of the Amazon Region (SUDEA), was murdered on 18 January.
34. Jaime Fernando Bazante Guzmán, member of ASOINCA, was murdered on 19 January.
35. Henry Saúl Moya Moya, member of the Tolima Farm Workers' Association (ASTRACATOL), was murdered on 22 January.
36. Oberto Beltrán Narváez, member of ADEMACOR, was murdered on 28 January. He was shot down by hit men close to the school where he worked.
37. Rigoberto Polo Contreras, member of ADEMACOR, was murdered on 3 February. He was riding on the back of a motorbike taxi when he was approached by two other motorcyclists, who ordered him to get off the motorbike and then shot him.
38. Omar Alonso Restrepo, member of the Agriculture and Mining Federation of Southern Bolívar (FEDEAGROMISBOL), was murdered on 10 February.
39. José de Jesús Restrepo, member of FEDEAGROMISBOL, was murdered on 10 February.
40. Beatriz Alarcón, member of the Antioquia Teachers' Association (ADIDA), was murdered on 13 February.
41. Francisco Ernesto Goyes Salazar, member of the Nariño Teachers' Union (SIMANA), was murdered on 12 March.
42. Duvian Cadavid Rojo, member of ADIDA, was murdered on 13 March.
43. Israel Verona, member of the ACA, was murdered on 17 March.
44. Rosendo Rojas Tovar, member of the Caquetá Teachers' Association (AICA), was murdered on 20 March.

45. Gustavo Gil Sierra, member of ADIDA, was murdered on 20 March.
46. Antonio Garcés Rosero Miyer, member of ASOINCA, was murdered on 26 March.
47. Javier Cárdenas Gil, member of the Trade Union Association of Sand and Gravel Workers of Quindío, was murdered on 1 April.
48. Henry Ramírez Daza, member of the Union of Liquor Industry Workers (SINTRABECOLICAS), was murdered on 11 April.
49. Francisco Valerio Orozco, member of ADIDA, was murdered on 16 April.
50. José Isidro Rangel Avendaño, member of the National Union of Transport Workers (SNTT), was murdered on 19 April.
51. Jorge Iván Montoya Torrado, member of the SNTT, was murdered on 20 April.
52. Elkin Eduardo González was found murdered on 21 April. He had not been seen for two days and his body was found in a remote area with several gunshot wounds.
53. Aliciades González Castro, member of the ACA, was murdered on 21 April.
54. Diego Fernando Escobar Muñera, member of the Union of Judiciary Workers (ASONAL JUDICIAL), was murdered on 22 April.
55. Benito Díaz Álvarez, member of ADEMACOR, was murdered on 25 April.
56. Javier Estrada Ovalle, member of SUTEV, was murdered on 27 April.
57. Nelson Camacho González, member of the Union of Oil Industry Workers (USO), was murdered on 17 June. He was waiting for the bus to take him to work when hit men on a motorbike shot him several times and killed him.
58. Ibio Efrén Caicedo, member of ADIDA, was murdered on 19 June.
59. Pedro Elías Ballesteros Rojas, a Judge of the Republic and member of ASONAL JUDICIAL, was murdered on 4 September, in the city of Cúcuta in the department of North Santander.
60. Salvador Forero Moreno was murdered on 9 September when two armed assailants came into the school at which he worked and, after forcing him to go with them, drove him to a place where they killed him with a shot in the head.
61. Luis Fernando Hoyos Arteaga, member of ADEMACOR, was murdered on 10 September in the neighbourhood of Moganbo in Montería, in the department of Córdoba.
62. William Tafur, member of the National Union of Mining and Power Industry Workers (SINTRAMIENERGETICA), was murdered on 28 October in the city of Santa Marta in the department of Magdalena.
63. Omaira Tamayo Montano, a teacher who was a member of the Magdalena Union of Teachers (EDUMAG), was murdered on 30 October, in the town of Sitio Nuevo, in the department of Magdalena.

64. Carlos Hernando Castillo Calvache, a worker who was a member of ASEINPEC, was murdered on 4 November, in the city of Mocoa, in the department of Putumayo.
65. María Ligia González, member of the Colombian Teachers' Federation (FECODE), was murdered on 6 November by a hit man in a crowded street in the municipality of Tulúa, in the department of Valle del Cauca.
66. Thomas Aquino Buelvas was murdered on 14 November. ADEMACOR stated that the perpetrators were a group of heavily armed men who approached the local newsstand on the main road of the town of San Francisco del Rayo and gunned down six people who were there. He and five other people who had been participating in the local festivities died.
67. Diego Leonardo Vanegas González, member of ADIDA, was murdered on 16 November in Medellín.
68. Nevis Hernando Bula, member of ADEMACOR, was murdered on 20 November in Sahagún.
69. José Luis Montemiranda Rodríguez, a taxi driver who was a member of the Cartagena Taxi Drivers' Trade Union (SINCONTAXCAR), was murdered on 5 December in the city of Cartagena, in the department of Bolívar.
70. Ariel de Jesús Benítez Hernández, a teacher who was a member of ADIDA, was murdered on 6 December, in the town of Yarumal, in the department of Antioquia.
71. Wilson Albeiro Erazo Ascuntar, a worker who was a member of SINALTRAINAL, was murdered on 11 December, in the city of Palmira, in the department of Valle del Cauca.
72. Alberto Hernández, member of the Union of Municipal Employees of Saravena (SIDEMS), was murdered on 13 December, in the city of Saravena, in the department of Arauca.

## 2011

73. Manuel Esteban Tejada, member of ADEMACOR, was murdered on 10 January 2011 when armed assailants showed up at his home and shot him several times.
74. Humberto de Jesús Espinoza Díaz, member of the SER, was murdered on 30 January, when armed assailants blocked his path in the city of Pereira. He had been threatened on a number of occasions and had asked in vain for protection.
75. Carlos Alberto Ayala, member of the Putumayo Teachers' Association (ASEP), was murdered on 5 February by gunmen who lay in wait for him close to his home.
76. Gloria Constanza Goana was murdered on 22 March as she was getting out of her car to enter the court where she worked. She was approached by a hit man who shot her repeatedly. She was the Criminal Judge of the Saravena Circuit (Arauca) and was in charge of a case concerning the rape of two girls aged 13 and 14 and the murder of one of those girls and their 9- and 6-year-old brothers, which had taken place in Tame in October. The defendant is sub-lieutenant Raúl Muñoz Linares, who used to head the "Buitres 2" patrol, which forms part of the National Army's Fifth Mobile Brigade.

- 77 and 78. Héctor Orozco and Gildardo García, both rural workers, were murdered on 30 March as they were driving home on a motorbike. They were killed in a fully militarized area, less than four hundred metres away from a place where National Army soldiers are permanently stationed.
79. Ramiro Sánchez, member of the contractors' association ASOGRECON, was murdered on 8 April by two men on a motorbike.
80. Dionis Alfredo Sierra Vergara, member of ADEMACOR, was murdered on 15 May in Córdoba.
81. Johnny Alfredo Sierra, a teacher who was a member of ADEMACOR, was murdered on 16 May, in the municipality of La Apartada.
82. Alejandro José Peñata López disappeared on 20 June and was found dead in a rural area in the municipality of San Pelayo. It appeared that he had been hung with barbed wire.
83. Carlos Arturo Castro Casas, member of the Cali Municipal Enterprises Union (SINTRAEMCALI), was murdered on 23 May in the Los Robles neighbourhood of the city of Cali.
84. Freddy Antonio Cuadrado Núñez was murdered on Friday 27 May in Ciénaga. He was shot in the head.
85. Carlos Julio Gómez, member of SUTEV, was wounded on 26 May and taken to hospital, where he died on 29 May.
86. Rafael Tobón Zea, member of the Segovia branch of SINTRAMIENERGETICA, was murdered on 26 July by paramilitary groups, in the El Campo district of the municipality of Segovia, in the department of Antioquia.

### ***Attempted murders and death threats***

**406.** Furthermore, the complainant organizations allege the following acts of violence against trade union officials and members:

#### Trade union officials

1. On 1 October 2009, Mario Montes de Oca Anaya was attacked and seriously injured at the main entrance to the San Jerónimo Hospital in the city of Montería. Mr Montes de Oca Anaya is an official of the ADEMACOR executive subcommittee and a lawyer who represents displaced persons. ITUC emphasizes that the death threats against the teacher had already been reported, but the authorities had paid no attention.
2. On 24 November 2009, Luis Javier Correa Suárez, president of SINALTRAINAL, received a call on the telephone assigned to him by the Protection Programme of the Ministry of the Interior and of Justice and a voice said: "Javier Correa, you have until 22 December to resign. There will be no second call".
3. In a communication dated 9 April 2009, the WFTU reports that, between 2009 and 2010, USO officials were threatened by telephone, harassed and followed by armed men in several regions of the country. These events were reported to ECOPETROL and the national authorities, but no action was taken. Furthermore, Fernando Navarro

and Yesid Prieto had been direct victims of threats and attempted murder on previous occasions and these events were also reported to ECOPETROL and the authorities. More specifically, on Saturday 27 March, at approximately 11.15 a.m., in the city of Villavicencio, hit men on a motorbike attacked officials of the Bogotá executive subcommittee of the USO. They escaped unharmed but, in the reaction to the attack, a bodyguard was seriously wounded and died on his way to hospital in Villavicencio.

4. The officials of the National Union of Bank Employees (UNEB) were victims of harassment and threats and were declared military targets by the group known as the “Nueva Generación de Águilas Negras” (Black Eagles New Generation) in an email sent on 24 October 2009 to the union leaders.
5. José Omar Olivo Britto and teachers Ezequiel Martínez and Nancy Bustamante received death threats in March 2010, apparently from the illegal armed group known as “Les Urabeños”. Even though the persons concerned alerted the authorities, they were not provided with the necessary protection. José Britto, EDUMAG official, disappeared on 8 August, when he left his home in a taxi. He remains unaccounted for.
6. Over Dorado Cardona, president of ADIDA, was attacked on 12 April 2010 while he was in a car dealership. Four armed individuals burst into the premises, prompting the immediate reaction of two of the ADIDA president’s bodyguards. After an exchange of shots, one of the assailants was injured and both he and the three men with him were detained and duly handed over to the authorities.
7. Rodolfo Vecino and his family were threatened in a message sent to his personal address and to the USO’s National Human Rights and Peace Committee on 3 May 2010. Rodolfo Vecino was the USO’s legal adviser. He was accused of rebellion and given 48 hours to leave the country.
8. Esteban Padilla was injured in an attack on 14 July. He was a member of the SINTRAMIENERGETICA executive committee, worked for the enterprise Drummond Ltd. in Colombia and was known to be a social leader. Two motorbike hit men shot him, leaving him seriously injured. His bodyguard was also injured in the attack.
9. Ricardo Verón, member of the executive committee of the Tolima branch of ANTHOC, received death threats signed by paramilitary groups on 7 January 2011.
10. On 17 January 2011, Martín Fernando Ravelo, Robinson Díaz Camargo and Rafael Rodríguez Moros, USO leaders, received death threats from paramilitary groups operating in the region.
11. Javier Bermúdez Gómez, president of the Atlántico branch of the CUT, received death threats on 26 January 2011 when he accompanied a protest against the unfair dismissal of several workers.
12. Wilson Pérez, ANTHOC leader, and Domingo Tovar, general secretary of the CUT, received death threats on 23 February 2011 from paramilitary groups operating in the city of Florencia, in the department of Caquetá.
13. Rodolfo Vecino, national legal adviser of the USO, and Rafael Cabarcas, former member of the USO’s national executive committee (now retired) and Democratic Pole activist, continue to receive death threats from paramilitary groups.

14. On 1 March 2011, Gustavo Marín Villalba and Gustavo Sarmiento Triviño, president and vice-president respectively of the Risaralda branch of the CGT, received death threats signed by the paramilitary groups operating in the region.
15. On 3 March 2011, Jaime Burbano and Oscar Gerardo Salazar, members of the executive committee of the Cauca branch of the Single Union of Education Workers of Cauca (SUTEC), received death threats from paramilitary groups.
16. On 8 March 2011, Juan Carlos Valencia and Gerardo Santibáñez (officials of the Union of Public Sector Workers and Employers (SINTRAEMDES)), María Eugenia Londoño (president of the SER), Vicente Villada Carvajal (president of the Risaralda branch of the CUT), Diego Osorio Montes (legal adviser of the SER) and Carlos Hernando Valencia (legal adviser of the Risaralda branch of the CUT), received death threats from paramilitary groups operating in the region.
17. Alex Gómez, Octavio Collazos, Martha Baquero, Rosmery Londoño, Héctor Valencia, Libardo Pérez, Luz Mila Beltrán, Carlos Silva, Wilson Pérez, Yesid Doncel, Yolanda Fajardo, Maide Salcedo, Jorge Londoño, Franco Jojoa, Fernando Mecaya and Antonio Velen, all members of FENSUAGRO, which is affiliated to the CUT, and union representatives in the departments of Caquetá, Huila and Putumayo, received death threats from paramilitary groups on 15 March 2011.
18. On 25 March 2011, unidentified persons violently broke into the home of Miguel Alberto Fernández Orozco, president of the Cauca branch of the CUT. He had already received death threats.
19. On 3 November 2010, Fredis Marrugo Velazquez, a leader of the Union of Food Industry Workers (USTRIAL), was physically assaulted, beaten and held by security personnel working for a tuna processing facility run by the enterprise “Seatech International Tuna Processing Facility”.
20. On 10 December 2010, members of the executive committee of the Cali branch of SINTRAUNICOL received death threats by text message. Other trade union, civil society and human rights organizations in the department of Valle del Cauca were also targeted.
21. On 16 December 2010, the leaders of the Montería branch of SINTRAUNICOL received written death threats signed by paramilitary groups operating in the region.
22. On 14 January 2011, the life of Henry Gordon, member of the executive board of the Atlántico branch of the CUT, was endangered by two armed men who attacked the union leader while he was travelling in his car.
23. On 17 February 2011, leaders of SINALTRAINAL and of the Union of Municipal Workers (SINTRAMUNICIPIO) were threatened by paramilitary groups in the city of Buga, in the department of Valle del Cauca.
24. On 25 May 2011, Yesid Calvache Saavedra, president of the Union of Oil Industry Workers of Putumayo (SINTRAPETROPUTUMAYO), received death threats signed by paramilitary groups operating in the department of Putumayo.
25. On 2 June 2011, Ingrid Vergara, technical secretary of the National Movement of Victims of State Crime, and Adriana Porra, member of the Sucre Leaders’ Network, received further threats. The “Los Rastros” group sent threats to human rights organizations.



26. On 13 June 2011, Fernando Carvajal, secretary of SINTRAPETROPUTUMAYO, received threats and was followed near his home by men on motorbikes. In the light of these threats, the union leader felt obliged to leave the region with his family.
27. On 19 June 2011, the life of Wilson Sáenz Manchola, senior official of the Valle del Cauca branch of the CUT, was endangered in an attack. The trade unionist received a gunshot wound, but he is recovering well.
28. On 18 August 2011, Duvan Vélez Mejía, president of the Antioquia branch of SINALTRAINAL and candidate to the executive board of the Democratic Pole, was the victim of an attempt against his life in the city of Medellín, and although he escaped unharmed, one of his bodyguards was injured and is in a clinic in the city.

## Members

1. In a communication dated 10 June 2010, SINALTRAINAL indicated that, on 16 May 2010, the “José Alvear Restrepo” Society of Lawyers received death threats, which applied also to SINALTRAINAL. These threats were reported to the Public Prosecutor’s Office. The union adds that, on 26 May 2010, a member of the executive committee of the Bucaramanga branch of SINALTRAINAL found a death threat that mentioned by name the employees of the Coca Cola enterprise in Bucaramanga and union officials. This threat came at a time when the union was in a dispute with regard to collective bargaining and a list of demands that had been filed on 5 May 2010. This threat was also reported to the Public Prosecutor’s Office and to the Ministry of the Interior and of Justice on 27 May 2010. SINALTRAINAL states that another threat was received by email, and was also reported to the Public Prosecutor’s Office and to the Ministry of the Interior and of Justice on 27 May 2010. SINALTRAINAL states in general terms that, in Colombia, not only have over 4,000 men and women involved in the trade union movement been killed over the last 20 years, another unknown number of people – a significant number of whom are union leaders or activists in transnational corporations – have received death threats.
2. Edgar Ramírez Delgado was attacked on 2 January 2011, when he was approached by individuals who started to insult him for being a trade unionist and tried to force him into a parked vehicle with its engine running. Thanks to the intervention of several passers-by, they did not succeed, although the victim suffered from various fractures as a result of being beaten.
3. Henry Gordon Atencio was attacked on 14 January 2011, while he was on his way to the municipality of Soledad to attend a meeting with workers at the maternity hospital, where there were problems of mass dismissal that had been denounced by the CUT. Two gunmen intercepted the security patrol vehicle and threatened his life, but thanks to the instant reaction of his bodyguard, they were unsuccessful in carrying out the assault.
4. On 2 April 2011, Martín Ravelo, Rafael Rodríguez Moros, Robinson Díaz Camargo and Luis Alberto Galvis, all members of the USO in the city of Barrancabermeja, received death threats by email, signed by paramilitary groups.
5. On 1 and 14 March 2011, the following trade union organizations received death threats from paramilitary groups: the Single Agricultural Trade Union Federation (FENSUAGRO), the El Valle Single Trade Union of Education Workers (SUTEV), the Association of University Professors (ASPU), the National Trade Union of University Workers of Colombia (SINTRAUNICOL), the Association of Ministry of Defence Employees (ASODEFENSA), and the National Association of Public Servants of the Office of the Ombudsman (ASDEP).

6. On 20 June 2011, more than 1,100 workers of the enterprise Montajes JM SA declared that they were in permanent assembly in response to serious violations of their labour rights. The Government responded with police force, which resulted in several workers being injured and hundreds of workers being arrested, in addition to the more than 1,000 workers who were dismissed. The USO, which supports the struggle of workers in Puerto Gaitán, has denounced the ongoing and illegal efforts by intelligence agents of the Colombian State to follow the workers.
7. On 22 July 2011, the Valle del Cauca branch of the CUT and SINALTRACAMPO , as well as the unionists and human rights campaigners Wilson Sáenz, Diego Escobar, Álvaro José Vera, Omar Romero, Edgar Alberto Villegas, Henry Domínguez, Oscar Franco Pérez, Elizabeth Ramírez, Jairo González and Rubí Martínez Velasco, received death threats in a letter signed by the paramilitary groups operating in the region.
8. On 23 July 2011, 44 teachers who worked in a rural public school in the department of Córdoba and who belonged to ADEMACOR were forced to leave their jobs in the light of the constant threats that they were receiving from the paramilitary groups operating in the department.
9. On 1 August 2011, police officer José Martínez Cano, who formed part of the protection team assigned to the director of the Colombian Teachers' Federation and the former president of ADIDA, was shot and is recovering in a clinic in Medellín.

### **Arbitrary arrests**

- 407.** The complainant organizations' allegations relate also to the arbitrary arrests of trade union officials and members mentioned below:

#### Trade union officials

1. Araceli Cañaveral Vélez was arbitrarily arrested on 17 January 2011, in the city of Medellín, by order of the Fifth Specialized Prosecutor's Office of Cartagena, without being offered any information as to why she was deprived of his liberty. She was told only that she would be taken to Cartagena, where criminal proceedings are being taken against her. She is a social and trade union leader of ASOTRACOMERCIANT, which is affiliated to the CUT.
2. Jailer González, president of ASTRACATOL, an affiliate of FENSUAGRO – CUT, was arbitrarily detained on 16 April 2011 by members of the Colombian army in the municipality of Chaparral, in the department of Tolima.

#### Members

Luis Alberto Castillo Flores and Alfonso Yépez Patino, members of the Santander Rural Workers' Association (ASOGRAS), were arbitrarily arrested on 5 December 2010 by police officers in Sabana de Torres, in the department of Santander.

- 408.** ITUC emphasizes that, as indicated above, it is clear that the situation in Colombia of violence against the trade union movement remains ongoing and has not changed, despite the strong claims to the contrary by the Colombian authorities in various forums and the change of government.

409. In a communication dated 1 September 2011, the WFTU indicates that the threatening pamphlets against the trade union officials have not stopped and that the “Águilas Negras”, the “Urabeños” and other far right groups are still threatening and harassing members of the trade union movement. A significant percentage of the threats and harassment against trade unionists is carried out by private paramilitary armies funded by commercial landowners.
410. Finally, in its communication dated 25 January 2012, the ITUC alleges that murder of five trade union officials and 17 trade union members, attempted murder of one trade union official and arbitrary arrests of two trade union officials which have taken place between April and December 2011. The ITUC also submits a list of murders that have occurred between 1 January and 31 December 2011, provided by the CUT, and a list of murders of 19 teachers occurred between January and October 2011, provided by FECODE.

## B. The Government’s reply

411. In a communication dated 29 November 2010, the Government reports on the strategy developed in order to reach swift judicial decisions in cases of violence against trade unionists. In accordance with the tripartite agreement signed in 2006 – renewed on 26 May 2011 – the Administrative Chamber of the Higher Judicial Council set up two specialized criminal courts and a criminal circuit court to deal with the backlog of cases, subject to the provision by the Government of the necessary resources for their operation. These courts were responsible for processing and reaching decisions on the criminal proceedings relating to murders and other acts of violence against union leaders and trade unionists that are under way in various judicial offices across the country. The Administrative Chamber created two types of judicial office to take into account the powers conferred under the Code of Criminal Procedure, namely: specialized criminal circuit courts handle cases of aggravated murder, torture, genocide, personal injury for terrorist purposes, kidnapping for ransom, forced disappearance and other wrongful acts against the lives and physical and moral integrity of union officials and activists in accordance with the procedural laws in force with respect to the powers of specialized courts.
412. In communications dated 21 February and 10 May 2011, the Government reports – through the National Human Rights and International Humanitarian Law Unit and the different branches of the Prosecutor’s Office – on the progress made in processing the complaints and in the investigations that are taking place in relation to trade union matters. The events took place between 1998 and 2008.
413. By a communication dated February 2012, the Government provides updated information indicating that the National Human Rights and International Humanitarian Law Unit has now 170 prosecutors, instead of 101 previously. To advance in the field of crimes against trade unionists, the sub-unit had a substantial increase in its personnel which went from ten prosecutors in January 2011 to 25 in January 2012. Of the 25 prosecutors, five are devoted exclusively to the care of victims in the recently created Victim Assistance Centres (three of them are operative). Similarly, the same sub-unit, which had 100 criminal investigators in January 2011, has, since January 2012, 243 full-time officers assigned to investigate crimes committed against trade union leaders, members and workers. The Government emphasizes that investigations are monitored by the head of the unit, the National Directorate of Criminal Prosecutions, and the Deputy Prosecutor’s Office. To date, the decongestion courts issued 375 judgments for a total of 479 applications. In addition, the Government states that the Prosecutor’s Office conducted a study to analyse 354 convictions, obtained between 2000 and 2011, for crimes committed against trade unionists in order to identify the real motive for the crimes. The study shows that of 483 decisions, 351 concern crimes of voluntary manslaughter and homicide of protected

persons. The analysis of motives of these crimes demonstrates that the exercise of trade union activities is the reason in 17.7 per cent of cases (63 cases).

**414.** In a communication dated 1 March 2012, the Government indicates that in compliance with the commitments undertaken in the context of a high-level mission which visited the country in February 2011, the Plan of Action Related to Labour Rights signed by Colombia and the United States in April 2011 and the Labour Agreement signed by the Government, Colombian enterprises and the CGT in May 2011, the following additional measures have been taken in relation to acts of violence against trade unionists and the fight against impunity: (1) adoption of Resolution No. 716 of 6 April 2011, which includes trade union activists among those covered by the Protection Programme; (2) a budget of \$110 million to fund the programme in 2012; (3) the adoption of Decree No. 4912 of 26 December 2011 to amend the nature and functioning of the Risk Assessment and Recommendation of Measures Committee for the purpose of having a more objective risk assessment; and (4) the adoption of Act No. 1448 of 2011, which includes the compensation to the families of the trade unionists, victims of violence.

### ***Murders of trade union officials and members***

**415.** In a communication dated 21 April 2010, the Government reports that it sent a copy of the complaint sent by the Office to the trade union organizations in order to request any additional information that would enable the Public Prosecutor's Office to make progress in its investigations.

**416.** In a communication dated 5 September 2010, the Government states that the Office of International Relations and Cooperation requested information from the National Unit and the Human Rights Unit of Public Prosecutor's Office relating to the list of the victims of the acts of violence referred to in the complaint, asking for information about the investigations under way and the status of the proceedings concerning the individuals being examined in the context of the complaint. The report was received by the Government on 25 August 2010. The Government emphasizes that it has made several efforts to combat impunity and the violence committed against workers. As a result, there was a reduction in the murder rate of trade unionists of 26.3 per cent between 2008 and 2009, and of 85.7 per cent between 2002 and 2009, although it has not been established that the cause of death in each of these reported murders was the victim's trade union activity.

**417.** Furthermore, the Government, while it regrets and objects to each one of these crimes, asks for the following names to be removed from the list of reported murders, as the victims did not belong to a trade union organization:

- Paulo Suárez, member of the Arauca Rural Workers' Association;
- Raúl Medina Díaz, member of the Arauca Rural Workers' Association;
- Apolinar Herrera, member of the Arauca Rural Workers' Association;
- Fabio Sánchez, member of the Arauca Rural Workers' Association;
- Alberto Jaimes Pabón, member of the Arauca Rural Workers' Association;
- Omar Alonso Restrepo, member of the Agriculture and Mining Federation of Southern Bolívar;

- José de Jesús Restrepo, member of the Agriculture and Mining Federation of Southern Bolívar;
- Israel Verona, member of the Arauca Rural Workers' Association; and
- Aliciades González Castro, member of the Arauca Rural Workers' Association.

**418.** The Government indicates that the abovementioned workers belonged to community action boards and rural workers' associations, which were not registered as trade union organizations. In one case, reference is made to a retired teacher who did not belong to the trade union. The Government adds that community action boards are civil society organizations that promote citizen participation in the running of their communities. They also serve as a means of dialogue with national, departmental and municipal governments and seek to create opportunities for participation with a view to promoting the development of neighbourhoods, towns and districts. Through these boards, mayors can also set development plans and reach agreement on and monitor the implementation of projects. Rural workers' associations are legal non-profit-making entities under private law, comprising rural workers, whose main purpose is to engage in dialogue with the national Government on matters relating to agrarian social reform, agricultural credit, marketing, merchandizing and technical agricultural support. Rural workers' associations have their own definition and structure, in so far as they are neither established, nor inspected and monitored, by the labour authorities. In this regard, when this group of the population is at risk, the Government provides protection through its Protection Programme, although the measures taken by the Committee for Regulation and Risk Assessment (CRER) are taken not in the context of trade unions, but rather in the context of social leaders or human rights defenders, depending on the case.

**419.** The Government indicates that, through the Public Prosecutor's Office, progress has been made in investigating several of the cases referred to the complaint:

1. Pablo Antonio Rodríguez Gavarito: The case is under investigation. Cúcuta district, Support Structure Prosecutor's Office No. 2. Humanitarian Affairs Unit of the Prosecutor's Office.
2. Rafael Antonio Sepúlveda Lara: The case is under investigation. Cúcuta district, Inter-institutional Homicide Team (BRINHO) of Prosecutor's Office No. 6, Cúcuta.
3. Hebert González Herrera: The case is under investigation. Bucaramanga district, Support Structure Prosecutor's Office No. 1, Barrancabermeja.
4. Diego Cobo: The case is under investigation. Montería district, District Prosecutor's Office No. 22, Chinu.
5. Gustavo Gómez: The case is under investigation. Pereira district, District Prosecutor's Office No. 19, Dosquebradas.
6. Fredy Díaz Ortiz: The case is under investigation. Valledupar district, District Prosecutor's Office No. 13.
7. Abel Carrasquilla: The case is under investigation. Bucaramanga district, Support Structure Prosecutor's Office No. 1, Barrancabermeja.
8. Oscar Eduardo Suárez Suescún: The case is under investigation. Cúcuta district, District Prosecutor's Office No. 6.

9. Zuly Rojas: The case is under investigation. Cúcuta district, Specialized Prosecutor's Office No. 1.
10. Honorio Llorente Meléndez: The case is under investigation. Bucaramanga district, Support Structure Prosecutor's Office No. 2, Barrancabermeja.
11. Rafael Antonio Cantero Caballos: The case is under investigation. Montería district, District Prosecutor's Office No. 23.
12. Ramiro Israel Montes Palencia: The case is under investigation. Montería district, District Prosecutor's Office No. 24, Montelibano.
- 13–16. Fabio Sánchez, Paulo Suárez, Raúl Medina Díaz and Apolinar Herrera: The cases are under investigation. Cúcuta district, District Prosecutor's Office No. 2, Savarena.
17. Zoraida Cortés López: The case is at the trial stage. Pereira district, Specialized Prosecutor's Office No. 2.
18. Lenny Yanube Gómez: The case is under investigation. Popayán district, District Prosecutor's Office No. 3.
19. Luis Franklin Vélez Figueroa: The case is under investigation. Quibdó district, District Prosecutor's Office No. 2.
20. Jorge Alberto García: The case is under investigation. Pereira district, Local Prosecutor's Office No. 19, Santa Rosa de Cabal.
21. María Rosabel Zapata: The case is under investigation. Cali district, in District Prosecutor's Office No. 20.
22. Jacinto Herrera: The case is under investigation. Riohacha district, in District Prosecutor's Office No. 1.
23. Fredy Fabián Martínez Castellanos: The case is under investigation. Barranquilla district, in District Prosecutor's Office No. 41.
24. Alberto Jaimes Pabón: The case is under investigation. Cúcuta district, District Public Prosecutor's Office No. 2, Saravena.
25. Armando Cáceres Álvarez: The case is under investigation. Bogotá district, District Prosecutor's Office No. 3.
26. Iván Eduardo Tovar Murillo: The case is under investigation. Ibagué district, District Prosecutor's Office No. 46, Guamo.
27. Jorge Reinaldo Ramírez: The case is under investigation. Buga district, District Prosecutor's Office No. 23, La Unión.
28. Elkin Eduardo González: The case is under investigation. Monteria District, Prosecutor's Office No. 1.
29. Gloria Constanza Gaona: The case is under investigation. National Human Rights and International Humanitarian Law Unit, Specialized Prosecutor's Office No. 52.

30. and 31. Héctor Orozco and Gildardo García: The case is under investigation. National Human Rights and International Humanitarian Law Unit, Specialized Prosecutor's Office No. 48.
  32. Oberto Beltrán Narváez: The case is under investigation. Monteria district, Lorica District Prosecutor's Office No. 23.
  33. Rigoberto Polo Contreras: The case is under investigation. Monteria district, Chinu District Prosecutor's Office No. 22.
  34. Benito Díaz Álvarez: The case is under investigation. Monteria district, Lorica District Prosecutor's Office No. 23.
  35. Hernán Abdiel Ordóñez Dorado: The case is under investigation. Cali District, Prosecutor's Office No. 46.
  36. Manuel Esteban Tejada: The case is under investigation. National Human Rights and International Humanitarian Law Unit, Specialized Prosecutor's Office No. 103.
  37. Humberto de Jesús Espinoza Díaz: The case is under investigation. Manizales, Prosecutor's Office No. 2, Anserma.
  38. Carlos Alberto Ayala: The case is under investigation. National Human Rights and International Humanitarian Law Unit, Specialized Prosecutor's Office No. 124 .
  39. Ramiro Sánchez: The case is under investigation. Manizales District, Prosecutor's Office No. 1, Puerto Boyaca.
- 420.** Furthermore, in its communication of February 2012, the Government indicates that in the case of the murder of Luis German Restrepo Maldonado on 12 August 2010, a judgment was issued against Mr John Bayron Cardona Sepulveda, Alexander Pérez Pérez, Alexander Correa and Hernan Martinez Javier Molina Saldarriaga, who were imprisoned. Judgments in connection with the murder of Mr Nelson Camacho González and Efen Ibio Caicedo were issued.
- 421.** Likewise, the Government states that, through the Ministry of the Interior and of Justice, it continues to protect trade union leaders. In 2009, 1,550 union leaders were protected. As part of its policy to defend and safeguard workers' rights, the Protection Programme has been strengthened for workers. In 2002, the Protection Programme budget for protecting union leaders was of more than US\$7 million and in 2009 it was US\$15,481,763. Between 2002 and 2009, more than US\$86 million has been invested in the protection of union leaders. There are 196 high-level protection schemes for union leaders, which represents 28.91 per cent of all protection schemes available to the public.
- 422.** In a communication dated 3 June 2011, the Government indicates that progress continues to be made in the campaign against terrorism and general and organized crime, which has led to the capture of 2,400 criminals and 1,570 insurgents and to the demobilization of 1,600 guerilla fighters.
- 423.** Lastly, in a communication dated 29 September 2011, the Government indicates, in connection with the 25 murders reported by the CUT in its communication dated 4 May 2010, that further information is needed from the complainant organizations to enable the authorities to conduct investigations into these violations. Specific information about the context of the murders is important in order to determine whether the killings occurred within the general context of violence or whether they were actually the result of union activity. In addition, the Government states that the Public Prosecutor's Office is officially

expediting the investigations into the murders committed in Colombia, and that there is a special sub-unit that is responsible for the investigations into the murder of trade unionists. For this reason, the complainants must provide detailed information about the allegations so that the Public Prosecutor's Office can carry out the necessary investigations.

### ***Attempted murders, disappearances and death threats***

**424.** In a communication dated 5 September 2010, the Government reports on the investigations launched into the attempted murders and death threats:

- concerning Ramiro Arroyave, Álvaro Pulido, José Genis Montoya, William Gaviria, Fidel Madero, Rafael Bohada, William Pareja, Luis Jiménez, Guillermo Rivera, Segundo Mora and Enrique Hernández (of UNEB), the case is under investigation in Bogotá district, District Prosecutor's Office No. 209, and
- concerning Luis Javier Correa, the case is also under investigation in Bogotá district, District Prosecutor's Office No. 209.

**425.** By a communication dated February 2012, the Government provided additional information in connection with investigations initiated in the following cases:

- José Omar Olivo Britto, Ezequiel Martínez and Nancy Bustamante: The threats are under investigation by the Prosecutor's Office No. 6, Ceinaga in Santa Marta. The disappearance of José Omar Olivo Britto is also under investigation by the National Human Rights and International Humanitarian Law Unit, Specialized Prosecutor's Office No. 18.
- Edgar Ramírez Delgado: The case is under investigation. Prosecutor's Office No. 164, Cali district.
- Over Dorado Cardona: The case is under investigation. Medellín district, Specialized Prosecutor's Office No. 39.
- Rodolfo Vecino: The case is under investigation. Cartagena district, Specialized Prosecutor's Office No. 1.
- Henry Gordon Atencio: The case is under investigation. Barranquilla district, Prosecutor's Office No. 19.
- Rafael Moros Rodríguez, Robinson Díaz Camargo and Martín Fernando Ravelo Ravelo: The case is under investigation. Bucaramanga district, Prosecutor's Office No. 1, Barrancabermeja.
- Wilson Pérez: The case is under investigation. Florence district, Prosecutor's Office No. 8.
- Rafael Cabarcas: The case is under investigation. Cartagena district, Prosecutor's Office No. 1.
- Gustavo Sarmiento: The case is under investigation. Pereira district, Prosecutor's Office No. 11.
- Jaime Burbano and Oscar Salazar: The case is under investigation. Popayan district, Prosecutor's Office No. 2.



- Juan Carlos Valencia: The case is under investigation. Florence district, Prosecutor's Office No. 8.
- Miguel Alberto Fernández Orozco: The case is under investigation. Popayan district, Prosecutor's Office No. 11.
- José Fraydel Melo Bedoya: The case is under investigation. Cali district, Prosecutor's Office No. 83.

### C. The Committee's conclusions

**426.** *The Committee notes with concern that the allegations concern the murder, attempted murder and arbitrary arrest of trade union officials and members.*

**427.** *In this regard, while it deeply regrets the alleged murders and acts of violence, the Committee takes note of the information provided by the Government on its efforts to combat impunity and the violence committed against workers and the protection offered to trade union leaders (renewal of the 2006 tripartite agreement, establishment of special courts to ensure that swift judicial decisions are reached in cases of violence against trade unionists, the adoption of Resolution No. 716 of 6 April 2011, which includes trade union activists among those who are covered by the Protection Programme, a budget of \$110 million to fund the programme in 2012, the adoption of Decree No. 4912 of 26 December 2011 to amend the nature and functioning of the Risk Assessment and Recommendation of Measures Committee for the purpose of having a more objective risk assessment, the adoption of Act No. 1448 of 2011, which includes the compensation to the families of the trade unionists, victims of violence, etc.), and that investigations have been launched into only some of the acts referred to in the complaint and that three decisions were handed down concerning cases of murder. The Committee emphasizes that freedom of association can only be exercised in conditions in which fundamental rights, and in particular those relating to human life and personal safety, are fully respected and guaranteed and that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 43–44].*

### **Murder of trade union officials and members**

**428.** *The Committee notes that the complainant organizations refer in their complaint to the murder of three trade union officials and 86 union members (see also paragraph 430) between January 2009 and July 2011.*

**429.** *The Committee notes that the Government reports on the status of the investigations launched into 39 murder cases (Pablo Rodríguez Garavito, Rafael Antonio Sepúlveda Lara, Hebert González Herrera, Diego Cobo, Gustavo Gómez, Fredy Díaz Ortiz, Abel Carrasquilla, Oscar Eduardo Suárez Suescún, Zuly Rojas, Honorio Llorente Meléndez, Rafael Antonio Cantero Ceballos, Ramiro Israel Montes Palencia, Fabio Sánchez, Paulo Suárez, Raúl Medina Díaz, Apolinar Herrera, Zoraida Cortés López, Lenny Yanube Gómez, Armando Cáceres Álvarez, Luis Franklin Vélez Figueroa, Jorge Alberto García, María Rosabel Zapata, Jacinto Herrera, Iván Edgardo Tovar Murillo, Fredy Fabián Martínez Castellanos, Alberto Jaimes Pabón, Jorge Reinaldo Ramírez, Elkin Eduardo González, Gloria Constanza Gaona, Héctor Orozco, Gildardo García, Oberto Beltrán Narváez, Rigoberto Polo Contreras, Benito Díaz Álvarez, Hernán Abdiel Ordóñez Dorado, Manuel Esteban Tejada, Humberto de Jesús Espinoza Díaz, Carlos Alberto Ayala and*

Ramiro Sánchez) and into two cases of death threats (against members of the National Union of Bank Employees (UNEB) and Luis Javier Correa). The Committee trusts that such investigations will make it possible in the very near future to shed light on the facts and punish the culprits. The Committee requests the Government to keep it informed of the investigations under way and the subsequent legal proceedings.

- 430.** Furthermore, the Committee takes note of the request by the Government to remove nine names from the list of murders, as those workers – Paulo Suárez, Raúl Medina Díaz, Apolinar Herrera, Fabio Sánchez, Alberto Jaimes Pabón (on the list of cases under investigation), Omar Alonso Restrepo, José de Jesús Restrepo, Israel Verona, and Aliciades González Castro – belonged to community action boards and rural workers' associations, which are not registered as trade union organizations. In this regard, as was stated by the mission that visited Colombia in 2009, in order to support efforts to investigate the acts of violence against the trade union movement, the Committee considers that the criteria relating to information to be transmitted to the investigating bodies could be analysed in the framework of the follow-up of the tripartite agreement renewed in 2011 on a tripartite basis within the framework of the Committee for Consultation on Labour and Wage Policies.
- 431.** The Committee notes that the trade union organizations make allegations concerning the murders of certain individuals, without mentioning to which trade union they belonged. Furthermore, the Committee notes that the Government, in its last communication, indicated that detailed information was needed on the allegations made by the CUT in its communication of 4 May 2010, to enable the Public Prosecutor's Office to conduct the necessary investigations. The Committee requests the complainant organizations to provide further information on the circumstances in which the murders of Walter Escobar, Mauricio Antonio Monsalve Vásquez, Salvador Forero Moreno, Alejandro José Peñata López, Freddy Antonio Cuadrado Núñez, Norberto García Quinceno, Carlos Andrés Cheiva, Jaime Fernando Bazante Guzmán, Henry Saúl Moya Moya, Francisco Ernesto Goyes Salazar, Duvian Cadavid Rojo, Rosendo Rojas Tovar, Gustavo Gil Sierra, Antonio Garcés Rosero Miyer, Javier Cárdenas Gil, Henry Ramírez Daza, Francisco Valerio Orozco, José Isidro Rangel Avendaño, Jorge Iván Montoya Torrado, Diego Fernando Escobar, Javier Estrada Ovalle and Beatriz Alarcón took place.
- 432.** With regard to the other alleged murders (Miguel Ángel Guzmán, Manuel Alfonso Cuello Valenzuela, Nelson Camacho González, Ibio Efrén Caicedo, Pedro Elías Ballesteros Rojas, Luis Fernando Hoyos Arteaga, William Tafur, Omaira Tamayo Montano, Carlos Hernando Castillo Calvache, María Ligia González, Thomas Aquino Buelvas, Diego Leonardo Vanegas González, Nevis Hernando Bula, José Luis Montemiranda Rodríguez, Ariel de Jesús Benítez Hernández, Wilson Albeiro Erazo Ascuntar, Alberto Hernández, Ramiro Sánchez, Dionis Alfredo Sierra Vergara, Johnny Alfredo Sierra, Carlos Arturo Castro Casas, Carlos Julio Gómez and Rafael Tobón Zea), the Committee urges the Government to take without delay the measures needed to launch judicial investigations in order to shed light on these murders, identify responsibilities and punish the culprits. The Committee requests the Government to keep it informed in this respect.
- 433.** The Committee takes note of the ITUC's new allegations contained in its communication dated 25 January 2012 concerning murders, attempted murders and arbitrary arrests, as well as the lists of murders that occurred in 2011 provided by the CUT and murders of 19 teachers, provided by FECODE. The Committee requests the Government to provide its observations thereon without delay.

### **Attempted murder and death threats**

- 434.** *With regard to the numerous alleged death threats referred to in the complaint (concerning more than 120 individuals), the Committee notes that, according to the Government, investigations are being carried out into the threats made against the members of the UNEB and 19 other trade unionists. The Committee requests the Government to keep it informed with regard to these investigations.*
- 435.** *Deploring that the Government did not provide any information as regards the majority of the other death threat allegations, the Committee urges the Government to take the necessary measures without delay to launch judicial investigations in order to shed light on these cases, identify responsibilities and punish the culprits. The Committee requests the Government to keep it informed in this respect. Furthermore, the Committee requests the Government to take measures without delay to carry out risk assessments corresponding to the threatened union officials and members, in order to provide them with the necessary protection.*

### **Arbitrary arrests**

- 436.** *With regard to the allegations concerning the arbitrary detention of Araceli Cañaverl Vélez, trade union and social leader of ASOTRACOMERCIANT, which is affiliated to the CUT, and of Jailer González, president of ASTRACATOL, Luis Alberto Castillo Flores and Alfonso Yépez Patino, members of the Santander Rural Workers' Association (ASOGRAS), the Committee deeply regrets to note that the Government has not sent its observations in this regard. The Committee stresses that the detention of union officials or trade unionists for reasons connected with their activities in defence of the interests of workers constitutes a serious interference with civil liberties in general and with trade union rights in particular; and that the arrest of trade unionists against whom no charge is brought involves restrictions on freedom of association, and governments should adopt measures for issuing appropriate instructions to prevent the danger involved for trade union activities by such arrests [see *Digest*, *op. cit.*, paragraphs 64 and 70]. The Committee requests the Government to send its observations in this regard.*

### **The Committee's recommendations**

- 437.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *With regard to the 39 murders that are currently under investigation, the Committee trusts that such investigations will make it possible in the very near future to shed light on the facts and punish the culprits. The Committee requests the Government to keep it informed of the investigations under way and the subsequent legal proceedings.*
- (b) *Taking note of the request by the Government to remove nine names from the list of murders, as those workers – Paulo Suárez, Raúl Medina Díaz, Apolinar Herrera, Fabio Sánchez, Alberto Jaimes Pabón, Omar Alonso Restrepo, José de Jesús Restrepo, Israel Verona, and Aliciades González Castro – belonged to community action boards and rural workers' associations, which are not registered as trade union organizations, the Committee considers that, in order to support efforts to investigate the acts of violence against the trade union movement, the criteria for compiling information to be transmitted to the investigating bodies could be analysed*

*on a tripartite basis within the framework of the Committee for Consultation on Labour and Wage Policies.*

- (c) The Committee requests the complainant organizations to provide more information on the circumstances surrounding the murders of Walter Escobar, Mauricio Antonio Monsalve Vásquez, Salvador Forero Moreno, Alejandro José Peñata López, Freddy Antonio Cuadrado Núñez, Norberto García Quinceno, Carlos Andrés Cheiva, Jaime Fernando Bazante Guzmán, Henry Saúl Moya Moya, Francisco Ernesto Goyes Salazar, Duvian Cadavid Rojo, Rosendo Rojas Tovar, Gustavo Gil Sierra, Antonio Garcés Rosero Miyer, Javier Cárdenas Gil, Henry Ramírez Daza, Francisco Valerio Orozco, José Isidro Rangel Avendaño, Jorge Iván Montoya Torrado, Diego Fernando Escobar, Javier Estrada Ovalle and Beatriz Alarcón.*
- (d) With regard to the other murders referred to in the complaint (Miguel Ángel Guzmán, Manuel Alfonso Cuello Valenzuela, Pedro Elías Ballesteros Rojas, Luis Fernando Hoyos Arteaga, William Tafur, Omaira Tamayo Montano, Carlos Hernando Castillo Calvache, María Ligia González, Thomas Aquino Buevas, Diego Leonardo Vanegas González, Nevis Hernando Bula, José Luis Montemiranda Rodríguez, Ariel de Jesús Benítez Hernández, Wilson Albeiro Erazo Ascuntar, Alberto Hernández, Ramiro Sánchez, Dionis Alfredo Sierra Vergara, Johnny Alfredo Sierra, Carlos Arturo Castro Casas, Carlos Julio Gómez and Rafael Tobón Zea), the Committee urges the Government to take the necessary measures without delay to launch judicial investigations in order to shed light on these murders and to identify and punish the culprits. The Committee requests the Government to keep it informed in this respect.*
- (e) The Committee requests the Government to provide its observations on the allegations contained in the ITUC communication dated 25 January 2012 concerning murders, attempted murders and arbitrary arrests, as well as the lists of murders that occurred in 2011 provided by the CUT and murders of 19 teachers, provided by the FECODE.*
- (f) With regard to the numerous alleged death threats referred to in the complaint (concerning more than 120 individuals), the Committee notes that, according to the Government, investigations are being carried out into the threats made against the members of the National Union of Bank Employees (UNEB) and 19 other trade unionists. The Committee requests the Government to keep it informed with regard to the proceedings under way.*
- (g) Deploring that the Government did not provide any information as regards the majority of the other death threat allegations, the Committee urges the Government to take the necessary measures without delay to launch judicial investigations in order to shed light on these murders and to identify and punish the culprits. The Committee requests the Government to keep it informed in this respect. Furthermore, the Committee requests the Government to take measures without delay to carry out risk assessments corresponding to the threatened union officials and members, in order to provide them with the necessary protection.*

- (h) *With regard to the alleged arbitrary detentions, the Committee requests the Government to send its observations in that regard.*
- (i) *The Committee draws the special attention of the Governing Body to the serious and urgent nature of this case.*

CASE NO. 2602

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Korea  
presented by**

- the Korean Metalworkers’ Federation (KMWF)
- the Korean Confederation of Trade Unions (KCTU) and
- the International Metalworkers’ Federation (IMF)

*Allegations: The complainants allege that “illegal dispatch” workers, i.e. precarious workers in disguised employment relationships, in Hyundai Motors’ Corporation (HMC) Ulsan, Asan and Jeonju plants, Hynix/Magnachip, Kiryung Electronics and KM&I, are effectively denied legal protection under the Trade Union and Labour Relations Adjustment Act (TULRAA) and are left unprotected vis-à-vis: (1) recurring acts of anti-union discrimination, notably dismissals, aimed at thwarting their efforts to establish a union; (2) the consistent refusal of the employer to bargain as a result of which none of the unions representing those workers have succeeded in negotiating a collective bargaining agreement; (3) dismissals, imprisonment and compensation suits claiming exorbitant sums, for “obstruction of business” in case of industrial action; and (4) physical assaults, court injunctions and imprisonment for “obstruction of business” aimed at preventing dismissed trade union leaders from re-entering the premises of the company to stage rallies or exercise representation functions*

**438.** The Committee last examined this case at its March 2011 meeting and on that occasion presented an interim report to the Governing Body [see 359th Report, paras 342–370, approved by the Governing Body at its 310th Session].

**439.** The Government sent its observations in a communication dated 28 October 2011.

440. The Republic of Korea has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

#### A. Previous examination of the case

441. At its March 2011 session, in the light of the Committee's interim conclusions, the Governing Body approved the following recommendations:

- (a) The Committee expects that the Government will take all necessary measures to ensure protection of workers' organizational rights against abuses in relation to disguised employment relationships and requests it to provide a copy of the Supreme Court ruling of 22 July 2010 in the case of a worker dismissed from the HMC Ulsan factory in February 2005 and to provide information on the outcome of the retrial of this case by the lower court. It also requests the Government to keep it informed of the outcome of the inspection it conducted following the 22 July 2010 decision of the Supreme Court to assess the state of in-company subcontracting at 29 workplaces, and of any further impact this decision has on the situation of workers in a disguised employment relationship.
- (b) The Committee requests the Government to take the necessary measures to ensure that all workers, including "self-employed" workers, such as heavy goods vehicle drivers, can fully enjoy freedom of association rights with the organizations of their own choosing for the furtherance and defence of their interest, including the right to join federations and confederations of their own choosing subject to the rules of the organization concerned and without any previous authorization.
- (c) The Committee requests the Government to indicate whether national legislation provides for the right of appeal in the case of dissolution of a trade union by the administrative authority. If such a procedure is not provided for, it requests the Government to take the necessary measures, in consultations with the social partners, to amend the provisions of the TULRAA and its Enforcement Decree, so as to ensure that workers' organizations are not liable to be dissolved by administrative authority and that an administrative decision does not take effect until a final decision is handed down. It requests the Government to keep it informed in this respect.
- (d) The Committee requests the Government to hold consultations with all the parties involved with the aim of finding a mutually acceptable solution so as to ensure that, on the one hand, workers who are self-employed could fully enjoy trade union rights under Conventions Nos 87 and 98 for the purpose of furthering and defending their interest, including by the means of collective bargaining and, on the other hand, that no measures which would deprive trade union members from being represented by their respective unions are taken against the KCWU and the KTWU. The Committee requests the Government to keep it informed of the outcome of such consultations.
- (e) The Committee once again requests the Government to develop, in consultation with the social partners concerned:
  - (i) appropriate mechanisms aimed at strengthening the protection of subcontracted ("dispatch") workers' rights to freedom of association and collective bargaining, guaranteed to all workers by the TULRAA, and at preventing any abuse of subcontracting as a way to evade in practice the exercise by these workers of their fundamental rights. Such mechanisms should include an agreed process for dialogue determined in advance; and
  - (ii) specific collective bargaining mechanisms relevant to the particularities of self-employed workers.
- (f) The Committee once again urges the Government to carry out without delay independent investigations into:

- (i) the dismissals of the subcontracted workers in HMC Ulsan and Jeonju and, if these workers are found to have been dismissed solely on the grounds that they staged industrial action against a “third party”, i.e. the principal employer (subcontracting company), to ensure that they are reinstated in their posts without loss of pay as a primary remedy. If the judicial authority determines that reinstatement of trade union members is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination; and
  - (ii) the alleged acts of violence perpetrated by private security guards against trade unionists during rallies at HMC Asan and Ulsan and at Kiryung Electronics and, if they are confirmed, to take all necessary measures to punish those responsible and compensate the victims for any damages suffered.
- (g) As regards the allegations of acts of anti-union discrimination and interference at Hynix/Magnachip and at HMC (Ulsan factory and Asan Plant), the Committee once again urges the Government to take the necessary measures to reinstate the dismissed trade union leaders and members as a primary remedy; if the judicial authority determines that reinstatement is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and to prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination. The Committee also requests the Government to keep it informed of the High Court decision in the case of workers dismissed from Asan Plant.
- (h) Regretting that the Government has not replied to its previous requests, the Committee once again urges the Government to take all necessary measures to promote collective bargaining over the terms and conditions of employment of subcontracted workers in the metal sector, in particular in HMC, KM&I and Hynix/Magnachip, including through building negotiating capacities, so that subcontracted workers in these companies may effectively exercise their right to seek to improve the living and working conditions of their members through negotiations in good faith.
- (i) Regretting that the Government has not replied to its previous requests, the Committee once again urges the Government to take all necessary measures without delay so as to bring section 314 of the Penal Code (“obstruction of business”) into line with freedom of association principles, and to keep it informed in this regard.
- (j) The Committee expects that the Government and the judicial authorities will put in place adequate safeguards so as to avert in future the possible risks of abuse of judicial procedure on grounds of “obstruction of business” with the aim of intimidating workers and trade unionists, and that the courts in their rulings will take due account of the need to build a constructive industrial relations climate in the context of individual industrial relations.
- (k) The Committee expects that the above recommendations will be implemented without further delay and urges the Government to keep it informed in this respect. It once again reminds the Government that it may avail itself of the technical assistance of the Office.

## **B. The Government’s reply**

### ***In-company subcontracting***

**442.** In a communication dated 28 October 2011, the Government states that the Supreme Court ruling of 22 July 2010 is expected to serve as an important basis to determine whether a case of in-company subcontracting is illegal dispatch or not. The Government further indicates that, after the Supreme Court sent the case of the Hyundai Motor Company (HMC) Ulsan factory back to the High Court, the latter upheld on 10 February 2011 the Supreme Court’s decision, acknowledging that the subcontracted workers were illegally dispatched and that an employment relationship is constituted between HMC and the

workers of the in-company subcontractors who had worked there for more than two years. For that reason, the High Court revoked the decision of the retrial as well as the first instance decision of the Administrative Court, both of which were made based on the premise that HMC is not the employer of the workers. However, HMC appealed against the High Court decision on 14 February 2011, and the case is currently pending in the Supreme Court.

- 443.** According to the Government, with controversies mounting over whether in-company subcontracting is used as an illegal form of worker dispatch in large companies, inspections were conducted for 25 companies in September and October 2010; the initial plan being to inspect 29 companies but four of them refused to accept the inspection. The inspection found that the shipbuilding, electronics and IT sectors each had an illegal dispatch case. In particular, the Government reports that, in a shipbuilding company, there were no illegal dispatch cases between the contracting company and the subcontracted companies but illegal cases were identified between in-company subcontractors; following the inspection, warnings were issued to prevent any repetition of similar violations. In an electronics company, it was found that 11 workers of the subcontracted companies were illegally dispatched to the contracting company; a corrective order was issued for the contracting company to either directly employ the workers or convert the dispatch into a legitimate form. In an IT company, 18 workers of the subcontractors who had been illegally dispatched to the IT company were directly hired by the contracting company as per the corrective order of the Ministry of Employment and Labour (MOEL). Also, another company caught in the inspection for illegal dispatch of 327 workers corrected the illegal practice and employed the workers directly.
- 444.** Subcontracted workers are granted the rights to freedom of association and collective bargaining guaranteed to all workers by the Trade Union and Labour Relations Adjustment Act (TULRAA), and the trade union of the subcontracted company can perform collective bargaining with its direct employer, i.e. the subcontracted company, who determines the working conditions of the workers. In-company subcontracting is a matter of the company's management decision and should not necessarily be seen as a way to evade the exercise by the workers of their fundamental rights.
- 445.** The Government will continue its monitoring and guidance efforts to ensure prevention of illegal subcontracting. As part of such efforts, the MOEL has released the "Guidelines for Protection of Subcontracted Workers' Working Conditions" on 18 July 2011 for compliance by contracting and subcontracted companies, along with instructions for the guideline and the "Self-compliance Checklist for the Guideline for Subcontracted Workers". The MOEL plans to foster an environment conducive to the compliance with the guideline by establishing a channel, called the "Illegal Subcontracting Reporting Center", in its local offices for reporting of illegal subcontracting cases against the guideline's legal requirements, and to run the supporters club for the improvement of the subcontracted workers' working conditions. Furthermore, the Ministry will make sure that compliance checks are conducted during the workplace inspection, actively guide both the contracting and subcontracted companies to comply with the guideline, and identify and publish best practices to raise awareness. By promoting the guideline, the Government intends to protect subcontracted worker's labour rights and improve their working conditions in cooperation with the contracting and subcontracted companies, thereby strengthening their business competitiveness.
- 446.** As regards Article 314 of the Penal Code, the Government refers to the provisions of the TULRAA stipulating that "no employer shall claim damages against a trade union or workers in cases where he/she has suffered damage because of collective bargaining or industrial action under the Act" (Article 3), that such justifiable acts shall not be punishable (Article 4), and that "no act of violence or destruction shall be construed as



being justifiable for any ground” (Article 4). The Government concludes that justifiable industrial actions are protected whereas the trade union is held responsible in both civil and criminal terms for any illegitimate industrial actions it has taken. Any illegitimate industrial actions ruled by the court as “obstruction of business” are punishable under Article 314(1) of the Penal Code, which seeks to punish those who interfere with the business of another by circulating false facts or through fraudulent means or by the threat of force. According to the Government, the “obstruction of business” charge applies to illegal industrial actions involving acts of violence, occupation of production lines, etc., that are obviously against the Penal Code; and the “threat of force” as a means for obstruction of business refers to any influence that overwhelms the free will and judgment of another by force or threat. A labour strike staged as an industrial action may be seen as an obstruction of business if it goes beyond a simple refusal to work specified in the employment contract, influencing the employer to accept the workers’ demands by force or threat of a collective refusal to work. The Government further indicates that, recently, the Supreme Court ruled that “obstruction of business” by “threat of force” does not apply to all industrial actions but to the cases where it is deemed, based on the circumstances and developments, that such actions were committed abruptly at a time unpredictable to the employer causing serious confusion or material damage to the business operation of the employer which could overwhelm the free will and judgement of the employer as to the continuance of business (Supreme Court decision 2007Do482 of 17 March 2011). In the Government’s view, it is unlikely that the “obstruction of business” provision in the Penal Code will infringe on the freedom of association principles, since this decision clarifies that the “obstruction of business” charge will be applied only to illegal strikes with overwhelming influence on the free will and judgment of the employer as to the continuance of business.

447. Lastly, the Government informs that, after the Supreme Court ruled on 25 June 2009 that workers of HMC Asan Plant had been unfairly dismissed and sent the case back to the High Court, the latter upheld on 8 December 2009 the Supreme Court’s decision and cancelled the first instance decision which had ruled otherwise. The employer appealed to the Supreme Court once again but the appeal was dismissed for lack of grounds for appeal. As a result, it was finally confirmed that the workers were unfairly dismissed.

### ***Freedom of association of heavy goods vehicle drivers***

448. The Government indicates that, besides the employment contract, there are several other contracts aimed at the provision of labour such as the delegation contract, the subcontract, etc., and that the provisions of labour laws are, in principle, applicable only to the worker and his/her employer with a “contractual employment relationship” which is recognized when an “employer–employee relationship” exists between them.
449. According to the Government, the Supreme Court judges that, irrespective of the type of contract, whether it be an employment contract, a subcontract or a delegation contract, the employer–employee relationship is determined based on several factors that are reflective of the actual relationship between the parties including whether the worker is under the supervision or direction of the alleged employer, whether the employer pays wages to the worker as a reward for the work performed, and the nature and specifics of the work (Supreme Court decision 2005Da20910 of 11 May 2006). When it comes to self-employed drivers of ready-mixed concrete trucks, the courts consistently denied their status as an employee (Supreme Court decision 2005Da64385 of 13 October 2006). They also did not acknowledge the organizations of ready-mixed concrete truck drivers as trade unions pursuant to the TULRAA (Supreme Court decisions 2003Du3871 of 8 September 2006 and 2004Du4888 of 30 June 2006, etc.). Along the same lines, the Supreme Court concluded that the self-employed drivers of cargo trucks and dump trucks are not considered as employees as defined by the TULRAA, citing that an employer–employee

relationship does not exist between the drivers and the company they work with because the drivers have the ownership of the vehicles, work independently without specific supervision and oversight by the company and bear overall costs incurred on the job (Supreme Court decision 2000Da30240 of 6 October 2000).

- 450.** The Government concludes that, since the owner drivers of cargo trucks, dump trucks and ready-mixed concrete trucks are self-employed persons, not employees of another, they can neither organize or join a trade union, nor exercise the trade union's right to collective bargaining. Therefore, specific collective bargaining mechanisms for these workers are not admissible under the Korean legal system. In the Government's view, judgement on whether a worker of a specific type is an employee solely belongs to the authority of the Judiciary, and as the judicial authority concluded that the aforementioned owner drivers do not have the employee status, the administrative authority cannot take measures against the decision.
- 451.** However, the Government states that, according to the Korean Constitution that guarantees freedom of association, self-employed drivers can establish an organization to represent their interests and use it as a vehicle to convey their demands to their business counterpart. This process enables the drivers to negotiate rates and other matters with their appropriate counterpart and, ultimately, protect their own rights and interests. Nevertheless, the Government stresses that such an organization differs from the trade union defined by TULRAA and thus is not eligible for the benefits enjoyed by the trade union under the Act. According to the Government, organizations of cargo and dump truck drivers have been established and operate freely without the intervention of the Government, engaging in negotiations on rates and other matters.

### ***Dissolution of a trade union by the administrative authority***

- 452.** The Government indicates that, where, after a trade union is delivered with a union establishment certificate, there arise grounds for disqualifying the trade union under the TULRAA, the administrative authority shall demand correction within the period of 30 days. If the correction is not made within this period, the authority shall notify the trade union in question that it shall not be regarded as a trade union as provided for under the Act (article 9(2) of the Enforcement Decree of the TULRAA). According to the Government, such a notification is not an order by the administrative authority to dissolve the trade union. It does not force the dissolution of the trade union or forbid union activities. Neither does it constitute a retroactive revocation of the union establishment certificate that was issued previously, but rather a notice that the protection and benefits granted to trade unions under the Act are no longer applicable to them. The organization can still continue its activities even after the notification is issued; however, such activities will no longer be regarded as union activities but as activities by an organization organized based on the freedom of association.
- 453.** The Government further indicates that the trade union may appeal against the notification. Nevertheless, it is one of the core principles of the Korean administrative laws that an administrative decision remains in effect until and unless the court's final ruling is delivered against it. In the Government's view, mandating that an administrative decision based on the TULRAA does not take effect until the final court decision is handed down will therefore trigger a conflict with the principle and eventually with the entire legal framework, where this legal principle is universally applied. According to the Government, the principle is not aimed at restricting trade union rights, as it applies also in the opposite case where a trade union files for a remedy for unfair labour practices and the Labour Relations Commission issues an order to the employer to remedy, this administrative decision takes effect immediately even when the employer appeals against the decision,

rather than remaining ineffective until the final ruling. The Government indicates, however, that there is a legal tool called the “suspension of execution”, a court order to temporarily suspend the execution of a decision, which can be applied in the case when irrecoverable damage could be caused by the execution of the decision. The trade union may seek a suspension of execution to make the decision unenforceable until the final decision is rendered by the court. The Government states that, in 2009, it had requested the Korean Construction Workers Union (KCWU) and the Korean Transport Workers Union (KTWU), both of which had non-employees as members, to make voluntary efforts to correct the unlawful practice; however, it did not notify them that they shall not be regarded as a trade union.

### C. The Committee’s conclusions

454. *The Committee notes that this case concerns “illegal dispatch” workers, i.e. precarious workers in disguised employment relationships, in HMC Ulsan, Asan and Jeonju plants, Hynix/Magnachip, Kiryung Electronics and KM&I, who are allegedly denied legal protection under the TULRAA and are left unprotected vis-à-vis: (1) recurring acts of anti-union discrimination, notably dismissals, aimed at thwarting their efforts to establish a union; (2) the consistent refusal of the employer to bargain as a result of which none of the unions representing those workers have succeeded in negotiating a collective bargaining agreement; (3) dismissals, imprisonment and compensation suits claiming exorbitant sums, for “obstruction of business”.*
455. *With respect to its previous recommendation (a) relating to the Supreme Court ruling of 22 July 2010, the Committee notes the Government’s indication that: (i) the decision is expected to serve as an important basis to determine whether a case of in-company subcontracting is illegal dispatch; (ii) the High Court decision of 10 February 2011 upheld the Supreme Court’s decision acknowledging that the subcontracted workers were illegally dispatched and that an employment relationship is constituted between HMC and the workers of the in-company subcontractors who had worked there for more than two years; and HMC appealed against this High Court decision before the Supreme Court; and (iii) inspections were planned in 29 companies but four refused; the inspections conducted in 25 companies in September and October 2010 found that the shipbuilding, electronics and IT sectors each had an illegal dispatch case; and where workers of the subcontracted companies were illegally dispatched to the subcontracting company, a corrective order was issued mostly demanding the subcontracting company to directly employ the workers or sometimes leaving the option to convert the dispatch into a legitimate form. Given the apparent pervasive use of this type of employment, the Committee expresses concern at the fact that, according to the Government, some companies refused and were able to refuse inspection, and trusts that the Government will take the necessary measures to ensure that, where necessary, inspections may take place to ensure respect for freedom of association and collective bargaining principles. The Committee also requests the Government to keep it informed of the final outcome of the judicial proceedings concerning the case of a worker dismissed from the HMC Ulsan factory and any other concrete developments illustrating the impact of the Supreme Court ruling of 22 July 2010 on the situation of workers in a disguised employment relationship.*
456. *With respect to its previous recommendations (e) (i) and (h) concerning the need to strengthen the trade union and collective bargaining rights of “illegal dispatch” workers, the Committee notes the Government’s indication that: (i) it has released the “Guidelines for Protection of Subcontracted Workers’ Working Conditions” on 18 July 2011 for compliance by contracting and subcontracted companies, along with instructions and a “Self-compliance Checklist for the Guideline for Subcontracted Workers”, has established the channel “Illegal Subcontracting Reporting Center” for reporting of illegal subcontracting cases, will make sure that compliance checks are conducted during the*

workplace inspection, will actively guide all stakeholders to comply with the Guideline and will publish best practices to raise awareness; (ii) in-company subcontracting is a matter of the company's management decision and should not necessarily be seen as a way to evade the exercise by the workers of their fundamental rights; and (iii) subcontracted workers are granted the rights to freedom of association and collective bargaining guaranteed to all workers by the TULRAA, and the trade union of the subcontracted company can perform collective bargaining with the subcontracted company who determines the working conditions of the workers.

**457.** *While welcoming the monitoring and guidance efforts made by the Government to prevent illegal subcontracting, the Committee cannot but express its concern at the continuing allegations of use of “in-company subcontracting” to evade the exercise of trade union rights. It wishes to emphasize in this regard that collective bargaining between the relevant trade union and the party who determines the terms and conditions of employment of the subcontracted/agency workers should always be possible. The Committee therefore once again requests the Government to develop, in consultation with the social partners concerned, appropriate mechanisms, including an agreed process for dialogue determined in advance, aimed at strengthening the protection of subcontracted/agency workers' rights to freedom of association and collective bargaining, guaranteed to all workers by the TULRAA, thus preventing any abuse of subcontracting as a way to evade in practice the exercise by these workers of their fundamental rights. Moreover, deeply regretting that the Government has not replied to its previous requests, the Committee once again urges the Government to take all necessary measures to promote collective bargaining over the terms and conditions of employment of subcontracted/agency workers in the metal sector, in particular in HMC, KM&I and Hynix/Magnachip, including through building negotiating capacities, so that trade unions of subcontracted/agency workers in these companies may effectively exercise their right to seek to improve the living and working conditions of their members through negotiations in good faith. The Committee also asks the Government to provide a copy of the “Self-Compliance Checklist for the Guideline for Subcontracted Workers”.*

**458.** *As regards its previous recommendation (f), the Committee notes that, according to the Government, following the Supreme Court ruling of 25 June 2009 that the strike action was legitimate and the workers of HMC Asan Plant had been unfairly dismissed and after the return of the case to the High Court, the latter upheld on 8 December 2009 the Supreme Court's decision, the employer appealed to the Supreme Court once again, the appeal was dismissed for lack of grounds, and, as a result, it was finally confirmed that the workers were unfairly dismissed. In this regard, the Committee requests the Government to confirm the reinstatement of these unfairly dismissed workers. Moreover, deeply concerned by the absence of information concerning any action taken in relation to the workers at Hynix/Magnachip and at HMC (Ulsan factory), the Committee once again urges the Government to carry out without delay independent investigations into: (i) the dismissals of the subcontracted/agency workers in HMC Ulsan and Jeonju and, if these workers are found to have been dismissed solely on the grounds that they staged industrial action against a “third party”, i.e. the principal employer (subcontracting company), to ensure that they are reinstated in their posts without loss of pay as a primary remedy. If the judicial authority determines that reinstatement of trade union members is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination; and (ii) the alleged acts of violence perpetrated by private security guards against trade unionists during rallies at HMC Asan and Ulsan and at Kiryung Electronics and, if they are confirmed, to take all necessary measures to punish those responsible and compensate the victims for any damages suffered.*

459. Deeply concerned by the absence of information concerning any action taken by the Government to implement its previous recommendation (g) concerning the allegations of acts of anti-union discrimination and interference at Hynix/Magnachip and at HMC (Ulsan factory and Asan Plant) through the termination of contracts with subcontractors in case of establishment of trade unions of subcontracted workers, the Committee once again urges the Government to take the necessary measures to reinstate the dismissed trade union leaders and members as a primary remedy; if the judicial authority determines that reinstatement is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and to prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination.
460. As regards its previous recommendations (b), (d) and (e)(ii) concerning the need to guarantee trade union rights to “self-employed” workers such as heavy goods vehicle drivers, the Committee notes that the Government states that: (i) the provisions of labour laws are, in principle, applicable only to workers and employers with a “contractual employment relationship”; (ii) according to the Supreme Court, this necessitates an employer–employee relationship which is given if the worker is under the supervision or direction of the alleged employer, is paid wages by the employer as a reward for the work performed, and according to the nature and specifics of the work; (iii) the Supreme Court denied the employee status of drivers of ready-mixed concrete/cargo/dump trucks because the drivers have the ownership of the vehicles, work independently without specific supervision and oversight by the company and bear overall costs incurred on the job; their organizations are thus not acknowledged as trade unions pursuant to the TULRAA; (iv) in the Government’s view, the administrative authority cannot go against the judiciary’s decision, which means that these self-employed workers can neither organize or join a trade union, nor exercise the trade union’s right to collective bargaining, and specific collective bargaining mechanisms for these workers are not admissible under the Korean legal system; (v) since the Korean Constitution guarantees freedom of association, self-employed drivers can establish organizations to represent and protect their rights and interests, convey their demands to and negotiate rates and other matters with their business counterpart; however, they differ from the trade unions defined by the TULRAA and are thus not covered by the Act; and (vi) such organizations have been established and operate freely without Government intervention.
461. The Committee wishes to emphasize, at the outset, that it is not taking a position as to whether the interpretation of the national legislation by the courts is founded. The mandate of the Committee consists in determining whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 6]. In this regard, the Committee recalls that by virtue of the principles of freedom of association, all workers – with the sole exception of members of the armed forces and the police – should have the right to establish and join organizations of their own choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize [see **Digest op. cit.**, para. 254]. The Committee considers that this principle equally applies to heavy goods vehicle drivers. Consequently, and considering that truck drivers should be able to join the organizations of their own choosing to further and defend their interests, including organizations formed under the TULRAA, the Committee once again requests the Government to take the necessary measures to: (i) ensure that “self-employed” workers, such as heavy goods vehicle drivers, fully enjoy freedom of association rights, in particular the right to join the organizations of their own choosing; (ii) to hold consultations to this

*end with all the parties involved with the aim of finding a mutually acceptable solution so as to ensure that workers who are self-employed could fully enjoy trade union rights under Conventions Nos 87 and 98 for the purpose of furthering and defending their interest, including by the means of collective bargaining; and (iii) in consultation with the social partners concerned, to identify the particularities of self-employed workers that have a bearing on collective bargaining so as to develop specific collective bargaining mechanisms relevant to self-employed workers, if appropriate. The Committee also recalls that it is for the federations and confederations themselves to decide whether or not to accept the affiliation of a trade union, in accordance with their own constitutions and rules [see **Digest** op. cit., para. 722]. The Committee therefore requests the Government to take the necessary measures to: (i) ensure that organizations established or joined by heavy goods vehicle drivers have the right to join federations and confederations of their own choosing, subject to the rules of the organizations concerned and without any previous authorization; and (ii) withdraw the recommendation made to the KCWU and the KTWU to exclude owner drivers from their membership, and refrain from any measures against these federations, including under Article 9(2) of the Enforcement Decree of the TULRAA, which would deprive trade union members of being represented by their respective unions. The Committee requests the Government to keep it informed of all measures taken or envisaged in this respect.*

**462.** *In relation to its previous recommendation (c) concerning de-registration of unions by administrative decision, the Committee notes that, according to the Government: (i) the notification under Article 9(2) of the Enforcement Decree of the TULRAA does not trigger the dissolution of the trade union or forbid union activities but rather informs that the organization is no longer regarded as a union nor protected by the TULRAA; (ii) the trade union may appeal against such notification; (iii) nevertheless, it is one of the core principles of the Korean administrative laws that an administrative decision remains in effect until and unless the court's final ruling is delivered against it; and (iv) court orders to temporarily suspend the execution of a decision can be applied in the case when irrecoverable damage could be caused by the execution of the decision.*

**463.** *In this regard, the Committee considers that a notification of the loss of union status and protection under the relevant laws amounts to the suspension of the legal personality of the union and thus to a cancellation of its registration. It recalls that measures taken to withdraw the legal personality of a trade union should be taken through judicial and not administrative action to avoid any risk of arbitrary decisions. If the principle that an occupational organization may not be subject to suspension or dissolution by administrative decision is to be properly applied, it is not sufficient for the law to grant a right of appeal against such administrative decisions; such decisions should not take effect until the expiry of the statutory period for lodging an appeal, without an appeal having been entered, or until the confirmation of such decisions by a judicial authority [see **Digest** op. cit., paras 702–703]. While noting that trade unions could seek a suspension of execution to make the decision under Article 9(2) of the Enforcement Decree of the TULRAA unenforceable until the final decision is rendered by the court, the Committee considers that measures of suspension or dissolution by the administrative authority constitute such extreme acts of interference and serious infringements of the principles of freedom of association that they should at least be subject to appeal to a judicial authority with automatic and immediate suspensive effect. The Committee therefore requests the Government to take the necessary measures, in consultation with the social partners, to amend the provisions of the TULRAA and its Enforcement Decree, so as to ensure that workers' organizations are not liable to dissolution or suspension by an administrative authority or at least that such an administrative decision does not take effect until a final judicial decision is handed down. It requests the Government to keep it informed in this respect.*

464. *With respect to its previous recommendations (i) and (j) concerning Article 314(1) of the Penal Code, the Committee notes the Government's statement that: (i) Articles 3 and 4 of the TULRAA illustrate that justifiable industrial actions are protected whereas the trade union is held responsible in both civil and criminal terms for any illegitimate industrial actions ruled by the courts as "obstruction of business" under Article 314(1), which seeks to punish those who interfere with the business of another by circulating false facts or through fraudulent means or by the threat of force; (ii) "threat of force" refers to any influence that overwhelms the free will and judgment of another by force or threat, and that a labour strike may thus be seen as an obstruction of business if it goes beyond a simple refusal to work specified in the employment contract, influencing the employer to accept the workers' demands by force or threat of a collective refusal to work; and (iii) Article 314(1) is unlikely to infringe freedom of association principles, since a recent Supreme Court decision clarifies that the charge of "obstruction of business" by "threat of force" only applies to industrial actions where it is deemed that "such actions were committed abruptly at a time unpredictable to the employer causing serious confusion or material damage to the business operation of the employer which could overwhelm the free will and judgment of the employer as to the continuance of business".*
465. *The Committee recalls that the question of the application of "obstruction of business" provisions in an occupational context has been the subject of recurring comment by the Committee in relation to its examination of Case No. 1865 involving the Republic of Korea. The Committee observes that industrial action is deemed illegitimate under Article 314 when the impact of the recourse to this fundamental right amounts to obstruction of business, and that "obstruction of business" by "threat of force" is deemed given where industrial action is committed abruptly, causing serious confusion or material damage to the business operation which could overwhelm the free will and judgment of the employer. In this respect, the Committee recalls that it has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests. As regards cases in which strikes may be restricted or prohibited, the Committee has always held that, by linking restrictions on strike action to interference with trade and commerce, a broad range of legitimate strike action could be impeded [see **Digest**, op. cit., paras 521 and 592]. Moreover, the Committee recognizes that strikes are by nature disruptive and costly and that strike action also represents important costs for those workers who choose to exercise it as a last resort tool and means of pressure on the employer to redress any perceived injustices. The Committee is therefore bound to express once again its great concern at the excessively broad legal definition of "obstruction of business" encompassing practically all activities related to strikes (see Case No. 1865, 335th Report, para. 834). It also recalls that penal sanctions should only be imposed as regards strikes where there are violations of strike prohibitions which are themselves in conformity with the principles of freedom of association [see **Digest**, op. cit., para. 668]. Consequently, the Committee once again urges the Government to take all necessary measures without delay so as to bring section 314 of the Penal Code "obstruction of business" into line with freedom of association principles, and to keep it informed in this regard. The Committee also expects that the Government and the judicial authorities will put in place adequate safeguards so as to avert in future the possible risks of abuse of judicial procedure on grounds of "obstruction of business" with the aim of intimidating workers and trade unionists, and that the courts in their rulings will take due account of the need to build a constructive industrial relations climate in the context of individual industrial relations.*
466. *Lastly, the Committee expects that the above recommendations will be implemented without further delay and urges the Government to keep it informed in this respect. It once again reminds the Government that it may avail itself of the technical assistance of the Office to this end.*

## The Committee's recommendations

467. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) Given the apparent pervasive use of this type of employment, the Committee expresses concern at the fact that, according to the Government, some companies refused and were able to refuse inspection, and trusts that the Government will take the necessary measures to ensure that, where necessary, inspections may take place to ensure respect for freedom of association and collective bargaining principles. The Committee also requests the Government to keep it informed of the final outcome of the judicial proceedings concerning the case of a worker dismissed from the HMC Ulsan factory and any other concrete developments illustrating the impact of the Supreme Court ruling of 22 July 2010 on the situation of workers in a disguised employment relationship.*
- (b) Welcoming the monitoring and guidance efforts made by the Government to prevent illegal subcontracting, the Committee once again requests the Government to develop, in consultation with the social partners concerned, appropriate mechanisms, including an agreed process for dialogue determined in advance, aimed at strengthening the protection of subcontracted/agency workers' rights to freedom of association and collective bargaining, guaranteed to all workers by the TULRAA, so as to prevent any abuse of subcontracting as a way to evade in practice the exercise by these workers of their trade union rights. Moreover, the Committee once again urges the Government to take all necessary measures to promote collective bargaining over the terms and conditions of employment of subcontracted/agency workers in the metal sector, in particular in HMC, KM&I and Hynix/Magnachip, including through building negotiating capacities, so that trade unions of subcontracted/agency workers in these companies may effectively exercise their right to seek to improve the living and working conditions of their members through negotiations in good faith. The Committee also asks the Government to provide a copy of the "Self-Compliance Checklist for the Guideline for Subcontracted Workers".*
- (c) Deeply concerned by the absence of information concerning any action taken in relation to the workers at Hynix/Magnachip and at HMC (Ulsan factory), the Committee once again urges the Government to carry out without delay independent investigations into: (i) the dismissals of the subcontracted/agency workers in HMC Ulsan and Jeonju and, if these workers are found to have been dismissed solely on the grounds that they staged industrial action against a "third party", i.e. the principal employer (subcontracting company), to ensure that they are reinstated in their posts without loss of pay as a primary remedy. If the judicial authority determines that reinstatement of trade union members is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination; and (ii) the alleged acts of violence perpetrated by private*



*security guards against trade unionists during rallies at HMC Asan and Ulsan and at Kiryung Electronics and, if they are confirmed, to take all necessary measures to punish those responsible and compensate the victims for any damages suffered. Moreover, following the Supreme Court ruling of 25 June 2009 and the High Court ruling of 8 December 2009, the Committee requests the Government to confirm the reinstatement of the unfairly dismissed workers of HMC Asan Plant.*

- (d) *Deeply concerned by the absence of information concerning any action taken by the Government to implement its previous recommendation concerning the allegations of acts of anti-union discrimination and interference at Hynix/Magnachip and at HMC (Ulsan factory and Asan Plant) through the termination of contracts with subcontractors in case of establishment of trade unions of subcontracted workers, the Committee once again urges the Government to take the necessary measures to reinstate the dismissed trade union leaders and members as a primary remedy; if the judicial authority determines that reinstatement is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and to prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination.*
- (e) *The Committee once again requests the Government to take the necessary measures to: (i) ensure that “self-employed” workers, such as heavy goods vehicle drivers, fully enjoy freedom of association rights, in particular the right to join the organizations of their own choosing; (ii) to hold consultations to this end with all the parties involved with the aim of finding a mutually acceptable solution so as to ensure that workers who are self-employed could fully enjoy trade union rights under Conventions Nos 87 and 98 for the purpose of furthering and defending their interest, including by the means of collective bargaining; and (iii) in consultation with the social partners concerned, to identify the particularities of self-employed workers that have a bearing on collective bargaining so as to develop specific collective bargaining mechanisms relevant to self-employed workers, if appropriate. The Committee also requests the Government to take the necessary measures to: (i) ensure that organizations established or joined by heavy goods vehicle drivers have the right to join federations and confederations of their own choosing, subject to the rules of the organizations concerned and without any previous authorization; and (ii) withdraw the recommendation made to the KCWU and the KTWU to exclude owner drivers from their membership, and refrain from any measures against these federations, including under Article 9(2) of the Enforcement Decree of the TULRAA, which would deprive trade union members of being represented by their respective unions. The Committee requests to be kept informed of all measures taken or envisaged in this respect.*
- (f) *The Committee requests the Government to take the necessary measures, in consultation with the social partners, to amend the provisions of the TULRAA and its Enforcement Decree, so as to ensure that workers’ organizations are not liable to dissolution or suspension by an*

*administrative authority or at least that such an administrative decision is subject to appeal to a judicial authority with suspensive effect. It requests the Government to keep it informed in this respect.*

- (g) *Expressing once again great concern at the excessively broad legal definition of “obstruction of business” encompassing practically all activities related to strikes, the Committee once again urges the Government to take all necessary measures without delay so as to bring Article 314 of the Penal Code “obstruction of business” into line with freedom of association principles, and to keep it informed in this regard. The Committee also expects that the Government and the judicial authorities will put in place adequate safeguards so as to avert in future the possible risks of abuse of judicial procedure on grounds of “obstruction of business” with the aim of intimidating workers and trade unionists, and that the courts in their rulings will take due account of the need to build a constructive industrial relations climate in the context of individual industrial relations.*
- (h) *The Committee expects that the above recommendations will be implemented without further delay and urges the Government to keep it informed in this respect. It once again reminds the Government that it may avail itself of the technical assistance of the Office to this end.*

CASE No. 2753

INTERIM REPORT

**Complaint against the Government of Djibouti  
presented by  
the Djibouti Labour Union (UDT)**

*Allegations: The complainant denounces the closure of its premises and the confiscation of the key to its letter box by order of the authorities, the intervention of the police at a trade union meeting, the arrest and questioning of trade union officials and the general ban on trade unions from holding any meetings*

- 468.** The Committee last examined this case at its March 2011 meeting [see 359th Report, approved by the Governing Body at its 310th Session, paras 395–413]. The Djibouti Labour Union (UDT) sent further information in a communication dated 29 August 2011.
- 469.** The Government sent its observations in a communication dated 20 October 2011.
- 470.** Djibouti has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

## A. Previous examination of the case

**471.** At its March 2011 meeting, the Committee made the following recommendations [see 359th Report, para. 413]:

- (a) The Committee regrets that, despite the time that has elapsed since the presentation of the complaint, the Government has not replied to the complainant's allegations, even though it has been requested several times, including through an urgent appeal, to present its comments and observations on this case. The Committee urges the Government to be more cooperative in the future.
- (b) The Committee urges the Government to send its observations without delay concerning the intervention by the police and the need to obtain authorization from the Ministry of the Interior for organizing trade union meetings such as the union congress.
- (c) The Committee urges the Government to explain the reasons for the arrest and interrogation of Mr Anouar Mohamed Ali, general secretary of the STED, and Mr Abdourachid Mohamed Arreh, member of the SEP, following the intervention by the police on 13 October 2009.
- (d) The Committee urges the Government to reply to the allegations by the UDT concerning the intervention by the police to prevent the UDT general secretary from entering the union premises, the confiscation of the key to the union's letter box and the appropriation by a member of the Djiboutian delegation of mail addressed to the UDT during the International Labour Conference.
- (e) The Committee is bound to note with deep concern the blatant lack of progress and the apparent unwillingness on the part of the Government to settle the pending issues, particularly to stop the harassment suffered by the UDT. The Committee expresses, in the strongest terms, its expectation that the Government will take concrete measures without delay to improve the situation.

## B. Additional information from the complainant

**472.** In a communication dated 29 August 2011, the UDT indicates that its general secretary was still being harassed and had been prevented from boarding an aeroplane in order to attend a tripartite regional conference organized by the ILO and the Arab Labour Organization (ALO) in Morocco. The complainant maintains that the police withheld Mr Adan Mohamed Abdou's passport at the airport on 12 December 2010 and that it has still not been returned to him.

**473.** The complainant further states that 62 dockworkers, members of the Dock Workers' Union, were brutally arrested by the police on 2 January 2011 and were imprisoned and subjected to violent treatment while in detention, which lasted for three months. All that they had done was to peacefully demand compensation to which they were entitled but which had been withheld by the authorities for more than a year.

**474.** The UDT regrets that regional and international trade union organizations appear to want to cooperate with a Government which has continued to violate the standards and principles of freedom of association for more than a decade and which is regularly found guilty by the ILO. The UDT would like an awareness-raising campaign and sustained pressure at the international level to condemn the persistent violations of freedom of association by the Government of Djibouti, described as an autocratic and despotic regime, which affect the organization of the independent trade union movement and the training of its members and threaten the security of trade unionists and their families.

### C. The Government's reply

475. In a communication dated 20 October 2011, the Government refutes all of the complainant's allegations, in particular those concerning acts of intimidation towards trade union leaders, prevention of access by union officials to UDT premises and tampering with UDT correspondence.
476. The Government states with regard to the union meeting of 13 October 2009 that the meeting was a UDT seminar for which a public establishment – the *Palais du Peuple* – had been made available by the authorities. According to the Government, the event had turned into a congress, resulting in differences of opinion between participants and physical clashes. The Government states that the authorities had to intervene in order to end the violence between trade union members. Moreover, the Government disputes the allegations that trade union members were arrested, that access to UDT premises was monitored or letter box keys confiscated.
477. The Government concludes by stating that the allegations made by the UDT are unfounded and are intended only to obstruct Government action. The Government requests that the Committee verify the complainant's allegations, which merely obstruct the social dialogue to which social partners in Djibouti aspire.

### D. The Committee's conclusions

478. *The Committee notes that the present case concerns allegations of interference by the authorities in trade union activities and acts of intimidation against the trade union movement, prevention of access by the UDT to its premises and to its correspondence and of tampering with its mail during an international conference. The Committee notes that the allegations also concern the confiscation of the passport of the complainant organization's general secretary as he was preparing to leave the country to attend an activity organized by the ILO, in addition to acts of violence by the authorities against trade union members who were holding a peaceful demonstration.*
479. *The Committee observes that the Government does not refute the fact that law enforcement officers intervened in the trade union meeting held by the UDT on 13 October 2009. According to the Government, law enforcement officers were obliged to intervene in order to ensure public security as differences between the participants in the UDT activity had led to physical clashes involving the use of knives.*
480. *The Committee notes that the Government rejects the complainant's allegations regarding the arrest of trade union members following the intervention of law enforcement officers, in particular the arrest and interrogation of Mr Anouar Mohamed Ali, general secretary of the Djibouti Electricity Workers' Union (STED) and Mr Abdourachid Mohamed Arreh, member of the Primary School Teachers' Union (SEP).*
481. *The Committee observes that in its communication, the Government also denies having ordered the police to intervene to prevent union officials from gaining access to UDT premises and having confiscated the key to the letter box of the UDT. The Government maintains that the allegation that a member of the Djiboutian delegation appropriated mail addressed to the UDT during the International Labour Conference is unfounded and aims to undermine the credibility of the Government's action.*
482. *The Committee notes with deep concern the information that the passport of the general secretary of the UDT was withheld on 12 December 2010 and that he was not able to leave the country when he was supposed to take part in a regional activity organized jointly in Morocco by the ALO and the ILO, and the absence of reply from the Government. The*

*Committee recalls that participation by trade unionists in international trade union meetings is a fundamental trade union right; governments should therefore abstain from any measure, such as withholding travel documents, that would prevent representatives of workers' organizations from exercising their mandate in full freedom and independence. Moreover, the Committee has already had cause to indicate that participation as a trade unionist in symposia organized by the ILO is a legitimate trade union activity and a government should not refuse the necessary exit papers for this reason [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 153 and 765]. Under these circumstances, the Committee urges the Government to report without delay on the reasons why the police withheld the passport of Mr Adan Mohamed Abdou, general secretary of the UDT, on 12 December 2010, and to indicate whether the document has been returned to him in order to ensure that he is able to move freely in order to carry out his mandate.*

- 483.** *The Committee also notes with deep concern the allegation that 62 dockworkers, members of the Dock Workers' Union, were brutally arrested by the police on 2 January 2011 during a peaceful demonstration in front of the Parliament and that they were imprisoned and subjected to violence while in detention, which lasted for three months, and the absence of reply from the Government. The Committee wishes to recall that workers should enjoy the right to peaceful demonstrations to defend their occupational interests. The use of the forces of order during trade union demonstrations should be limited to cases of genuine necessity, and the police authorities should be given precise instructions so that, in cases where public order is not seriously threatened, people are not arrested simply for having organized or participated in a demonstration [see **Digest**, *op. cit.*, paras 133, 150 and 151]. The Committee urges the Government to provide without delay explanations concerning the arrest of 62 dockworkers, members of the Dock Workers' Union, during the demonstration of 2 January 2011 in front of the Parliament and concerning the conditions of their detention.*
- 484.** *The Committee recalls that it had previously noted the complainant's allegation that the management of the hotel where its congress was due to take place had informed it that its reservation had been cancelled by order of the authorities and that it was necessary to obtain authorization from the Ministry of the Interior to organize such an activity. According to the UDT, the Ministry of the Interior confirmed the prohibitive measures against it. The Committee once again urges the Government to provide explanations without delay concerning the need to obtain authorization from the Ministry of the Interior for organizing trade union meetings such as a trade union congress. The Committee once again recalls that in view of the fact that in every democratic trade union movement the congress of members is the supreme trade union authority which determines the regulations governing the administration and activities of trade unions and which establishes their programme, the prohibition of such congresses would seem to constitute an infringement of trade union rights [see **Digest**, *op. cit.*, para. 456].*
- 485.** *Lastly, the Committee notes with concern the contradictory information supplied by the complainant and the Government in this case. It notes with regret that the Government essentially limits itself to refuting the allegations of interference and harassment made by the complainant, without further explanation. In addition, the Committee is bound to recall that it has been urging the Government for many years to give priority to promoting and defending freedom of association and to give effect as a matter of urgency to the specific commitments that it has made before international bodies to settle pending issues and to enable the development of free and independent trade unionism, as the only guarantee of sustainable social dialogue in Djibouti. The Committee is bound to note with deep concern, based on the additional information provided by the complainant and the Government's brief observations, the lack of progress in this direction to date. The Committee finds itself obliged once again to urge the Government to maintain a social*

*climate free from acts of anti-union interference and harassment, in particular against the UDT.*

### **The Committee's recommendations**

**486.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee urges the Government to indicate without delay the reasons why the police withheld the passport of Mr Adan Mohamed Abdou, general secretary of the UDT, on 12 December 2010, and to indicate whether the document has been returned to him in order to ensure that he is able to move freely in order to carry out his mandate.*
- (b) The Committee urges the Government to provide without delay explanations concerning the arrest of 62 dockworkers, members of the Dock Workers' Union, during the demonstration of 2 January 2011 in front of the Parliament and concerning the conditions of their detention.*
- (c) The Committee once again urges the Government to provide explanations without delay concerning the need to obtain authorization from the Ministry of the Interior for organizing trade union meetings such as a trade union congress.*
- (d) Recalling that it has been urging the Government for many years to give priority to promoting and defending freedom of association and to give effect as a matter of urgency to the specific commitments that it has made before international bodies to settle pending issues and to enable the development of free and independent trade unionism, as the only guarantee of sustainable social dialogue in Djibouti, the Committee is bound to note with deep concern the lack of any progress in this direction. The Committee finds itself obliged to urge the Government again to maintain a social climate free from acts of anti-union interference and harassment, in particular against the UDT.*

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CASE NO. 2786

INTERIM REPORT

**Complaint against the Government of Dominican Republic  
presented by  
the National Trade Union Confederation (CNUS)**

*Allegations: Anti-union acts and dismissals in the enterprises “Frito Lay Dominicana”, “Universal Aloe” and “MERCASID”, as well as the refusal to register various trade unions*

- 487.** The Committee last examined this case at its March 2011 meeting, when it presented an interim report to the Governing Body [see 359th Report, paras 414–458, approved by the Governing Body at its 310th Session (March 2011)].
- 488.** The Government sent its observations in a communication dated 20 October 2011.
- 489.** The Dominican Republic has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

- 490.** At its March 2011 meeting, the Committee made the following recommendations [see 359th Report, paras 414–458]:
- (a) The Committee requests the Government, in consultation with the most representative workers’ and employers’ organizations, to take measures to amend the legislation in order to allow trade unions of self-employed workers or trade unions of contract workers to be founded and registered.
  - (b) Recalling that the Government freely ratified Convention No. 87 and that it is obliged to guarantee that the provisions of the Convention are respected, and assuming that all procedural requirements have been met, the Committee requests the Government to register SINAMITO (whose membership consists of self-employed workers), the Trade Union of Workers of the Enterprise Barrick Gold and the Trade Union of Electricity Generator and Converter Building and Repair Workers and Related of Haina (whose members are contract workers).
  - (c) As to the National Trade Union of Workers of the Call Center Branch, the Committee requests the complainant organization to communicate its observations concerning the Government’s reply and expects that the Government and the trade union in question will together examine how the problems referred to by the Government might be resolved. The Committee also requests the Government to investigate claims of pressure being brought to bear on workers to get them to leave the trade union and if these allegations are proven to be true, to take the necessary measures to prevent any such acts from occurring in the future.
  - (d) As to SUTRAMICEMA and FUTRAMETAL, the Committee expects the Government and the trade union and the federation in question, to examine how the problems referred to by the Government might be solved. The Committee requests the Government to keep it informed in this regard.
  - (e) The Committee notes that the Government has not sent its observations regarding the allegations contained in the communication dated 8 July 2010 concerning anti-union dismissals, threats and practices in certain enterprises, such as the Frito Lay Dominicana

enterprise, the Universal Aloe enterprise and the MERCASID enterprise and requests the Government to send its observations without delay, together with the views of these enterprises obtained through the most representative employers' organization.

## **B. The Government's reply**

- 491. *Refusal to register the National Trade Union of Operators of Topographical Instruments (SINAMITO).*** In its communication dated 28 September 2011, the Government states that, on 9 August 2011, the trade union informed the Ministry of Labour that it had held an assembly on 17 July 2011 at which the trade union had decided to amend its statutes and change its name to "Trade Union of Construction Workers and Operators of Topographical Instruments" (registration No. 00126-1962). The Government states that, as a result of these arrangements, the application filed by the National Trade Union Confederation (CNUS) and SINAMITO is resolved.
- 492. *Constant harassment of the Trade Union of Workers and Salespersons of Frito Lay Dominicana.*** The Government states that the Ministry of Labour has responded appropriately to the various applications received from both the Trade Union of Workers of Frito Lay Dominicana and the CNUS and relating to alleged violations committed by that enterprise against both unionized and non-unionized workers, as reflected in the reports prepared by labour inspectors. In the inspection report of 16 June 2010, it is recorded that the Secretary-General of the trade union, Mr Ramón Mosquea, told the labour inspector that it was not in his interest for the complaint to be investigated but for it to be referred to the Ministry of Labour so that mediation with the enterprise could resume.
- 493. *Refusal to register the United Trade Union of Workers of Minera Cerros de Maimón (SUTRAMICEMA).*** The Government states that the Ministry of Labour sent back the registration application on the grounds that it contained errors that made it impossible to proceed with registration in conformity with national legislation. The workers managing the trade union subsequently decided to join the Trade Union of Workers of Cerro de Maimón Mine (SITRACEMA), registered under No. 24/2010 on 19 October 2010. The issue of the trade union registration application by the workers of that enterprise was thus resolved.
- 494. *Refusal to register the Trade Union of Workers of the Enterprise Barrick Gold.*** The Government states that the Ministry of Labour, acting in accordance with labour legislation, sent back the application on the grounds that the CNUS itself had reported in a previous communication that workers listed in the Barrick Gold registration application worked for an enterprise known as "Graña y Montero" (G&M). The Government states that returning a registration application with observations does not mean that the application has been rejected. The General Labour Director attended a meeting with CNUS officers and lawyers to discuss and take note of their observations. As a result, the United Trade Union of Workers of the Enterprise Minera Pueblo Viejo Cotuí (Barrick Gold) was registered under No. 10-2010 by the Ministry of Labour on 25 June 2010, and the representation was resolved.
- 495. *Refusal to register the Single Federation of Workers of the Mining, Metallurgy, Chemicals, Energy and Various Industries and Related (FUTRAMETAL).*** The Government reiterates that on 13 March 2010, the registration application was returned to FUTRAMETAL together with various observations clearly based on the law and understood and recognized by the trade union confederations. The observations were accepted by the Secretary-General of the federation and FUTRAMETAL was registered on 12 November 2010.



- 496. *Anti-union practices in the MERCASID enterprise.*** In the complaint filed by the CNUS regarding MERCASID, it is stated that workers have been dismissed from this enterprise for having joined an existing trade union, and that a campaign of slander was launched against Mr Pablo de la Rosa, a trade union officer, with the aim of damaging his image and forcing him to abandon his demand that the collective agreement in force be respected. Regarding the situation of Mr de la Rosa, the Government states that, according to investigations conducted by the Ministry of Labour, the real issue was the application by MERCASID for the lifting of trade union immunity because of alleged misconduct by Mr de la Rosa under the Labour Code. The Labour Court of the National District, in its ruling of 3 August 2009, rejected the application by MERCASID, which complied with the ruling, and Mr de la Rosa kept his job and remained an officer of the trade union.
- 497.** Regarding the dismissal of workers who joined the trade union, the Government states that the Ministry of Labour has conducted various investigations, including those of 18 August and 10 September 2010, in response to the complaint lodged by the SID Workers' Trade Union (SITRASID) concerning the alleged anti-union repression of trade union officers. Neither investigation found evidence to indicate to the labour inspectorate that there had been any practices contrary to freedom of association. The inspectors observed that there was some rivalry between various officers, apparently over the leadership of the trade union.
- 498. *Refusal to register the Trade Union of Electricity Generator and Converter Building and Repair Workers and Related of Haina.*** In the complaint, the CNUS stated that the application for the registration of the Trade Union of Electricity Generator and Converter Building and Repair Workers and Related of Haina was filed with the Ministry of Labour on 26 October 2009. The application contained all of the required documentation, which referred to the enterprises in which the founders of the trade union provided their services, and thereby proved that they were wage earners in those enterprises. The CNUS stated that, through a ruling dated 5 November 2009, the General Labour Director rejected the trade union's application for registration, claiming that the union was being established by self-employed workers who were not governed by the Labour Code. The workers were dismissed as a result.
- 499.** The Government states that the Labour Code was the product of consensus and discussions among the parties to labour relations, namely, employers, workers and the State. The Code stipulates that its provisions are applicable to wage-earning workers, meaning that in this instance, the persons applying for registration are workers who are not covered by the Labour Code. The State accordingly passed Act No. 122-05 of 2005, whereby all associations or entities not governed by the Labour Code are entitled to organize and acquire a legal personality. Regarding the dismissal of the workers, the Government states that it never received a report of any alleged dismissals, and since the alleged enterprises are not known, there is no way an investigation can be conducted into the allegations.
- 500. *Anti-union practices in the Universal Aloe enterprise.*** The complainant organization stated that pregnant women had been dismissed from this enterprise, direct threats had been made against trade union officials and the interventions of the Ministry of Labour had not been sufficiently effective. The Government states that the Ministry of Labour keeps the enterprise under constant supervision through the labour inspectorate; over 15 investigations had been carried out in the previous year, mostly in response to complaints from the workers' trade union, and every application had been duly processed. Regarding the dismissal of pregnant workers, the Government states that the Ministry of Labour had recorded only one case in which a female worker had had a fight with a female colleague, apparently in a fit of jealousy thought to involve a trade union officer. No evidence of anti-union discrimination by the enterprise had been found. Likewise, no

practices harmful to freedom of association had been uncovered by any of the various investigations.

- 501. *Refusal to register the Trade Union of Workers of the Call Center Branch.*** The Government reiterates that some of the workers mentioned in relation to the establishment of the trade union had informed the Ministry of Labour in writing that they had not consented to being part of the trade union, or that their names had been used without their knowledge. The Ministry of Labour had no choice but to take these reports into consideration when deciding whether or not to register the trade union, otherwise it would have exposed itself to a legal challenge by the workers in question. Similarly, given that enterprises are required to inform the Ministry of Labour of contract terminations, it was discovered that some of the workers mentioned in the application had been dismissed before the time of the founding assembly. Consequently, the trade union did not have the number of members required for the establishment of trade unions under labour legislation. It should be noted that Rococo Investment, Inc. (the enterprise that employed nearly all of the workers) was sanctioned by the Ministry of Labour for attempting to ignore the trade union immunity of the workers at the time the composition of the management committee was announced. The Government states that Rococo Investment, Inc. ceased operations in the Dominican Republic in September 2011.
- 502.** The Government points out that there are no impediments to workers to establish their organizations and that various trade unions have been registered in recent months in the call centre branch, namely, the Trade Union of Workers of the Enterprise ACS (SETA); the Trade Union of Workers of the Enterprise Nearshore Call Center Services SA, and the National Union of Call Center Employees (UNECA).

### **C. The Committee's conclusions**

- 503.** *The Committee recalls that this case relates to anti-union actions and dismissals in the enterprises "Frito Lay Dominicana", "Universal Aloe" and "MERCASID", as well as the refusal to register various trade unions, namely, the Trade Union of Workers of the Call Center Branch (enterprises Rococo Investment, Inc., Stream International, Language Line and Git Prepaid); SINAMITO; the Trade Union of Workers of the Enterprise Barrick Gold (enterprise Minera Pueblo Viejo Barrick Gold); the SUTRAMICEMA and the Trade Union of Electricity Generator and Converter Building and Repair Workers and Related of Haina; and the FUTRAMETAL.*
- 504.** *Regarding the refusal to register the abovementioned trade unions, and recalling that it asked for them to be registered, the Committee notes with interest that most of them are already registered or have opted to merge with another trade union, namely; SINAMITO, the Trade Union of Workers of the Enterprise Minera Pueblo Viejo Cotuí (Barrick Gold); the FUTRAMETAL; and SITRACEMA – formerly the (incipient) SUTRAMICEMA.*
- 505.** *Regarding the allegations of dismissal and impediments to the establishment of trade unions of self-employed workers or contract workers (the Trade Union of Electricity Generator and Converter Building and Repair Workers and Related of Haina), the Committee takes due note of the Government's statement that it has never received a report of any alleged anti-union dismissals and that, given that the Labour Code is applicable only to wage-earning workers, the State adopted Act No. 122-05, whereby all associations or entities not governed by the Labour Code are entitled to organize and acquire a legal personality. The Committee requests the Government to indicate whether self-employed workers and contract workers may bargain collectively.*

**506.** *Regarding the National Trade Union of Workers of the Call Center Branch, the Committee recalls that in its previous recommendations it had requested the complainant organization to communicate its observations concerning the Government's reply, and requested the Government to contact the trade union in question with a view to examining how the problems referred to by the Government might be resolved. The Committee notes that the complainant organization has not provided the observations requested. It also notes that the Government states that: (a) Rococo Investment, Inc. (the enterprise that employed nearly all of the workers) was sanctioned by the Ministry of Labour for attempting to ignore the trade union immunity of the workers at the time the composition of the management committee was announced; (b) the enterprise ceased operations in the Dominican Republic in September 2011; and (c) various trade unions have been registered in recent months in the call centre branch, namely, SETA; the Trade Union of Workers of the Enterprise Nearshore Call Center Services SA, and UNECA.*

**507.** *Regarding the alleged anti-union practices in the Frito Lay Dominicana enterprise, the Universal Aloe enterprise and the MERCASID enterprise, the Committee notes that the Government indicates that:*

- (a) in the inspection report of 16 June 2010, it is recorded that the Secretary-General of the Trade Union of Workers and Salespersons of Frito Lay Dominicana, Mr Ramón Mosquea, told the labour inspector that it was not in his interest for the complaint to be investigated but for it to be referred to the Ministry of Labour so that mediation with the enterprise could resume;*
- (b) the campaign of slander against Mr Pablo de la Rosa was an application by MERCASID for the lifting of trade union immunity, that the Labour Court of the National District, in its ruling of 3 August 2009, rejected the application, and that the abovementioned enterprise complied with the ruling. Regarding the dismissal of workers for having joined a trade union, the Committee notes that the Government indicates that the Ministry of Labour has carried out various investigations into the alleged anti-union repression of trade union officers and found no evidence of practices contrary to freedom of association; and*
- (c) regarding the alleged threats against officers of the trade union of workers of the enterprise Universal Aloe, the Ministry of Labour found no signs of anti-union discrimination by the enterprise, nor were practices harmful to freedom of association uncovered.*

*The Committee requests the Government to provide additional information, in particular as regards the allegations of inspection flaws (absence of impartiality and failure to carry-out inspections).*

## **The Committee's recommendations**

**508.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee requests the Government to indicate whether self-employed workers and contract workers may bargain collectively.*
- (b) The Committee requests the Government to provide additional information as regards the allegations of inspection flaws (absence of impartiality and failure to carry-out inspections).*

CASE NO. 2819

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of the Dominican Republic  
presented by  
the National Confederation of Dominican Workers (CNTD)**

***Allegations: The complainant organization alleges the dismissal of all the founders of a trade union in a company, and the suspension of union leaders for submitting a draft collective agreement and for exerting the right to organize in another company***

- 509.** The complaint is contained in a communication of the National Confederation of Dominican Workers (CNTD) dated 20 October 2010. The CNTD submitted new allegations in a communication of 8 March 2011.
- 510.** The Government sent its observations in a communication dated 20 October 2011.
- 511.** The Dominican Republic has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

**A. The Complainant's allegations**

- 512.** In its communication dated 20 October 2010, the CNTD states that in its meeting of 26 January 2009, the workers of the company Ciramar International Trading Ltd decided to establish the Union of Workers of Ciramar International (STECI), which was registered by the Ministry of Labour under No. 02/2009. The complainant organization alleges that on 29 January 2009, the company Ciramar International Trading Ltd dismissed (termination of contract for no valid reason) all the founding members of the trade union, claiming that it was carrying out the orders of the Chief of Naval Staff, which did not acknowledge the trade union and denied the dismissed persons entry to the company's premises (according to the complainant these facts are recorded in Report No. 18-2006 submitted under the investigation carried out on Ciramar International Trading Ltd).
- 513.** The company Ciramar International Trading Ltd manufactures and repairs ships and its main headquarters are located in the naval base of Las Calderas, in the municipality of Bani and province of Peravia, in the south of the country. Although the company is located inside the grounds of a naval military base, it is not attached to this military body and the workers that established the trade union are not part of the military. The fact that a company is located in areas controlled by military bodies does not mean that its workers cannot form a trade union and that they are excluded from the scope of ILO Convention No. 87.
- 514.** The complainant organization indicates that, following their dismissal for participating in the foundation of the trade union, the dismissed workers Sandy Soto Díaz, Richard Candelario, Onasis R. Espinosa, Víctor Beltre G., Beato Brujan Arias, Gilberto de los Santos, Bodre Brujan, Porfirio Ramírez Guzmán, José del Carmen Guance, Samuel de

Jesús Franco, Daniel Ramírez Báez and Santos Reyes filed a complaint against Ciramar International Ltd, before the competent district court, the Civil, Commercial and Labour Panel of the Court of First Instance of the Judicial District of Peravia. In this complaint they requested the court to declare the dismissals null and void, order their reinstatement in their normal activities, the payment of wages foregone over the period that they were not in the company and compensation for damages caused.

- 515.** The complainant states that pursuant to the abovementioned complaint, the Civil, Commercial and Labour Panel of the Court of First Instance of the Judicial District of Peravia handed down Ruling No. 23 on 12 July 2010 in which the presiding judge decided not to order the workers' reinstatement "since the current labour legislation in the Dominican Republic does not provide for the reinstatement of workers and workers dismissed under such conditions (protected by trade union immunity) are only entitled to compensation".
- 516.** The complainants state that protection guaranteeing the exercise of a fundamental right, in this case the freedom of association, must include the restitution of the right once this has been breached. To exercise the right to organize, dismissed workers must be reinstated to their posts, since financial compensation does not guarantee the exercise of the right to organize, but only provides monetary compensation for the damages caused. Only the continued employment of the union founders, leaders and members guarantees the existence and effective operation of the workers' union. Therefore, their irregular and abusive dismissal should lead to their reinstatement in their posts. Accepting only financial compensation for the dismissal of union leaders and activists is tantamount giving up the right to organize, which contradicts the terms of Convention No. 98. According to the complainant, the position adopted by the company Ciramar International Trading Ltd by dismissing and denying entry to its premises to the union founders and leaders, on the grounds of the supposed opposition of the Navy of the Dominican Republic, constitutes a flagrant violation of Article 2 of Convention No. 87, and Articles 2 and 3 of Convention No. 98. At the same time, the decision of the Civil, Commercial and Labour Panel of the Court of First Instance of the Judicial District of Peravia, not to order the reinstatement of the workers dismissed in trade union reprisals and to attempt to settle the case through financial compensation alone, also constitutes a serious violation of freedom of association and of the terms of Conventions Nos 87 and 98.
- 517.** In its communication of 8 March 2011, the CNTD states that on 19 July 2007, 31 workers of the company Elsamex International SL, who were working on the extension of the Las Américas motorway, on the stretch for the province of San Pedro de Macorís and La Romana, in the exercise of the right to form a trade union, enshrined in the Constitution of the Dominican Republic, the Labour Code and Conventions Nos 87 and 98, created the Union of Workers of Elsamex Internacional SL – Concesionaria Dominicana de Autopistas y Carreteras (CODACSA) (STEEI–CODACSA) to counter the company's recent treatment of workers. The CNTD alleges that, as soon as the company Elsamex International SL was notified of the creation of the trade union, it applied a whole series of serious anti-union practices.
- 518.** The complainant organization indicates that on 26 February 2008, the STEEI–CODACSA notified the company of a draft collective agreement to initiate a bargaining process in view of signing of a collective agreement. The interest and the actions taken by the union and the workers of Elsamex International SL to exercise the right to collective bargaining and improve living and working conditions through a collective agreement were thwarted. After various mediation sessions before the Ministry of Labour the mediation process was brought to an end on 18 April 2008, when the company declared that: "the company currently has no interest in concluding a collective agreement with its employees and the

trade union that they have created, and that for the time being, its relations with the workers' union will be regulated in accordance with the Dominican Labour Code”.

- 519.** The CNTD indicates that, following the failure of the mediation due to the company's refusal to bargain collectively, the trade union followed all the legal procedures to stage a strike. Under pressure from the strike, the Ministry of Labour offered further mediation. Following various rounds of meetings and the company's initial refusal to negotiate an agreement, proposals were discussed and agreed on, but the company did not sign the agreement. On 15 February 2009, following on from its anti-union practices employed to obstruct the signing of the collective agreement and its workers' right to organize, Elsamex International SL proceeded to suspend (without pay) union leaders Pilar Castro Madrigal, Eliezer Jil, Carlos Julio Santos de la Cruz, Santo G. Michell, Juan Samuel F., Julio Berson Hernández, Pablo Taveras and Ramón Orlando Santana Rijo.
- 520.** The CNTD adds that the companies Elsamex International SL and the CODACSA are interrelated, as Elsamex International SL is one of the founders of the latter. The workers would receive orders from representatives of both companies indistinctly, which indicates that they are the same company.
- 521.** The complainant organization indicates that, since the suspension of the union leaders, Elsamex International SL and CODACSA continue with their work on the extension of the Las Américas motorway. The CNTD adds that, as a result of this barefaced illegal suspension, to prevent the signing of the collective agreement and further trade union action, such as another strike, the suspended workers Pilar Castro Madrigal, Eliezer Jil, Carlos Julio Santos de la Cruz, Santo G. Michell, Juan Samuel F., Julio Berson Hernández, Pablo Taveras and Ramón Orlando Santana Rijo, filed a complaint before the Labour Court of San Pedro de Macorís, requesting that it declare the suspensions illegal, order the workers' reinstatement to their usual posts, order the company to pay the wages foregone during the period of illegal suspension, and the payment of compensation for the damages caused by the company in its attempt to stop the workers' from organizing, bargaining collectively and striking .
- 522.** In response to this request, Panel No. 2 of the Labour Court of San Pedro de Macorís handed down Ruling No. 202-2009 on 12 October 2009, ordering Elsamex International SL and CODACSA to pay the wages forgone for the months from 15 February 2009 to the date of the final ruling or the defendant's termination of the work contracts. These companies were also ordered to pay compensation for the damages caused to the abovementioned workers as a result of the companies' violation of their right to organize.
- 523.** Ruling No. 202-2009 handed down by the Labour Court of San Pedro de Macorís (Panel No. 2) was appealed by the companies and also by the workers, who requested the Labour Court of San Pedro de Macorís to uphold the decision and include a further article ordering the reinstatement of the workers to their usual position. As a result of this appeal, the Labour Court of San Pedro de Macorís handed down appeal Labour Ruling No. 425-2010, revoking Ruling No. 202-2009 handed down by the Labour Court, absolving CODACSA from any liability and rejecting the workers' trade union immunity protection. It also allowed the false closure and termination of the company's activities. In an attempt to please everyone, the Labour Court only ordered Elsamex International SL to pay 20,000 Dominican Republic pesos (DOP) in damages per worker (DOP20,000 is the equivalent of US\$523.33) to Pilar Castro Madrigal, Eliezer Jil, Carlos Julio Santos de la Cruz, Santo G. Michell, Juan Samuel F., Julio Berson Hernández, Pablo Taveras and Ramón Orlando Santana Rijo for the violation of labour law standards and legislation established in the Constitution.

524. During the actions brought before both courts, the complainant workers provided evidence of the companies' anti-union practices, firstly to dismantle the trade union and then to avoid signing the collective agreement and obstructing the right to strike, which explains the fictitious closure of the company. The interrelation and solidarity between the two companies was also demonstrated. According to the CNTD, Ruling No. 425-2010 of the Labour Court of San Pedro de Macorís, makes the Dominican Republic guilty of violating Conventions Nos 87 and 98 by not implementing the mechanisms to guarantee the exercise of the right to organize, to collective bargaining and to strike of the workers Pilar Castro Madrigal, Eliezer Jil, Carlos Julio Santos de la Cruz, Santo G. Michell, Juan Samuel F., Julio Berson Hernández, Pablo Taveras and Ramón Orlando Santana Rijo, who were working for Elsamex International SL and CODACSA.

## **B. The Government's reply**

525. In its communication dated 20 October 2011, the Government declares that both the Constitution and the Labour Code fully guarantee the freedom of association and collective bargaining of workers, which is also enshrined in Conventions Nos 87 and 98 of the International Labour Organization, which have been ratified by the Dominican Republic. In view of guaranteeing this right, following the complaints filed by both the CNTD and the STEEL-CODACSA, the Ministry of Labour initiated a series of investigations through the Labour Inspectorate, which in various instances found that the company in question was indeed adopting an anti-union attitude; in such cases, the labour inspectors reported the corresponding violations.

526. With regard to collective bargaining, as a result of the interventions requested by the CNTD, the Ministry of Labour proceeded to organize meetings, which at first, were not attended by the company. However, at the Ministry of Labour's insistence the company attended the requested mediation sessions, sitting down with the trade union to initiate the collective bargaining procedure. The Government indicates that after various mediation sessions the parties managed to negotiate an agreement. However, when the agreement was about to be signed, Elsamex International SL and CODACSA declared that they no longer held the work licence that they had signed with the Ministry of Public Works in previous years. In view of the above, one of the companies proceeded to terminate its workers' contracts, requesting the definitive closure of the company before the Ministry of Labour. This closure was denied on the grounds that the Ministry considered that the arguments submitted in the request were unsubstantiated.

527. The Government indicates that, as the CNTD states in its complaint, the union leaders proceeded to lodge an appeal before the relevant courts, as a result of which, according to information from the CNTD, the appeal is currently awaiting a decision by the Supreme Court of Justice.

528. With regard to the allegations against the company Ciramar International Trading Ltd, the Government declares that since the workers of this company decided to form a trade union, the Ministry of Labour has provided them with all the support specified in the Labour Code and in ILO Conventions Nos 87 and 98. In this respect, the Government intervened in the whole process of the formation of the trade union in question. However, the company did not comply with the Government's observations that it should allow the establishment of the trade union, and on this basis, was charged with the violation of freedom of association and adoption of unfair practices in respect of freedom of association.

529. The Government indicates that, in view of the position taken by the company Ciramar International Trading Ltd, the trade unionists filed a complaint requesting the annulment of the dismissals, the reinstatement of the workers and the payment of wages. In this respect,

a decision was handed down in which, although the Court ordered the company to pay compensation, it failed to rule on the annulment of the dismissals and the reinstatement of the workers. In light of this, the workers filed an appeal which is currently pending the decision of the San Cristobal Court of Appeal.

- 530.** The Government adds that, on another front, the Ministry of Labour is pursuing actions and meeting with the navy with a view to it reasoning with the company to make it understand that the workers are free to establish a trade union and engage in collective bargaining. The Government reiterates that it is open to any guidance or observations from the ILO regarding the issues raised in this report, and it stresses that it remains intent on ensuring effective compliance with legal standards, whether these are national or international, in view of guaranteeing peace in the workplace with regard to the employer–worker relationship.

### **C. The Committee’s conclusions**

- 531.** *The Committee observes that in this case the CNTD alleges that days after having constituted the STECI, all its founding members were dismissed (named in the complaint). Moreover, the CNTD alleges that in the context of anti-union practices to prevent the signing of the collective agreement and the exercise of the right to organize, the company Elsamex International SL – CODACSA suspended eight union leaders (named in the complaint).*

#### **Company Ciramar International Trading Ltd**

- 532.** *With respect to the dismissal of all the founding members of the STECI, the Committee notes that the Government states that: (1) the company workers received the Ministry of Labour’s full support from the moment that they decided to establish a trade union; (2) the authorities intervened throughout the process of creating the trade union, but the company did not comply with the observations made that it should allow the establishment of the trade union and it was therefore charged with the violation of freedom of association and of adopting unfair practices in respect of the freedom of association; (3) in view of the attitude adopted by the company, the unionized workers filed a complaint requesting the annulment of the dismissals, the reinstatement of the workers, and the payment of wages foregone; (4) in this respect, a ruling was handed down, which while ordering the company to pay compensation, made no ruling regarding the annulment of the dismissals and the reinstatement of the workers; (5) in response, the workers filed an appeal, which is pending a decision by the Court of Appeal of San Cristobal; (6) the Ministry of Labour is pursuing actions and meeting with the navy with a view to it reasoning with the company to make it understand that the workers are free to form a trade union and engage in collective bargaining; and (7) it is open to any guidance or observations from the ILO regarding the issues raised in this complaint.*
- 533.** *The Committee observes that the complainant organization confirms that the complainants appealed to the courts requesting that the dismissals be declared null and void, ordering the workers’ reinstatement, the payment of the wages foregone and compensation for damages caused. In this regard, the complainant organization submits a copy of the ruling, where the preamble indicates that: (1) “regarding the first claim made by the complainants, it should be established whether the complainants were dismissed by the defendant, as they alleged; in this respect, article 391 of the Labour Code states that the dismissal of workers protected by trade union immunity must first be submitted to the Labour Court, to determine within no more than five days whether the grounds for dismissal refer to an offense, or to union leadership, duties or activities. Where the employer does not observe this formality, the dismissal is null and void or does not terminate the work contract”; (2) “in this case, the defendant did not comply with the*



requirement established in the previous article and, as the report of the labour inspector states, limited itself to claiming that the navy denied the workers entry to the company, therefore entitling them to dismiss them”; (3) “having established that the complainants were not allowed to enter the company on the grounds of their trade union activity and being unable to establish whether their dismissal was justified, the court must declare this null and void, thereby upholding the validity of the work contract”; (4) “the complainants’ request their reinstatement but this must be rejected on the grounds that the current legislation does not provide for reinstatement and that the workers dismissed in those circumstances, will only be liable to compensation in the event of this being declared unjustified or null and void, all obligations and restrictions resulting in compensation but not in reinstatement”; (5) “that by not having complied with the requirements established in the Labour Code the defendant violated the rights of these workers, whereby the company is obliged to compensate them” (the company is ordered to pay DOP1million in compensation to the complainants). The complainant organization contests the court’s decision against ordering the reinstatement of the workers and its attempt to settle the case through financial compensation only.

534. In this respect, noting that the administrative authority and the judiciary confirm the anti-union nature of the dismissals and the violation of article 391 of the Labour Code on submitting the dismissal of a worker protected by trade union immunity to the Labour Court, the Committee stresses that “anti-union discrimination is one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions” [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 769]. Moreover, while taking note of the decision of the Labour Court and of the fact that the legislation does not provide for the possibility of reinstatement, the Committee recalls that no one should be subjected to anti-union discrimination because of legitimate trade union activities and that the remedy of reinstatement should be available to those who are victims of anti-union discrimination [see **Digest**, op. cit., para. 837]. Under these circumstances, the Committee requests the Government to take the necessary measures to amend the legislation so as to bring it into conformity with this principle. The Committee requests the Government to continue to make every effort to bring the parties together with the objective of obtaining the reinstatement of the dismissed union founders. The Committee requests the Government to keep it informed in this regard.

**Companies Elsamex International SL and Concesionaria Dominicana de Autopistas y Carreteras (CODACSA)**

535. With regard to the allegations that, following on from anti-union practices to prevent the signing of a collective agreement and the exercise of the right to organize, the company Elsamex International SL – CODACSA suspended eight union leaders (named in the complaint), the Committee notes that the Government states that: (1) the Constitution and the Labour Code fully guarantee freedom of association; (2) in view of guaranteeing this right and in response to the complaints submitted by the CNTD and STEEI–CODACSA, the Ministry of Labour initiated a series of investigations through the Labour Inspectorate, which in various instances found that the company in question was adopting an anti-union attitude; in such cases, the labour inspectors reported the corresponding violations; (3) after the companies declared that they no longer held the work licence that they had signed with the Ministry of Public Works in previous years, they proceeded to terminate their workers’ contracts and requested their definitive closure before the Ministry of Labour (which was rejected); and (4) the union leaders proceeded to lodge appeals before the corresponding courts and the appeal against this decision is currently pending at the Supreme Court of Justice. The Committee also observes that the complainant organization sends a copy of the first instance ruling handed down by the Labour Court of the Judicial District of Pedro de Macorís regarding the claim of wages forgone due to illegal

*suspension and compensation for damages due to the violation of the freedom of association in which: (1) it is indicated that the “complainants’ request the payment of DOP20,000 in compensation for damages caused by the defendant violating its freedom of association and illegally withholding the complainants’ wages, whereby it proceeds to uphold their request, but for the sum of DOP1,000,000”; (2) “it upholds, as regards the form, the request for wages foregone due to illegal suspension and compensation of damages due to the violation of the freedom of association and the illegal withholding of wages”; and (3) “it orders, on the merits, the companies Elsamex International SL and CODACSA to pay the corresponding wages owed to the complainant workers for the months from 15 February 2009 to the date of the final ruling or up to the defendant’s termination of the work contracts”.*

- 536.** *The Committee also notes that the complainant organization submits the second instance ruling of the Labour Court of the Judicial District of San Pedro de Macorís regarding the suspensions where it decided to: (1) “revoke Ruling No. 202-2009 of 12 October 2009 handed down by the Labour Court of the Judicial District of San Pedro de Macorís stating insufficient legal grounds, the distortion of events and documents”; (2) “reject the complaint of the violation of freedom of association”; (3) “order the company Elsamex International SL to pay DOP20,000 per worker to Pilar Castro Madrigal, Eliezer Jil, Carlos Julio Santos de la Cruz, Santo G. Michell, Juan Samuel F., Julio Berson Hernández, Pablo Taveras and Ramón Orlando Santana Rijo, in damages for the violation of labour law standards and legislation, for negligence in the management of working relationships and the social rights established in the Dominican Constitution”; and (4) “absolve the company CODACSA of any liability”.*
- 537.** *In this respect, noting that the second instance court rejected the complaint of the violation of freedom of association and that, according to the Government, an appeal against this decision is currently pending before the Supreme Court of Justice, the Committee notes that – according to the allegations – the suspensions occurred during the process of bargaining a collective agreement, which failed, and following the staging of a strike and findings by the Labour Inspectorate that one of the companies was adopting an anti-union attitude. In these circumstances, the Committee recalls that in general “no person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities” [see **Digest**, op. cit., para. 771], and requests the Government to keep it informed of the outcome of the appeal of the ruling before the Supreme Court of Justice.*
- 538.** *Lastly, with regard to the alleged impossibility of concluding a collective agreement with the companies in question, the Committee notes that the Government states that: (1) as a result of the interventions requested by the CNTD, the Ministry of Labour proceeded to organize the corresponding sessions. At first, these were not attended by the companies, but at the Ministry of Labour’s insistence they attended the requested mediation sessions, sitting down with the trade union to initiate the collective bargaining procedure; (2) following various mediation sessions, the parties were able to negotiate an agreement, but when this was going to be signed, the companies declared that they no longer held the work licence that they had previously signed with the Ministry of Public Works; and (3) only one of the companies (according to the Government’s reply) applied to the Ministry of Labour for its definitive closure, and was rejected. In this respect, the Committee regrets to find that, despite its efforts, the trade union in question has not been able to conclude a collective agreement on working conditions with the company or companies concerned since 2008. In these conditions, the Committee stresses that “measures should be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers’ organizations and workers’ organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.” And “recalls the importance which it*

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*attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations” [see **Digest**, op. cit., paras 880 and 934]. In these circumstances, the Committee urges the Government to take the necessary measures to promote collective bargaining between the STEEI–CODACSA and the company or companies concerned. The Committee requests the Government to keep it informed in this regard.*

### **The Committee’s recommendations**

**539. In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:**

- (a) The Committee requests the Government to make every effort to bring the STECI and the company in question together, in view of achieving the reinstatement of the dismissed trade union founders. The Committee requests the Government to keep it informed in this regard. Moreover, the Committee requests the Government to take the necessary measures to amend the legislation in accordance with the principle indicated in the conclusions in relation to the remedy of reinstatement in cases of anti-union dismissals.*
- (b) The Committee requests the Government to keep it informed of the outcome of the appeal currently underway before the Supreme Court of Justice in relation to the suspension of eight union leaders of the STEEI–CODACSA.*
- (c) The Committee urges the Government to take the necessary measures to promote collective bargaining between the STEEI–CODACSA and the company or companies concerned. The Committee requests the Government to keep it informed in this regard.*

CASE NO. 2684

INTERIM REPORT

**Complaint against the Government of Ecuador  
presented by**

- **the National Federation of Workers of the State  
Petroleum Enterprise of Ecuador (FETRAPEC)**
- **Public Services International (PSI)**
- **the Single Trade Union Organization of Health Ministry  
Workers (OSUNTRAMSA)**
- **the United Workers' Front (FUT)**
- **the Ecuadorian Confederation of Free Trade Union  
Organizations (CEOSL)**
- **the Confederation of Workers of Ecuador (CTE) and**
- **the Ecuadorian Confederation of United Workers'  
Organizations (CEDOCUT)**

*Allegations: Legislation contrary to trade union  
independence and the right to collective  
bargaining; dismissals of trade unionists*

- 540.** The Committee last examined this case at its June 2009 meeting [see 354th Report, approved by the Governing Body at its 305th Session, paras 726–840].
- 541.** The United Workers' Front (FUT), the Ecuadorian Confederation of Free Trade Union Organizations (CEOSL), the Confederation of Workers of Ecuador (CTE), the Ecuadorian Confederation of United Workers' Organizations (CEDOCUT), the organizations of the National Coordinating Body of Public Trade Unions of Ecuador and the National Federation of Workers of the State Petroleum Enterprise of Ecuador (FETRAPEC) sent additional information in communications dated 20 and 21 May, 2 June, 21 August and 11 December 2009, and 19 and 25 May and 1 June 2010.
- 542.** The Government sent its observations in communications dated 16 June and 11 December 2009 and 13 October 2010.
- 543.** The technical cooperation mission carried out in the framework of the present case took place from 15–18 February 2011.
- 544.** Ecuador has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

- 545.** At its last meeting, the Committee made the following recommendations [see 354th Report, para. 840]:
- (a) The Committee requests the complainant organization FETRAPEC to confirm the status of trade union official of the signatories of the complaint, including the four dismissed persons, for example, by sending the minutes of the general meeting at which they were elected by their trade union organization, grass-roots union or federation. In turn, the

Committee requests the Government to indicate: (1) whether the consideration that the four dismissed persons were not trade union officials was related to their dismissal, which might have made them lose that status under Ecuadorian legislation; and (2) the specific facts which motivated the dismissal of those four persons, as it would appear from the Government's reply that they were dismissed unilaterally and without any indication of the grounds. The Committee also requests the Government to communicate the sanctions set out in the legislation in the case of arbitrary and unjustified dismissals of trade unionists.

- (b) The Committee requests the Government and the authorities competent for issuing labour legislation to hold in-depth consultations in advance and allowing sufficient time with the workers' and employers' organizations concerned in order, as far as possible, to reach shared solutions.
- (c) The Committee observes that Constituent Resolutions Nos 002, 004 and Executive Decree No. 1406 set a permanent cap on remuneration in the public sector, compensation for termination of the employment relation and prohibit supplementary private pension schemes which involve contributions of State resources. To the extent that these are permanent limitations on collective bargaining, the Committee requests the Government to restore the right of collective bargaining on conditions of work and living standards of workers and to inform it accordingly.
- (d) As regards the imposition of the revision of clauses of public sector collective agreements by administrative means (declaration of nullity or amendment) which contain excesses and unreasonable privileges (Constituent Resolution No. 008) by unilateral decision of a commission (Ministerial Order No. 00080 and Order No. 00155A) the Committee emphasizes that control of allegedly abusive clauses of collective agreements should not be up to the administrative authority (which in the public sector is both judge and party), but the judicial authority, and then only in extremely serious cases. Therefore, the Committee requests the Government to annul those ministerial texts and their effects since they seriously violate the principle of free and voluntary collective bargaining consecrated in Convention No. 98, and to indicate whether Constituent Resolution No. 008 is compatible with exclusively judicial control of the possible abusive character of certain clauses of collective agreements in the public sector. The Committee requests the competent authorities that, if it is wished to amend the result of collective bargaining in the public sector, they should wait until the expiry of the collective agreements and the respective employers should renegotiate their content with the trade union organizations.
- (e) The Committee requests the Government to take steps to ensure that the collective agreements, which were revised by administrative process, are renegotiated if the trade union organizations confirm the wish to do so.
- (f) The Committee requests the Government to keep it informed of measures taken to give effect to the various recommendations formulated in this report and, noting the request of the complainant organizations, invites the Government to accept an ILO mission to assist in solving the problems observed in this case.
- (g) The Committee requests the Government to send its observations on the communications from the CEOSL dated 16 March and 20 May 2009.

## **B. Additional information from the complainant organizations**

**546.** In communications dated 21 May and 2 June 2009, the FUT, the CEOSL, the CTE and the CEDOCUT confirm that the right to organize and collective bargaining of public sector workers has been restricted. The "Constituent Resolutions", sui generis instruments not subject to the rules for the formation of a law, contain provisions which expressly establish that these bodies of law shall not be "open to complaint, challenge, action for protection (*amparo*), demand, claim, administrative or judicial opinion or judgement whatsoever". There is no acceptable legal basis for this statement, which leaves workers whose rights have been expressly violated totally defenceless. The Constituent Assembly received a

mandate from the people to prepare a new Constitution and change the country's institutional framework. The Assembly exceeded the powers bestowed upon it by the people when it issued those Constituent Resolutions, which through dictatorial action could become immutable instruments by virtue of the fact that they do not exist in the Ecuadorian legal system. In Constituent Resolution No. 002, the public authority, which is also the employer, unilaterally imposes the amendment and deletion of clauses or articles contained in collective agreements and contracts that have been negotiated and legally concluded, ignoring the principle of collective autonomy. Constituent Resolution No. 004 goes even further, expressly affirming that compensation for unfair dismissal set out in legally concluded collective agreements is also referred to. Constituent Resolution No. 008 provides that for the sake of fairness in work, it is necessary to revise and regulate the clauses of unreasonable and excessive collective agreements concluded by minority groups which run counter to the general interest and the workers themselves.

**547.** The complainant organizations reiterate that, if, hypothetically speaking, there were “excesses or privileges”, these must be amended in accordance with practice based on the Constitution, the international agreements and the Labour Code, i.e. through collective bargaining, but in no way through the arbitrary intervention of and imposition by the Government. The Constituent Resolutions remained in force until the approval of the new Constitution on 20 October 2008 and all the regulations and standards issued by the executive authority and the Ministry of Labour and Employment (now the Ministry of Labour Relations) had to be coherent and in harmony with the provisions of the Constitution. Moreover, the Constitution and the ratified international human rights treaties prevail over any other legal standard or act of the public authorities. No provision is made in the legal hierarchy for the so-called “Constituent Resolutions” and any standards, precepts or provisions of the public authority that are contrary to the principles of the Constitution can be challenged before the Constitutional Court. The complainant organizations state that the new Constitution contains a tacit derogation of the Constituent Resolutions given that the derogating provision of the Constitution establishes that “any standard contrary to this Constitution ... shall be derogated. The rest of the legal order shall remain in force on the condition that it is not contrary to the Constitution.” Both the implementing regulation of Constituent Resolution No. 008, issued by the President of the Republic on 5 June 2008, and Ministerial Order No. 00080 issued by the Ministry of Labour and Employment, which refer to the revision of collective agreements in the public sector and the regulations covering the automatic adjustment and revision of the clauses of collective agreements are clearly contrary to the standards of the new Constitution and should therefore not be applied. However, the Government has arbitrarily and unilaterally revised collective agreements in the public sector.

**548.** The complainant organizations added that they opposed and protested against this arbitrary imposition by the Government. A number of officials left the meetings to which they had been convened as silent observers. Furthermore, in an effort to eliminate for good the most important rights of the workers set out in the collective agreements, on 30 April 2009, the President of the Republic issued Executive Decree No. 1701 stating that clauses contained in collective agreements which, in the President's view, contain “unreasonable privileges and benefits” should be deleted and prohibited. This Decree is unconstitutional and void because it was not issued within the time period set out by Constituent Resolution No. 008, i.e. one year from 30 March 2008, the date on which the abovementioned Resolution was issued, and there was no social dialogue process. If the legal provisions and government practices described above remain in force, workers will no longer be able to achieve progress through the conclusion of collective agreements, the public authority will impose its will on trade union organizations and all of the rights and principles won during the course of the workers' struggle will be reduced to the level of frustrated demands.

- 549.** Moreover, in a communication dated 20 May 2009, the organizations of the National Coordinating Body of Public Trade Unions of Ecuador state that this situation puts the validity of collective bargaining, the right to work, employment stability and the existence of the right to organize in the public sector at risk, setting a dangerous precedent for organizations of the workers in the private sector. The Coordinating Body calls on the Government to open tripartite social dialogue, the appropriate mechanism for the resolution of differences and issues.
- 550.** In a communication dated 21 August 2009, FETRAPEC confirms the status of trade union official of the signatories of the complaint, including the four dismissed persons, providing certified copies of the records of the boards of the Federation and the work councils. The Federation adds that Executive Decree No. 1701 of 30 April 2009 reduces the conclusion of collective agreements in the public sector to a minimum. The preamble of the Decree refers to the fourth transitional provision of Constituent Resolution No. 008, which states the following: “The executive authority, in the course of social dialogue, within a period of one year, shall establish the criteria governing the conclusion of collective labour agreements in all public sector institutions ... .” FETRAPEC states that there was no social dialogue, least of all with the workers of the public sector covered by the process of the conclusion of collective agreements.
- 551.** FETRAPEC highlights that the abovementioned Decree contains restrictions on trade union leave and eliminates employer contributions required for the conclusion of health insurance contracts. Public bodies are obliged to submit lists of personnel, stating staff members’ responsibilities and activities, to the National Technical Secretariat for Human Resources Development and Public Sector Remuneration (SENRES). Furthermore, according to the Decree, the Secretariat “shall proceed to determine which workers shall be subject to the Labour Code or to the conclusion of collective agreements, as the case may be”. SENRES also has the power to establish the amounts of compensation paid to those opting for voluntary cessation of service with a view to retirement. FETRAPEC states that the process of determining whether workers shall be subject to the Labour Code or to the conclusion of collective agreements (as referred to above) carried out by SENRES serves two purposes: (1) the redefinition and downgrading of the worker’s status, through the claim that the tasks that he carries out are purely or mainly manual rather than intellectual; (2) the redefinition of the employment relationship which occurs when a physical person continuously provides services for a public or private employer in a relationship of dependency or subordination and for remuneration. In the petroleum sector workers carry out tasks in both the administrative and operational sectors. Owing to the evolution of technology, there are technicians working in both sectors whose employment relationships are governed by the principle of reality, from both a factual and a legal point of view . Moreover, FETRAPEC states that the aim is to interfere in trade union affairs by altering the statute of workers is to ensure that they continue to be covered by the Organic Law on the Civil Service and Administrative Careers (LOSCCA) (now the Organic Law on the Civil Service (LOSEP)), which makes no provision for either collective bargaining or the right to strike. The complainant organization states that, far from restoring the right to collective bargaining, the Government is on the verge of eliminating it.
- 552.** As to the Constituent Resolutions, described as being supra-constitutional and incontestable, FETRAPEC states that the fact that the Assembly’s powers are incontestable does not mean that the Resolutions are above the Constitution and points out that Constituent Resolutions and sublegal standards detrimental to the conclusion of collective agreements remain in force. FETRAPEC recalls that the right to work, the freedom of association and the conclusion of collective agreements are guaranteed human rights under various international instruments ratified by Ecuador and that Ecuador is failing to comply with the international treaties to which it is a signatory.

- 553.** In a communication dated 1 June 2010, the FUT, the CEOSL, the CTE and the CEDOCUT added that, as a result of pressure brought to bear by organized workers during six months of dialogue with the Ministry of Labour, the Ministry of Policy and the executive authority, a number of small changes were conceded, such as the right to organize and to conclude collective agreements. Moreover, on 18 January 2010, the President of the Republic issued Executive Decree No. 225 amending Executive Decree No. 1701, which incorporates the parameters for the classification of public sector servants and workers and in which certain benefits and bonuses included in collective agreements which were eliminated as a result of the revision carried out by the Ministry of Labour Relations are restored to the workers. Furthermore, the obligation on the part of the employers and the labour authorities to maintain in force, unaltered and without any restrictions the clauses or articles of the collective agreements not covered by the prohibitions or deletions in question was reintroduced.
- 554.** However, the complainant organizations state that, in issuing Ministerial Order No. 00080 of 30 April 2010, the Ministry of Labour Relations committed another illegal act by establishing ceilings for collective bargaining in an irregular and discriminatory fashion, thus distorting the intention of Executive Decree No. 225 to respect the will of the parties.
- 555.** In a communication dated 11 December 2009, FETRAPEC states that, on 27 November 2009, around 300 workers of the state enterprise Petróleos de Ecuador were notified of their dismissal without any explanation whatsoever being given. These dismissals do not respond to the need to restructure the enterprise because official approval (*visto bueno*) for dismissals is usually sought in such cases.
- 556.** In a communication dated 19 May 2010, the CTE states that it supports the workers (retirees and non-retirees) in their move to denounce the enterprise PETROINDUSTRIAL, a public sector enterprise which belongs to the Ecuadorian State Petroleum Company (E.P. PETROECUADOR) system. The CTE denounces the violation of the collective agreement in force and demands the payment of the compensation owed to the workers. Following the voluntary separation of the workers, either through early retirement or cessation of the employment relationship, the enterprise failed to comply with section 185(2) of the Labour Code, which expressly states that enterprises shall pay the compensation due to the worker, within a non-extendable time period of 15 days, from the legal notification of the request for cessation of the employment relationship and shall settle the amount of the bonuses owed to the worker. After a year or more of waiting to be compensated, the workers initiated a legal action against their former employer who, having agreed to pay them for cessation of employment relationship on a pro-rata basis and to pension them off, never carried out in a rational way the payment of the bonuses and compensation corresponding to voluntary separation and retirement within the time period set out in law and in the collective agreement. The labour complaints were lodged and brought before the labour judges and, once all of the procedural rules had been complied with, the presiding and appeal judges rejected the said complaints on the legal pretext that “the time granted under labour legislation to workers (three years) to lodge legal claims against their employers, had expired”. It should be pointed out that no examination was ever carried out of the evidence which showed that, owing to the fact that the defendant enterprise had recognized the existence of the debt through partial dismissal payments, the time period in which the workers could bring an action claiming compensation was suspended and interrupted for up to five years from the moment the employment relationships were terminated. The workers lodged appeals with the Supreme Court, which rejected them stating that “there was no evidence proving the existence of any facts involving the interruption of the deadline and the suspension of the time period”. The CTE states that many of the workers, who were affected by pollution generated as a part of the petroleum refining process, died without receiving compensation. Extraordinary actions for protection were then lodged with the Constitutional Court but were declared inadmissible



by the Chamber of Admissions of that court. The workers are claiming the compensation due to them (US\$200 million), as well as compensation for damages caused.

**557.** The CTE adds, in a communication dated 25 May 2010, that 22 workers of the enterprise Unidad Eléctrica de Guayaquil were dismissed simply for demanding that the collective agreement in force be complied with. The workers were dismissed in compliance with section 172 of the Labour Code even though they had not committed any of the faults listed in the indents of the abovementioned section (the only way that an employer can request *visto bueno* for the dismissal of a worker). The enterprise also brought criminal proceedings against the workers, whom it accuses of being terrorists for demanding proper treatment in accordance with their contracts, thus violating specific provisions of the guarantees, ignoring the fact that work is a right and a social duty and that the State is obliged to guarantee work in accordance with the Constitution. The CTE highlights that the mass dismissals demonstrate that in terms of labour issues there are no fundamental guarantees in place, nor is there any respect for labour rights, giving rise to disputes in terms of worker–employer relations and socio-economic hardship for the families of the dismissed workers, who have yet to be reinstated despite the undertakings made by the State to that effect.

### C. The Government's reply

**558.** In a communication dated 16 June 2009, the Government reiterates the information previously provided and summarizes the outcome of the process of revision of the collective agreement concluded between OSUNTRAMSA and the Ministry of Public Health, an administrative act which took place on 4 and 5 November 2008 with the full participation of the representatives of the workers. Therefore, it has been both demonstrated and proven that the trade union officials, by attending and participating in this act and agreeing in consensus to the Resolutions that clear up a number of their concerns with regard to the revision of their collective agreement, have recognized that this process is completely valid. Furthermore, within the framework of an action for constitutional protection lodged against the chairperson of the committee revising said collective agreement by the Single Trade Union of Workers of Eugenio Espejo Hospital, the constitutional judge stated that the bringer of the action sought recognition for rights expressly prohibited by the Constitution itself and the Resolutions and therefore rejected the action for constitutional protection. Within the framework of the appeal proceedings, the court decided to confirm this decision, since the administrative act of revision does not violate the fundamental rights of the workers given that it simply ensues from the issuance of Constituent Resolution No. 008 and its implementing regulations.

**559.** In a communication dated 11 December 2009, the Government states, with regard to the dialogue processes requested by the Committee, that in conjunction with the Ministry of Labour Relations and the Ministry for the Coordination of Policy, meetings had been held with the representatives of the trade union centrals (CTE, CEOSL, CEDOCUT and the General Union of Ecuadorian Workers (UGTE), united under the banner of the FUT) with the aim of reforming Executive Decree No. 1701, an issue with regard to which several agreements already exist. The Government reiterates that the purpose of the revision of collective labour agreements in the public sector was to eliminate the excesses and privileges in terms of wages and salaries, removing the distortions generated by the existence of differentiated wages paid in certain state bodies which had been distorted for many years. Moreover, the Constituent Assembly tackled this issue in a harmonious way and in accordance with the Government's policies and principles. The Government states that, although a right of the workers, the conclusion of collective agreements must not give rise to privileges and abuses concerning the payment of compensation for any form of cessation of employment relationship which undermine the equality of citizens before the law and compromise the public financial resources of the State. The setting of limits and

general regulations with regard to the payment of compensation for any form of cessation of employment relationships, included in collective agreements, contracts, settlements and any agreement in the public sector, be they financial or otherwise, shall not represent an attempt to weaken the right to conclude collective agreements.

**560.** In a communication dated 13 October 2010, the Government reiterates that through a national popular referendum of 15 April 2007 the people approved the convocation of the Constituent Assembly, which assumed the constituent power, invested with full powers, and exercised it by the issue of laws, decisions and resolutions. Officials and public servants are under a moral and legal obligation to comply with decisions adopted by the Constituent Assembly. The provisions of both Constituent Resolution No. 008 and the regulations in application clearly and unambiguously establish that the list of clauses which are considered to contain excesses and privileges is only indicative and not exhaustive. The clauses singled out, as examples, by the Constituent Assembly itself and the President of the Republic as being void in law serve as guidelines which must be followed in the process of revision to determine other clauses which also contain excesses and privileges and are contrary to the general interest and which must also be declared void in law. The Government states that excesses regarding collective agreements have been uncovered, mainly in the oil sector.

#### **D. The Committee's conclusions**

- 561.** *The Committee notes that the issues pending in the present case include the dismissal of four trade union leaders of FETRAPEC, the need to restore social dialogue and collective bargaining in the public sector, the renegotiation of collective agreements (in particular the agreement signed by OSUNTRAMSA) and the need to repeal Ministerial Orders Nos 00080 and 00155A. Moreover, the Committee notes with interest that the Government agreed to the visit of a technical cooperation mission (which took place from 15–18 February 2011), giving effect to one of the recommendations of the Committee.*
- 562.** *The Committee notes that the complainant organizations reiterate that: (1) the rights of workers in the public sector to organize and collective bargaining have been restricted; (2) the Constituent Resolutions, considered to be prejudicial because they impose drastic limits on collective bargaining, are not open to challenge, leaving the workers defenceless, and the Constituent Assembly exceeded the powers bestowed upon it by the people when it issued those Resolutions; (3) amendments to the freely concluded collective agreements should only be carried out through collective bargaining; and (4) Executive Decree No. 225, amending certain provisions of Executive Decree No. 1701, introduced a number of improvements. The Committee also notes that, in new allegations, FETRAPEC and the CTE allege mass dismissals, violation of the collective agreement by the enterprise PETROINDUSTRIAL and the refusal by the Government to compensate workers in an adequate manner.*
- 563.** *The Committee notes that the Government states that the collective agreement signed with OSUNTRAMSA has been revised and that it has been demonstrated and proven that the trade union officials, by attending and participating in this act and agreeing in consensus to the resolutions that clear up a number of their concerns with regard to the revision of their collective agreement, have recognized that this process is completely valid.*
- 564.** *As to the dismissal of the four trade union officials (Mr Edgar de la Cueva, Chairman of the National Enterprise Committee of Petroproducción Workers (CENAPRO); Mr Ramiro Guerrero, Chairman of the National Enterprise Committee of Petrocomercial Workers (CENAPECO); Mr John Plaza Garay, General-Secretary of the Single Enterprise Committee of Workers of Petroecuador (CETAPE) and Mr Diego Cano Molestina, President of FETRAPEC), the Committee observes that the complainant organization has*

confirmed the status of trade union official of the signatories of the complaint, sending the minutes of the general meeting at which they were elected by their trade union organizations. The Committee observes that, according to the mission report, the Government stated that following the change in the statute of the State enterprise *Petróleos del Ecuador*, FETRAPEC had requested that its statutes be reformed in order to allow it to represent the workers of the new public enterprise *E.P. PETROECUADOR*, a request that was rejected by the authorities. The Government indicated that, owing to the fact that *E.P. PETROECUADOR* was a new enterprise rather than the result of a merger of the four subsidiaries that made up the old enterprise, it considered FETRAPEC to be defunct as a trade union body. The Government stated that new elections should be held to form a comité de empresa (the national term for majority union) and highlighted that, in accordance with the law, there is only one comité de empresa in each public enterprise. The Government stated that to date FETRAPEC had not initiated procedures concerning the holding of the proposed elections. The Committee recalls that in the light of Convention No. 87, organizations of workers can only be dissolved voluntarily or through judicial channels and that, consequently, the Government and the employer enterprise cannot consider FETRAPEC to be dissolved as a result of the change of statute of the public enterprise. Moreover, the Committee observes that according to the mission report, although the Government and the enterprise do not recognize FETRAPEC, trade union dues continue to be deducted from the wages of the workers affiliated to the abovementioned trade union organization. FETRAPEC stated that the dues were being held by the Ministry of Labour Relations. The Committee also notes that, according to the mission report, the Ministry of Labour Relations transferred the trade union dues to the enterprise. The Committee highlights that trade union dues do not belong to the authorities, nor are they public funds, but rather they are an amount on deposit that the authorities may not use for any reason other than to remit them to the organization concerned without delay [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 479]. The Committee requests the Government to take the necessary steps to ensure that the trade union dues are immediately returned to the workers and to keep it informed in that regard. Moreover, the Committee understands that the workers affiliated to FETRAPEC continue to work for the newly-created enterprise *E.P. PETROECUADOR*. The Committee requests the Government to encourage the initiation of discussions between FETRAPEC and the enterprise with a view to recognition of the trade union organization. Finally, the Committee highlights that one of the fundamental principles of freedom of association is that the workers shall enjoy adequate protection against acts of anti-union discrimination relating to their jobs, in particular trade union officials. Taking note of the fact that the Government has not provided information on the dismissal of Mr Edgar de la Cueva, Mr Ramiro Guerrero, Mr John Plaza Garay and Mr Diego Cano Molestina, the Committee requests the Government to encourage without delay the initiation of discussions between FETRAPEC and the enterprise with a view to the reinstatement of the abovementioned trade union officials.

565. As to Constituent Resolutions Nos 002, 004 and 008 and the restoration of the right to collective bargaining (in particular with regard to wages in the public sector and compensation for cessation of employment relationship), the Committee notes that, according to the complainant organizations, the abovementioned standards drastically limit collective bargaining in the public sector. However, the Committee notes that, according to the mission report, the trade union organizations (OSUNTRAMSA and CEOSL) highlighted that they were not calling into question the provisions of the abovementioned Constituent Resolutions but rather the provisions promulgated as a consequence of those Resolutions (Ministerial Orders Nos 00080 and 00155A). They indicated that their collective agreements in the public sector were rendered devoid of any of the rights that they had acquired and that the legal provisions were not respected given that there was no real bargaining process concerning the collective agreements but rather

*the ministerial authorities unilaterally imposed a series of amendments to the collective agreements. The Committee observes that the complainant organizations confirmed that Executive Decree No. 225, amending Executive Decree No. 1701, improved the situation although this did not mean that the rights lost as a result of the imposition of amendments to the collective agreements had been recovered.*

- 566.** *The Committee notes that, for its part, the Government reiterates the information provided at the time of the previous examination of the case. The Committee also notes that, according to the mission report, the Government insists that Constituent Resolutions Nos 002, 004 and 008 and Ministerial Orders Nos 00080 and 00155A, as amended by Executive Decree No. 225, were issued with the aim of regulating the excesses (referred to at the time of the previous examination of the case) which arose from the clauses of the collective agreements (in particular the collective agreement concluded by FETRAPEC with the enterprise E.P. PETROECUADOR). In its latest reply, the Government states that the establishment of limits and general regulations concerning the payment of compensation for any form of cessation of employment relationship included in collective agreements, contracts, settlements and any agreement in the public sector, be they financial or otherwise, shall not represent an attempt to weaken the right to conclude collective agreements and that public employees and servants have a moral and legal obligation to comply with the decisions adopted by the Constituent Assembly. The Government informed the ILO mission that, despite the fact that they enjoy legitimacy given that they were promulgated following a number of referendums in which a high percentage of the population voted in favour of their introduction, the Constituent Resolutions are supra-constitutional standards which, in the light of the provisions of Constituent Resolution No. 023, can be amended through the channel envisaged for the adoption of ordinary laws.*
- 567.** *In these circumstances, the Committee recalls its previous recommendations and requests the Government to annul the abovementioned Ministerial Orders and their effects given that they seriously violate the principle of free and voluntary collective bargaining enshrined in Convention No. 98. The Committee also requests the Government to state whether Constituent Resolution No. 008 is compatible with an exclusively judicial control of the possibly abusive character of certain clauses of collective agreements in the public sector.*
- 568.** *As to the in-depth consultations requested with a view, as far as possible, to finding shared solutions to legislative issues, the Committee notes that both the complainant organizations and the Government state that the Ministry of Labour Relations has held meetings with the representatives of the trade union centrals in order to set criteria governing the conclusion of collective agreements in the public sector which are defined in Executive Decree No. 225 of 18 January 2010. Moreover, the Committee observes that, according to the mission report, following two years of inactivity, on 15 January 2011, the National Labour Council (CNT) met at the request of the social partners to discuss the ongoing labour reform process and to encourage social dialogue. The Committee considers that the CNT could provide an appropriate forum for the promotion of social dialogue and the conclusion of tripartite agreements with a view to producing the legislative changes that would bring national legislation into line with the principles and requirements of the ratified Conventions. The Committee requests the Government to continue to encourage dialogue with the representative trade union organizations and to keep it informed of developments, in particular with regard to the meetings with the trade union representatives and the work of the CNT. The Committee also reiterates its previous conclusions and requests the Government once again to take the necessary measures to annul or amend the abovementioned Ministerial Orders and to keep it informed in that regard.*

- 569.** *As to the renegotiation of the collective agreements, the Committee notes that the Government summarizes the outcome of the process of revision of the collective agreement concluded between OSUNTRAMSA and the Ministry of Public Health, an administrative act which took place on 4 and 5 November 2008 with the full participation of the representatives of the workers. Moreover, according to the mission report, OSUNTRAMSA confirms that in the wake of the reformulation of the collective agreement by the Ministry of Employment Relations a new collective agreement was concluded with the Ministry of Health.*
- 570.** *The Committee notes that FETRAPEC alleges that, on 27 November 2009, around 300 workers of the state enterprise *Petróleos de Ecuador* were notified of their dismissal without any explanation whatsoever being given. These dismissals do not respond to the need to restructure the enterprise because *visto bueno* for dismissals normally sought in such cases. Furthermore, the Committee observes that, according to the mission report, the representatives of the trade union organization highlighted that the situation had worsened. In September 2010, more than 500 workers of the newly-created public enterprise (E.P. *PETROECUADOR*) were dismissed on the basis of *visto bueno* which allows for employment relationships to be terminated without compensation being paid to workers. The Committee notes that, according to the mission report, the enterprise's court representative and assistant court representative stated that they did not have any information on the workers affiliated to FETRAPEC or on any possible dismissals because they had only recently taken up their posts. The Committee requests the Government to send without delay detailed information on these allegations and its observations concerning the alleged anti-union nature of the dismissals.*
- 571.** *The Committee also takes note of the information provided by the CTE according to which the workers of the enterprise *PETROINDUSTRIAL*, a public sector enterprise which is a part of the E.P. *PETROECUADOR*, denounce the violation of the collective agreement in force and demand payment of the compensation due to them. The Committee notes that, according to the CTE, following the voluntary separation of the workers, either through early retirement or cessation of the employment relationship, the enterprise failed to comply with section 185(2) of the Labour Code, which expressly states that enterprises shall pay the compensation due to the worker, within a non-extendable time period of 15 days as of the legal notification of the request for cessation of the employment relationship and shall settle the amount of the bonuses owed to the worker. The Committee notes in particular that: (1) the workers decided to bring a claim against their former employer; (2) the employer enterprise agreed to pay them for the cessation of employment relationship on a pro-rata basis and to pension them off, although the enterprise never carried out in a rational way the payment of the bonuses and compensation corresponding to voluntary separation and retirement within the time period provided for by law and in the collective agreement; (3) the claims were rejected in the first and second instances given that "the time granted under labour legislation to workers (three years) to lodge legal claims against their employers, had expired"; (4) the Supreme Court rejected the appeal, stating that "there was no evidence proving the existence of any facts involving the interruption of the deadline and the suspension of the statute of limitation"; (5) the workers then turned to the Constitutional Court, lodging extraordinary actions for protection which were declared inadmissible by the Chamber of Admissions of that court. Without putting into question the deadlines mentioned by the Government, or the statute of limitations, the Committee highlights the importance of the issues raised and requests the Government to promote dialogue between the CTE and the enterprise with a view to finding a solution to this dispute.*
- 572.** *The Committee also notes that the CTE alleges that 22 workers of the enterprise *Unidad Eléctrica de Guayaquil* were dismissed simply for demanding that the collective agreement in force be complied with and that the enterprise brought criminal proceedings against the*

workers, who it deems to be terrorists. The Committee notes that the CTE states that the State undertook to reinstate the dismissed workers but has not to date done so. The Committee deeply regrets that the Government has not responded to these allegations and urges it to do so without delay.

### **The Committee's recommendations**

**573. In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:**

- (a) The Committee requests the Government to take the necessary measures to ensure that the trade union dues are immediately returned to the workers affiliated to FETRAPEC and to keep it informed in that regard. Moreover, the Committee requests the Government to encourage without delay the initiation of discussions between FETRAPEC and the enterprise with a view to recognition of the trade union organization.**
- (b) As to the dismissal of the four trade union officials (Mr Edgar de la Cueva, Mr Ramiro Guerrero, Mr John Plaza Garay and Mr Diego Cano Molestina), the Committee requests the Government to encourage the initiation of discussions between FETRAPEC and the enterprise with a view to reinstatement of these union officials. The Committee considers that, as a representative organization, FETRAPEC has a legitimate right to exist and represent its members. However, the Committee also considers that the statutes of this organization should take into account the existence of a new public enterprise and that said organization should hold trade union elections given that the four former subsidiaries no longer exist. Finally, the Committee requests the Government to take the necessary measures to ensure that the trade union dues are immediately returned to the workers and to keep it informed in that regard.**
- (c) The Committee requests the Government once again to annul the abovementioned Ministerial Orders and their effects, since they seriously violate the principle of free and voluntary collective bargaining enshrined in Convention No. 98, and to indicate whether Constituent Resolution No. 008 is compatible with an exclusively judicial control of the possibly abusive character of certain clauses of collective agreements in the public sector.**
- (d) The Committee requests the Government to continue to promote dialogue with the representative trade union organizations and to keep it informed of developments, in particular concerning the meetings with the trade union representatives and the work of the CNT. The Committee also reiterates its previous conclusions and requests the Government once again to take the necessary measures to annul or amend the abovementioned Ministerial Orders and to keep it informed in that regard.**
- (e) As to the alleged mass dismissals that took place in the enterprise E.P. PETROECUADOR in 2009 and 2010, the Committee requests the Government to send without delay detailed information on these allegations and its observations on the alleged anti-union nature of the dismissals.**

- (f) *Without putting into question the deadlines mentioned by the Government, or the statute of limitations, the Committee highlights the importance of the issues raised – violation of the collective agreement in force and non-compliant compensation – and requests the Government to promote dialogue between the CTE and the enterprise with a view to finding a solution to this dispute.*
- (g) *As to the alleged dismissals at the enterprise Unidad Eléctrica de Guayaquil and the ongoing criminal proceedings against the workers, the Committee deeply regrets that the Government has not responded and urges it to do so without delay.*

CASE NO. 2609

INTERIM REPORT

**Complaints against the Government of Guatemala  
presented by**

- **the Movement of Trade Unions, Indigenous Peoples and Agricultural Workers of Guatemala (MSICG) and**
  - **the Trade Union of Workers of Guatemala (UNSITRAGUA)**
- supported by  
the International Trade Union Confederation (ITUC)**

*Allegations: The complainant organization alleges numerous murders and acts of violence against trade unionists and acts of anti-union discrimination, and also obstacles to the exercise of trade union rights and social dialogue, denial of legal status to several unions and system failures leading to impunity with regard to criminal and labour matters*

- 574.** The Committee last examined this case at its March 2011 meeting, when it presented an interim report to the Governing Body [see 359th Report, paras 580–646, approved by the Governing Body at its 310th Session (March 2011)].
- 575.** The Movement of Trade Unions, Indigenous Peoples and Agricultural Workers of Guatemala (MSICG) sent further information and new allegations in communications dated 24 February 2011 and 14 February 2012. Also, the Trade Union of Workers of Guatemala (UNSITRAGUA) forwarded new allegations in a communication dated 24 November 2011.
- 576.** The Government sent its observations in communications dated 27 May and 12 August 2010, and 30 May, 14 July, 30 September, 25 October and 24 November 2011.
- 577.** Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

**578.** At its March 2011 meeting, the Committee made the following recommendations [see 359th Report, para. 646]:

- (a) The Committee draws attention to the gravity of this case, given the numerous allegations of murder, attempted murder, assault and death threats, kidnappings, harassment and intimidation and blacklisting.
- (b) With regard to the murder of trade union leaders and members, the Committee requests the complainant organization to clarify the facts as regards the cases of Mr Jaime Nery González and Mr Mario Caal so that the Government can provide information on how far the investigations have progressed. The Committee also urges the Government to provide information on the investigations into the murder of Mr Israel Romero Istacuy, Mr Diego Gustavo Chite Pu and Mr Sergio Alejandro Ramírez Huevo.
- (c) With regard to the murder of trade unionists Ms Olga Marina Ramírez Sansé, Mr Víctor Alejandro Soyos Suret, Mr Luis Arnaldo Ávila and Mr Pedro Antonio García, the Committee urges the Government to order independent investigations without delay and to keep it informed of their outcome and of the criminal charges brought as a result.
- (d) With regard to the injured workers of the Union of Small Traders and Assimilated Workers, the Committee requests the Government to keep it informed in detail of the outcome of the investigation under way and of the criminal charges brought in the matter.
- (e) With regard to the death of a trade unionist following the use of excessive force, the Committee urges the Government to keep it informed in detail of the outcome of the investigation under way and of the criminal charges brought in the matter. The Committee also urges that independent investigations be undertaken into the allegations of attempted extrajudicial killings, death threats and injuries to union members. The Committee requests the Government to keep it informed in detail about these investigations and about the criminal charges brought as a result.
- (f) With regard to the members of the National Health Union, the Committee urges the Government to order an independent investigation in the death threats received and to keep it informed in detail of the outcome of the investigation and of the criminal charges brought as a result.
- (g) With regard to the attempted murder of Mr Julián Capriel Marroquín, the Committee requests the complainant organization to clarify the facts so that clear and precise information can be submitted on the incident.
- (h) With regard to the alleged death threats against SITRABI and the Union of Workers of the Palo Gordo Sugar Refinery, the Committee urges the Government to send its observations on the matter without delay.
- (i) With regard to the kidnapping and rape of Ms María Alejandra Vásquez, the Committee requests the complainant organization to provide it with additional information so that the Government can conduct an investigation into the matter.
- (j) With regard to the alleged blacklisting of union members to prevent their being employed, the Committee urges the Government to conduct a thorough investigation of the allegations and to keep it informed of the outcome.
- (k) With regard to the officers of the Union of Workers of the Municipality of Zacapa, the Committee urges the Government to keep it informed of the criminal proceedings and to order an investigation into whether the criminal charges were brought in connection with the trade union activities of the union officials referred to.
- (l) With regard to the detailed allegations of harassment and intimidation cited by SITRAPETEN, the KCDA and the MSICG, the Committee urges the Government to send its observations on the subject without delay.



- (m) With regard to the alleged violation of freedom of association in the Las Américas SA and Crown Plaza Guatemala hotels, the Committee requests the Government to keep it informed of the outcome of the investigation under way.
- (n) With regard to the alleged violation of freedom of expression and of the right to bargain collectively in the Quetzal Port Enterprise, the Committee requests the Government to keep it informed of the outcome of the cases that are still awaiting a decision and to send it a copy of the rulings when they are handed down. Furthermore, the Committee will examine the matters relating to the company in the framework of Case No. 2341.
- (o) With regard to the alleged denial of the right to organize and restrictions on the registration of trade unions as required by the national labour legislation, the Committee requests the Government to keep it informed of any decisions taken on the subject and of the recognition of unions once the errors in their documentation have been corrected.
- (p) With regard to the orders for workers to be reinstated in the context of the collective dispute and the dismissal of members of the Union of Workers of the Municipality of Chimaltenango, the Committee requests the Government to keep it informed of the outcome of the decisions handed down by the judicial courts.
- (q) The Committee draws the special attention of the Governing Body to this case because of the extreme seriousness and urgency of the matters dealt with therein.

## **B. Additional information and new allegations from the complainants**

### ***Additional information***

- 579.** With regard to the murders of Mr Mario Caal and Mr Jaime Nery González, the complainant reiterates that the trade unionists were murdered in March 2008 and on 30 October 2008, respectively, and that they were involved in a labour dispute concerning the defence of their rights.
- 580.** With regard to the kidnapping and rape of Ms María Alejandra Vásquez, the complainant reiterates that on 6 January 2010 the deputy general secretary of the Union of Workers of the Winners enterprise was kidnapped, tortured and raped following the start of her union duties, which included submitting complaints to the enterprise regarding non-observance of the labour legislation.

### ***New allegations***

- 581.** In a communication dated 24 February 2011, the trade union indicates that the Guatemalan Institute for Trade Union, Indigenous, and Agricultural Research (INESICG), a body that provides technical and logistical support for the Movement of Trade Unions, Indigenous Peoples and Agricultural Workers of Guatemala (MSICG), conducted an investigation which gave it access to the trade union registers of the Ministry of Labour and Social Security and other official databases. According to the complainant, the investigation yielded information confirming the anti-union initiatives pursued as government policy:
- the rate of unionization in the country continues to decline every year and currently stands at only 2.2 per cent of the economically active population. This situation cannot be regarded as being a function of the economic cycle but is the result of a process whose constant feature has been obstruction of the exercise of freedom of association, especially in the main productive sectors;
  - between 1947 and June 2010, a total of 55 per cent of trade unions were eliminated before they could consolidate, which points to a pattern of destruction of trade unionism in the context of industrial relations. Of all the unions that were eliminated,

42 per cent had been unable to register their first executive committee, 13 per cent had been unable to register their second executive committee and the remaining 45 per cent had been eliminated after registration of their second executive committee.

**582.** The complainant emphasizes that, despite all the support given by the ILO supervisory bodies and the numerous technical assistance missions, the State still fails to show sufficient political will to combat anti-union violence and the impunity associated with it. As evidence of this, the complainant cites the serious acts of anti-union violence committed against union and labour rights defenders since 2007.

**583.** In addition to the murders of trade union officials in 2009 referred to in the previous examination of the case, the complainant alleges the murders of the following persons:

### ***Union officials murdered in 2007***

- (1) Julio Cesar Ixcoy García, member of the executive committee of the Union of Workers of the Municipality of Miguel Pochuta, murdered on 11 November.
- (2) Pedro Zamora, general secretary of the Union of Workers of the Puerto Quetzal Port Enterprise, murdered on 15 January in the context of a dispute with the employers relating to anti-union dismissals.
- (3) Rosalio Lorenzo, official of the Moto-Taxi Union of Jalapa, murdered in April.

### ***Union members murdered in 2007***

- (1) Liginio Aguirre, member of the Health Workers' Union of Guatemala, murdered on 20 December.
- (2) Salvador del Cid, member of the Union of Workers of the Municipality of Acasaguastlán, murdered in March, in the context of public protest action led by the union in San Agustín Acasaguastlán.
- (3) Licinio Trujillo, member of the Puerto Barrios branch of the Health Workers' Union, murdered in December.
- (4) Aníbal Ixcaquic, member of the Market Traders' Union of Guatemala, murdered in February.
- (5) Norma Sente Ixcaquic, member of the Market Traders' Union of Guatemala, murdered in February.
- (6) Matías Mejía, member of the National Action Front, murdered in February. At the time he was murdered, the worker was defending the natural resources of his community against the implementation of the canal project which formed part of the *Plan Pueblo Panamá* and was connected with the interests of the electricity supply companies operating in Guatemala.
- (7) Juana Xoloja, member of the Agricultural Development Committee Association, murdered in March.

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***Union officials murdered in 2008***

- (1) Armando Sánchez, adviser to the Traders' Union of Coatepeque, murdered in December.
- (2) Maura Antonieta Hernández, member of the executive committee of the prison service union (in the process of formation), murdered on 18 October.

***Union officials murdered in 2009***

- (1) Pedro Ramírez de la Cruz, director of the Office for the Defence of Indigenous Peoples in Las Verapaces and member of the National Council for Indigenous, Agricultural and People's Matters, murdered on 29 November, days after participating in the submission of the draft Rural Development Act to Congress.
- (2) Julio Pop Choc, branch official of the Health Workers' Union, murdered on 19 September.
- (3) Gilmer Orlando Borrer Zet, official in the community of San Juan Sacatepéquez, murdered on 12 October.

***Union members murdered in 2009***

- (1) Willy Morales, member of the National Action Front, murdered on 13 February.
- (2) Víctor Gálvez, member of the National Action Front, murdered on 24 October.
- (3) Jorge Humberto Andrade, member of the National Action Front, murdered on 30 April.
- (4) Adolfo Ich, member of the National Action Front, murdered on 27 September.

***Union officials murdered in 2010***

- (1) Evelinda Ramírez Reyes, president of the Resistance Front for the Defence of Natural Resources and People's Rights, murdered on 13 January.
- (2) Samuel Ramírez Paredes, general secretary of the Panchoy Banana Workers' Union, murdered on 26 March.
- (3) Juan Fidel Pacheco Coc, general secretary of the Migrant Workers' Union, murdered on 31 July.
- (4) Bruno Ernesto Figueroa, finance secretary of the integrated healthcare system sub-branch of the National Health Workers' Union of Guatemala, deceased on 10 August.

***Union members murdered in 2010***

- (1) Luis Felipe Cho, member of the Union of Workers of the Municipality of Santa Cruz, murdered on 6 March.
- (2) Héctor García, member of the Hotel Las Americas SA and Allied Hotel Workers' Union, murdered on 20 February.

- 584.** The complainant states that in 96 per cent of cases the murdered union officials and members and their organizations were engaged in a dispute involving demands relating to the exercise of union and labour rights, combating impunity and corruption or fighting for indigenous peoples' rights to natural resources or land access. Hence there is good reason to believe that the murders were committed as reprisals intended to disrupt union action. According to the allegations, there was an alarming increase in murders of trade unionists and union rights defenders between 2007 and 2009. One hundred per cent of the murders were committed with firearms; 98 per cent occurred a few weeks after the start of actions in support of union and labour rights; and 75 per cent of victims had received threats in relation to the exercise of union rights. The complainant indicates that in none of the abovementioned cases have the perpetrators or instigators been identified, tried or sentenced.
- 585.** Furthermore, in its communication dated 24 November 2011, UNSITRAGUA denounces the murder of Mr Miguel Angel Felipe Sagastume, founder and former Secretary-General of the Finca El Real Workers' Union, on 27 October 2011.
- 586.** As regards the violence against trade unionists, the complainant supplies a list of assaults and death threats against trade unionists – most of them MSICG members – that took place between 2008 and 2010 and emphasizes that the attacks have escalated, targeting trade unionists and also members of the MSICG policy board and the coordinator for women's issues.
- 587.** Lastly, in its communication dated 14 February 2012, the complainant alleges that two trade union leaders, Ms Maria de los Angeles Ruano Almeda, leader of the MSICG policy board, and Ms Ingrid Migdalia Ruano, the coordinator of the MSICG women's issues, were attacked on 7 November 2011. They have been bitten by their aggressor who tried to kidnap Ms Migdalia Ruano. The complainant indicates that on 8 November 2011 it has filed a criminal complaint urging for additional security measures and evidence gathering to identify the aggressor. These measures have been taken rather belatedly.
- 588.** Furthermore, the complainant alleges unjustified delays and a denial of justice. A number of MSICG members tried to obtain information, requesting documentation on the crimes committed against trade unionists and the status of criminal proceedings but were unable to obtain precise information. In addition, according to the allegations, there is no record of the murders of trade unionists in the database of the Public Prosecutor's Office, which implies that, despite the filing of the complaints, these have not even been entered in that database, even though the Public Prosecutor's Office is obliged to launch an inquiry automatically into any murder in the country, without the need for a complaint to be submitted. The complainant indicates that, according to a report submitted by the Human Rights Procurator on 15 February 2011, describing the cases of violence committed against human rights defenders which are currently under investigation, the Public Prosecutor's Office is not investigating the murders that the MSICG has reported or the acts of violence reported by the union's members. The report also reveals that, in the few cases which are being investigated, neither the perpetrators nor the instigators have been identified, tried or sentenced and, even worse, most of the cases are being dismissed, shelved or otherwise discarded by the Public Prosecutor's Office.

### **C. The Government's reply**

- 589.** *Palo Gordo Sugar Refinery Workers' Union.* In a communication dated 30 May 2011, the Government states, with regard to the threats made against the workers by the administrative manager, that the delegation of the general labour inspectorate of Mazatenango Suchitepequez consulted the members of the union executive committee at the Palo Gordo refinery, who indicated that no complaint had been filed, the issue had been

dealt with in a joint committee and, following discussions with the employers, it had been agreed that working on 24 and 25 December would be optional. Moreover, the Government indicates that it requested information from sub-station 33-32 of the National Civil Police of San Antonio Suchitepequez, which stated that the administrative manager did not draw his weapon at any time but requested assistance in view of the presence of a group of workers at the main entrance of the Palo Gordo refinery, armed with sticks and stones and wearing balaclavas, who had been planning to attack the manager on his arrival at the refinery in his vehicle; for this reason he received support from the police. The Government adds that the manager himself stated that he had reached an agreement with the group of workers that mutual respect would be shown.

- 590.** *Murder of Mr Marco Tulio Ramírez Portela, culture and sports secretary of the executive committee of the Izabal Banana Workers' Union (SITRABI).* In a communication dated 14 July 2011, the Government indicates that, according to information requested from the Department for Offences against Journalists and Trade Unionists at the Public Prosecutor's Office, the file was received at the aforementioned Office on 12 October 2009 and the department followed the due procedures. The case is currently in the investigation phase at the General Secretariat of the Public Prosecutor's Office since it has not been possible to identify the perpetrators of the crime.
- 591.** *Murder of Mr Pedro Antonio García.* In a communication dated 30 September 2011, the Government states that the case of the murder of Mr Pedro Antonio García, which is before the Municipal Prosecutor's Office of Malacatán under file No. MP/180/2010228, is being investigated and the Committee will be informed of further developments.
- 592.** *Deduction of payments by the municipality of Malacatán.* The Government states that the economic and social dispute filed on 3 February 2009 against the municipality of Malacatán is being dealt with by the Labour and Social Security Court of First Instance of Malacatán. The workers requested the intervention of the general labour inspectorate on account of non-compliance with the collective accord in the form of deductions of payments and asked the administrative channels to be declared exhausted so as to continue their action before the Labour Court. The Government adds that on 16 February 2009 the first conciliation hearing was held and the hearings corresponding to this stage were suspended further to the filing of an amparo (protection of constitutional rights) appeal against the members of the conciliation tribunal. On 6 December 2010, the negotiation of the abovementioned accord resumed at the conciliation stage. On the same day, the conciliation channels were declared exhausted and the parties decided to submit the dispute to arbitration. The Government states that arbitration has not taken place owing to the fact that, according to a decision of 1 February 2011, prior to the arbitration tribunal the defendant must fulfil the provisions of section 398 of the Civil Code. To date, no request has been made by the parties that the arbitration procedure should continue.
- 593.** *Threats and reprisals against Mr Germán Aguilar Abrego and his colleagues; disappearance of Mr Francisco del Rosario López Estrada.* In a communication dated 24 November 2011, the Government states that information was requested from the Department for Offences against Journalists and Trade Unionists at the Public Prosecutor's Office, which refers in detail to the procedures followed and establishes that the threatening phone calls to the persons named in the file were non-existent and so the complaint was dismissed by means of a decision of 14 May 2009. The Government adds that Mr Francisco del Rosario López Estrada has not disappeared but has been located in the department of El Petén.
- 594.** *Murder of Mr Julián Capriel Marroquín.* The Government states that the District Prosecutor's Office of Chiquimula followed due procedures and reported that on 29 July 2009 the residence of Mr Zacarías Lemus – who was suspected of committing the murder

(and subsequently died on 13 April 2010) – was searched for illegal weapons and vehicles. At present, the file is still at the investigation stage.

**595.** *Death threats against Ms Lesvia Morales and attempted murder of Mr Leocadio Juracán.* In a communication dated 27 May 2010, the Government states that information was requested from the Municipal Prosecutor's Office of Santiago Atitlán, which indicated that no complaint had been filed in relation to the alleged events. The Government requests that the complainant be asked to give details of the place where the complaint was filed so that it can take follow-up action.

**596.** *Murder of Ms Olga Marina Ramírez Sansé.* In a communication dated 12 August 2010, the Government states that the Ministry of Labour and Social Security followed due procedures to establish the facts, requesting information from the Public Prosecutor's Office, which stated that a complaint has been filed and this is at the investigation stage. There is also a complaint at the investigation stage which was filed on 10 February 2010 with the Departmental Branch of the Human Rights Procurator's Office in Chiquimula. In a communication dated 24 November 2011, the Government adds that the District Prosecutor's Office in Chiquimula has conducted various procedures, including drawing up ballistics reports and issuing summonses to the trade unionist's brother, who commented at the time that Ms Ramírez Sansé was not a member of any union. The victim's brother did not make an appearance in order to give a statement.

**597.** *Trade union rights in maquila enterprises.* In a communication dated 24 November 2011, the Government provides information on closures of *maquila* (export processing zones) textile enterprises where there were indications of unions being set up:

- Textiles del Mundo SA: closed one of its two plants with the corresponding procedures.
- Dong Bang Industrial: an agreement was reached directly with the workers.
- Cambridge Industrial: the enterprise reached an agreement with 404 workers; 65 workers decided to exhaust administrative remedies and have recourse to the labour courts.
- Chuckie: an agreement was reached directly with the workers.
- Textiles del Mundo: an agreement was reached directly with the workers.
- Modas Doo Sol: the workers dropped their legal action after directly reaching an agreement.
- You Won Textiles: Y&P Textiles SA absorbed the labour liabilities of You Won Textiles through a change of management and began a new employment relationship with the workers.

#### **D. The Committee's conclusions**

**598.** *The Committee recalls that in the present case the complainant alleges numerous murders and acts of violence against trade unionists and acts of anti-union discrimination, and also obstacles to the exercise of trade union rights and social dialogue, denial of legal status to several unions and system failures leading to impunity with regard to criminal and labour matters.*

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**Previously examined allegations of violence**

- 599.** *With regard to the murders of union officials Mr Mario Caal and Mr Jaime Nery González (recommendation (b), first part, in its last examination of the case in March 2011), the Committee recalls that it requested the complainant organization to clarify the facts so that the Government could provide information on how far the investigations had progressed. The Committee notes the complainant's indication that the trade unionists were murdered in March 2008 and on 30 October 2008, respectively, and that they were involved in a labour dispute for the defence of their rights. The Committee requests the complainant to indicate the location of the events and the judicial authority with which the complaint was filed, and to supply all information at its disposal.*
- 600.** *With regard to the murders of union official Mr Israel Romero Istacuy and trade unionists Mr Diego Gustavo Chite Pu and Mr Sergio Alejandro Ramírez Huezco (recommendation (b), second part), the Committee regrets that the Government has not provided any information in this respect. It therefore urges the Government once again to send information without delay on the investigations into these murders.*
- 601.** *With regard to the murders of trade unionists Ms Olga Marina Ramírez Sansé and Mr Pedro Antonio García (recommendation (c)), the Committee notes the Government's statement that, in the case of Ms Ramírez Sansé, the Ministry of Labour and Social Security followed due procedures to establish the facts, requesting information from the Public Prosecutor's Office, which indicated the existence of a complaint under investigation and also of a complaint under investigation before the Departmental Branch of the Human Rights Procurator's Office in Chiquimula. Regarding the case of Mr Pedro Antonio García, the Committee notes the Government's statement that it is at the investigation stage. However, the Committee regrets that the Government does not provide any information on the murders of Mr Víctor Alejandro Soyos Suret, member of the advisory board of the Union of Employees of the Criminal Investigation Directorate of the Public Prosecutor's Office (SITRADICMP), and Mr Luis Arnaldo Ávila, member of the Union of Commercial Workers of Coatepeque. The Committee therefore requests the Government to keep it informed of the outcome of the investigations into the murders of Ms Olga Marina Ramírez Sansé and Mr Pedro Antonio García. The Committee urges the Government once again to conduct independent investigations without delay into the murders of Mr Víctor Alejandro Soyos Suret and Mr Luis Arnaldo Ávila, and to keep it informed of their outcome and the subsequent criminal proceedings.*
- 602.** *With regard to the attempted murder of the trade unionist Mr Julián Capriel Marroquín (recommendation (g)), the Committee notes the Government's statement that: (1) the District Prosecutor's Office of Chiquimula followed due procedures; (2) on 29 July 2009 the residence of Mr Zacarías Lemus – who was suspected of committing the murder (and subsequently died on 13 April 2010) – was searched for illegal weapons and vehicles; and (3) at present, the file is still at the investigation stage. The Committee requests the Government to keep it informed of the outcome of the investigation into the murder of Mr Julián Capriel Marroquín.*
- 603.** *With regard to the alleged death threats against the Palo Gordo Sugar Refinery Workers' Union (recommendation (h)), the Committee notes the Government's statement that: (1) the administrative manager did not draw his weapon at any time; (2) he requested assistance in view of the presence of a group of workers at the main entrance of the Palo Gordo refinery, armed with sticks and stones and wearing balaclavas, who had been planning, according to the Government, to attack the manager on his arrival at the refinery in his vehicle – for this reason he received support from the police; and (3) the manager himself reached an agreement with the group of workers that mutual respect would be shown.*

- 604.** *With regard to the alleged death threats against the SITRABI (recommendation (h)), the Committee regrets that the Government has not supplied any information. The Committee once again urges the Government to send its observations on the matter without delay.*
- 605.** *With regard to the kidnapping and rape of Ms María Alejandra Vásquez, the Committee recalls the Government's previous statement that there were several complaints referring to persons with the same name and so the Committee had asked the complainant organization to provide it with additional information so that the Government could conduct an investigation into the matter (recommendation (i)). The Committee notes that the complainant repeats information which has already been supplied. The Committee therefore once again requests the complainant organization to send further information in this regard, such as the full name of the victim or the place where the complaint was filed, so that the Government can launch an investigation or provide information on any investigation already in progress.*
- 606.** *With regard to the murder of Mr Marco Tulio Ramírez Portela, culture and sports secretary of the executive committee of SITRABI, the Committee recalls that in a previous examination of the case it emphasized that the information supplied by the Government did not allow definitive conclusions to be reached, since it merely indicated that the motive for the murder was political rather than union related, and it requested the Government to send full information on this matter (see 355th Report, paras 860–862). The Committee notes the Government's statement that: (1) the file concerning the murder of Mr Marco Tulio Ramírez Portela was received on 12 October 2009; (2) the department followed the due procedures; and (3) the case is currently in the investigation phase. The Committee requests the Government to keep it informed of the outcome of the investigation in progress.*
- 607.** *With regard to the threats and reprisals against Mr Germán Aguilar Abrego and his colleagues and the disappearance of Mr Francisco del Rosario López Estrada, the Committee recalls that, in a previous examination of the case, it urged the Government to ensure the physical safety of trade unionists who are threatened or harassed and of witness Mr Roberto Dolores and to confirm the whereabouts of the allegedly missing Mr Francisco del Rosario López and the minor Ms María Antonia Dolores López (see 355th Report, para. 866(c)). The Committee notes the Government's statement that: (1) it was established that the threatening phone calls to the persons named in the file were non-existent, and so the complaint was subsequently dismissed by means of a decision of 14 May 2009; and (2) Mr Francisco del Rosario López Estrada has not disappeared but has been located in the department of El Petén. The Committee regrets that the Government has not supplied any information regarding the whereabouts of the minor Ms María Antonia Dolores López and requests it to indicate whether any investigations have been conducted into this matter.*
- 608.** *With regard to the death threats against Ms Lesvia Morales and the attempted murder of Mr Leocadio Juracán referred to in the previous examination of the case, the Committee notes the Government's statement that no complaint has been filed in relation to the alleged events and no information provided in response to its request that the complainant should be asked to give details of the place where the complaint was filed so that it can take follow-up action. The Committee requests the complainant organization to indicate the place where the complaint was filed so that the Government can take follow-up action.*
- 609.** *The Committee regrets that the Government has not supplied any information on the following aspects of several of its previous recommendations, namely:*
- *the investigations concerning the injured workers from the Union of Small Traders and Allied Workers (recommendation (d));*



- *the investigations concerning the death of a trade unionist following the use of excessive force and concerning the allegations of attempted extrajudicial killings, death threats and injuries to union members (recommendation (e));*
- *the investigations concerning the death threats received by members of the National Health Union (recommendation (f));*
- *the investigations concerning the criminal proceedings brought against officials of the Union of Workers of the Municipality of Zacapa (recommendation (k)); and*
- *the observations in relation to the allegations of harassment and intimidation submitted by the Union of Workers of the Petén Distribution Company (SITRAPETEN), the Altiplano Agricultural Workers' Committee (CCDA) and the Movement of Trade Unions, Indigenous Peoples and Agricultural Workers of Guatemala (MSICG) (recommendation (l)).*

**610.** *The Committee deeply deplores the acts of violence described in the complaint and expresses its deep concern at the large number of trade unionists who have been murdered and draws the Government's attention to the fact that trade union rights can only be exercised in a climate that is free of violence, pressure or threats of any kind against trade unionists, and it is for governments to ensure that this principle is respected [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 44].*

**611.** *The Committee once again notes with deep concern that the Government does not report on any murder suspects being detained. The Committee emphasizes that the absence of judgments against the guilty parties creates, in practice, a situation of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights [see **Digest**, op. cit., para. 52]. The Committee requests the Government to take measures as a matter of urgency to combat the total impunity observed in relation to these allegations. The Committee urges the Government to take steps to ensure that the investigations opened are concluded without delay so that the perpetrators are duly punished and requests the Government to provide detailed information on the outcome of the investigations and the criminal proceedings instituted in this regard.*

**612.** *The Committee regrets that the Government has not supplied any information on the following aspects of several other of its previous recommendations, namely:*

- *the investigations concerning alleged blacklisting (recommendation (j));*
- *the investigations concerning the alleged violation of freedom of association at the Las Américas SA and Crown Plaza Guatemala hotels (recommendation (m));*
- *the registration and recognition of trade unions (recommendation (o)); and*
- *the outcome of the decisions taken by the judicial authorities regarding the reinstatement orders and dismissals affecting the Union of Workers of the Municipality of Chimaltenango. The Committee urges the Government to send the requested information relating to these allegations.*

### **New allegations relating to acts of violence**

**613.** *The Committee notes with concern that the complainant organization alleges the murder of 12 union officials and 13 union members between 2007 and 2010, apart from the numerous cases already referred to in the context of the present case. The Committee once*

again underlines the seriousness of this case. In general terms, the Committee deeply deplores the murders of these union members and officials and reiterates the principles referred to above. The Committee urges the Government to conduct independent judicial inquiries without delay into the murders of the following union officials and members: Julio Cesar Ixcoy García, Pedro Zamora, Rosalio Lorenzo, Armando Sánchez, Maura Antonieta Hernández, Pedro Ramírez de la Cruz, Julio Pop Choc, Gilmer Orlando Borrer Zet, Evelinda Ramírez Reyes, Samuel Ramírez Paredes, Juan Fidel Pacheco Coc, Bruno Ernesto Figueroa, Liginio Aguirre, Salvador del Cid, Licinio Trujillo, Aníbal Ixcaquic, Norma Sente Ixcaquic, Matías Mejía, Juana Xoloja, Willy Morales, Víctor Gálvez, Jorge Humberto Andrade, Adolfo Ich, Luis Felipe Cho and Héctor García. The Committee requests the Government to keep it informed of the outcome of the investigations and the subsequent criminal proceedings.

- 614.** *As regards the murder denounced by UNSITRAGUA of Mr Miguel Angel Felipe Sagastume, founder and former Secretary-General of the Finca El Real Workers' Union, on 27 October 2011, the Committee requests the Government to send its observations on the matter without delay.*
- 615.** *Moreover, with regard to the attack against Ms Maria de los Angeles Ruano Almeda and Ms Ingrid Migdalia Ruano on 7 November 2011, the Committee requests the Government to provide its observations thereon without delay.*

### **Other allegations**

- 616.** *With regard to the deduction of payments by the municipality of Malacatán, the Committee notes the Government's statement that the economic and social dispute filed on 3 February 2009 against the municipality of Malacatán is being dealt with by the Labour and Social Security Court of First Instance of Malacatán. The Committee requests the Government to keep it informed of further developments.*
- 617.** *With regard to the status of trade union rights and the closure of various enterprises in the maquila sector, particularly Textiles del Mundo SA, Dong Bang Industrial, Cambridge Industrial, Chuckie, Textiles del Mundo, Modas Doo Sol and You Won Textiles (allegations mentioned in the context of a previous examination of the case – see 355th Report, para. 804), the Committee notes the Government's indication that agreements were reached directly with the workers or a new employment relationship was begun with the workers.*
- 618.** *Finally, with regard to the climate of impunity in connection with labour matters which is mentioned repeatedly on account of undue delays amounting to a denial of justice, the Committee regrets that the Government has not sent any reply. The Committee requests the Government to send its observations in this regard without delay.*

### **The Committee's recommendations**

- 619.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee expresses its deep concern at the gravity of this case, given the numerous murders, attempted murders, assaults and death threats, kidnappings, harassment and intimidation of trade union officials and members, and also the allegations of blacklisting and the climate of total impunity. The Committee deeply regrets that the Government only provides a partial reply in respect of the allegations made.*

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**Previously examined allegations of violence**

- (b) With regard to the murders of Mr Mario Caal and Mr Jaime Nery González, the Committee requests the complainant to indicate, in addition to the date on which the events occurred, the location of the events and the judicial authority with which the complaint was filed.*
- (c) With regard to the murders of union official Mr Israel Romero Istacuy and union members Mr Diego Gustavo Chite Pu and Mr Sergio Alejandro Ramírez Huevo, the Committee urges the Government once again to send information without delay on the investigations into these murders.*
- (d) The Committee requests the Government to keep it informed of the outcome of the investigations into the murders of union members Ms Olga Marina Ramírez Sansé and Mr Pedro Antonio García. The Committee urges the Government once again to conduct independent judicial investigations without delay into the murders of Mr Víctor Alejandro Soyos Suret and Mr Luis Arnaldo Ávila, and to keep it informed of their outcome and the subsequent criminal proceedings.*
- (e) With regard to the attempted murder of Mr Julián Capriel Marroquín, the Committee requests the Government to keep it informed of the outcome of the investigation in progress.*
- (f) With regard to the alleged death threats against SITRABI, the Committee urges the Government once again to send its observations on the matter without delay.*
- (g) With regard to the murder of union official Mr Marco Tulio Ramírez Portela, the Committee requests the Government to keep it informed of the outcome of the investigation in progress.*
- (h) With regard to the disappearance of the minor Ms María Antonia Dolores López, the Committee requests the Government to indicate whether any investigations have been conducted into this matter.*
- (i) With regard to the death threats against Ms Lesvia Morales and the attempted murder of Mr Leocadio Juracán, the Committee requests the complainant organization to indicate the place where the complaint was filed so that the Government can take follow-up action.*
- (j) With regard to the allegations of violence to which the Government has not replied, the Committee emphasizes their seriousness and regrets the lack of information from the Government. The Committee urges the Government to take steps to ensure that the investigations opened are concluded without delay so that the perpetrators are duly punished and requests the Government to provide detailed information on the outcome of the investigations. The Committee refers to the following investigations:*
  - the investigations concerning the injured workers from the Union of Small Traders and Allied Workers;*

- *the investigations concerning the death of a trade unionist following the use of excessive force and concerning the allegations of attempted extrajudicial killings, death threats and injuries to union members;*
  - *the investigations concerning the death threats received by members of the National Health Union;*
  - *the investigations concerning the criminal proceedings brought against officials of the Union of Workers of the Municipality of Zacapa; and*
  - *the observations in relation to the allegations of harassment and intimidation submitted by SITRAPETEN, the CCDA and the MSICG.*
- (k) *The Committee deeply deplores the acts of violence described in the complaint and expresses its deep concern at the large number of trade union officials and members who have been murdered and draws the Government's attention to the fact that trade union rights can only be exercised in a climate that is free of violence, pressure or threats of any kind against trade unionists, and it is for governments to ensure that this principle is respected. The Committee once again observes with deep concern that the Government does not report on any murder suspects being detained. The Committee requests the Government to take measures as a matter of urgency to combat the total impunity observed in relation to these allegations and urges the Government to take steps to ensure that the investigations opened are concluded without delay so that the perpetrators are duly punished and requests the Government to provide detailed information on the outcome of the investigations and the criminal proceedings instituted in this regard.*
- (l) *Regretting that the Government has not supplied any information on the following aspects of several other of its previous recommendations, namely:*
- *the investigations concerning alleged blacklisting;*
  - *the investigations concerning the alleged violation of freedom of association at the Las Américas SA and Crown Plaza Guatemala hotels;*
  - *the registration and recognition of trade unions; and*
  - *the outcome of the decisions taken by the judicial authorities regarding the reinstatement orders and dismissals affecting the Union of Workers of the Municipality of Chimaltenango, the Committee urges the Government to send the requested information relating to these allegations.*

### **New allegations relating to acts of violence**

- (m) *The Committee underlines the extreme seriousness of these allegations. The Committee deeply deplores the murders of 12 union officials and 13 union members (between 2007 and 2010), apart from the numerous cases already referred to in the context of the present case, and reiterates the principles referred to above. The Committee urges the Government to conduct*

*independent inquiries without delay into the murders of the following union officials and members: Julio Cesar Ixcoy García, Pedro Zamora, Rosalio Lorenzo, Armando Sánchez, Maura Antonieta Hernández, Pedro Ramírez de la Cruz, Julio Pop Choc, Gilmer Orlando Borrór Zet, Evelinda Ramírez Reyes, Samuel Ramírez Paredes, Juan Fidel Pacheco Coc, Bruno Ernesto Figueroa, Liginio Aguirre, Salvador del Cid, Licinio Trujillo, Aníbal Ixcaquic, Norma Sente Ixcaquic, Matías Mejía, Juana Xoloja, Willy Morales, Víctor Gálvez, Jorge Humberto Andrade, Adolfo Ich, Luis Felipe Cho and Héctor García. The Committee requests the Government to keep it informed of the outcome of the investigations and the subsequent criminal proceedings.*

- (n) *As regards the murder of Mr Miguel Angel Felipe Sagastume, founder and former Secretary-General of the Finca El Real Workers' Union, the Committee requests the Government to send its observations on the matter without delay.*

### **Other allegations**

- (o) *With regard to the attack against Ms Maria de los Angeles Ruano Almeda and Ms Ingrid Migdalia Ruano on 7 November 2011, the Committee requests the Government to provide its observations thereon without delay.*
- (p) *With regard to the deduction of payments by the municipality of Malacatán, the Committee requests the Government to keep it informed of further developments.*
- (q) *With regard to the climate of impunity which is mentioned repeatedly on account of undue delays amounting to a denial of justice, the Committee requests the Government to send its observations in this regard without delay.*
- (r) *The Committee draws the special attention of the Governing Body to the serious and urgent nature of this case.*

CASE NO. 2768

INTERIM REPORT

### **Complaint against the Government of Guatemala presented by**

- **the Guatemalan Trade Union, Indigenous and Campesino Movement (MSICG), acting through its Political Council made up of**
- **the General Confederation of Workers of Guatemala (CGTG)**
- **the Trade Union Confederation of Guatemala (CUSG)**
- **the Altiplano Campesino Committee (CCDA)**
- **the National Indigenous, Campesino and People’s Council (CNAICP)**
- **the National Front for the Defence of Public Services and Natural Resources (FNL) and**
- **the Trade Union of Workers of Guatemala (UNSITRAGUA)**

*Allegations: Death threats against trade union officers, unilateral amendment by the authorities of the statutes of two trade unions, anti-union discrimination in hiring, impediments to the right to organize through the signature of civil contracts for professional services, and an anti-union dismissal*

**620.** The complaint is contained in communications from the Guatemalan Trade Union, Indigenous and Campesino Movement (MSICG) – acting through its Political Council made up of the General Confederation of Workers of Guatemala (CGTG), the Trade Union Confederation of Guatemala (CUSG), the Altiplano Campesino Committee (CCDA), the National Indigenous, Campesino and People’s Council (CNAICP), the National Front for the Defence of Public Services and Natural Resources (FNL), and the Trade Union of Workers of Guatemala (UNSITRAGUA) – dated 14 January 2010. The complainant organizations sent additional information in communications dated 16 June 2010 and 14 February 2012.

**621.** The Government sent its observations in communications dated 30 July 2010, and 14 June, 13 September and 24 November 2011.

**622.** Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

#### **A. The complainants’ allegations**

**623.** In its communication dated 14 January 2010, the MSICG – acting through its Political Council made up of the CGTG, the CUSG, the CCDA, the CNAICP, the FNL and the UNSITRAGUA – reports the following anti-union actions: death threats against trade union officers, unilateral amendment by the authorities of the statutes of two trade unions, anti-union discrimination in hiring, impediments to the right to organize through the signature of civil contracts for professional services, and an anti-union dismissal.

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***Death threats against trade union officers***

624. The complainant organizations allege that, on 1 July 2009, Mr Marvin Mejía and Mr Rolando de Jesús Paz Fajardo, respectively the Secretary-General and the Disputes Secretary of the Workers' Union of the Office of the Auditor-General, which is affiliated to the CGTG and the MSICG, received death threats in the form of text messages on their mobile telephones. The complainant organizations add that the case has not been investigated even though a report was filed with the Ministerio Público (Public Prosecution Service).

***Unilateral amendment by the authorities of the statutes of two trade unions***

625. The complainant organizations state that two groups of workers had duly decided to establish the Union of Independent Traders of the Cahabón Municipal Market in the department of Alta Verapaz (SITRACAHABON) and the Trade Union of Workers of the National Institute of Forensic Sciences (SITRAINACIF). At the founding general assemblies, it was decided to set up the trade unions, adopt their draft statutes and elect the members of their interim executive committee. In accordance with legal procedure, notice of the establishment of the two trade unions was given to the General Labour Inspectorate of the Ministry of Labour and Social Welfare, together with an application to the General Labour Director for the recognition of the trade unions as legal entities, for their registration and for the adoption and registration of their statutes.

626. The complainant organizations state that section 2 in fine of the draft statutes literally reads as follows: "shall be considered to be affiliated with the Trade Union of Workers of Guatemala (UNSITRAGUA)".

627. The complainant organizations state that on 3 August and 7 December 2009, the Ministry of Labour and Social Welfare and the General Labour Director issued decisions DGT-PJ 77-2009 and DGT-PJ 84-2009, in which the trade unions were recognized as legal entities, their statutes were adopted and the registration of the trade unions was ordered. However, the passage referring to UNSITRAGUA affiliation was illegally, unilaterally and arbitrarily deleted from the transcript of the statutes in a manner which detracted from the genuine content of the statutes, bearing in mind that the transcript in question is the version used for the abovementioned registration and communicated to the workers along with the decisions.

***Anti-union discrimination in hiring: Polygraph tests***

628. The complainant organizations state that most enterprises in Guatemala require job applicants in all categories to undergo a polygraph test during which they are subjected to comprehensive questioning about their personal lives, with special emphasis on their trade union affiliation and any involvement in labour disputes. According to the complainants, it is obvious that any workers who have a history of trade union membership or representation before labour courts and trade union bodies are not ultimately selected for hiring. The tests are carried out in the absence of intervention by the labour authorities to guarantee the trade union and labour rights of workers.

***Impediments to the right to organize through the signature of civil contracts for professional services***

- 629.** The complainant organizations indicate that the State of Guatemala, in its capacity as an employer, has for years been disguising its labour relations or breaking the law in its hiring practices. At present, workers are hired by means of civil contracts for professional services. According to the complainants, the result is that workers are deliberately denied the right to organize and to enjoy all labour rights.
- 630.** The complainant organizations enclose a copy of the statement issued on 4 August 2009 by the Legal Advisory Department of the Ministry of Labour and Social Welfare, in which it is stated that State workers hired under line 029 of the State budget (civil contracts for professional services) “are not workers of the State of Guatemala and therefore are not entitled to form trade unions or enjoy labour rights”. It follows that all workers hired under the abovementioned budget line are denied the right to form trade unions.

***Anti-union dismissal***

- 631.** The complainant organizations state that Ms Lesbia Guadalupe Amézquita Garnica, who was a member of the MSICG delegation to the 99th Session of the International Labour Conference, accredited by the ITUC, and who was not present in her capacity as an employee of the Friedrich Ebert Foundation (FES), participated by providing technical support to the presentation of Guatemala’s case before the Committee on the Application of Standards on 11 June 2010. During the discussion of the case, the Guatemalan Employers’ delegate referred in his speech to the existence of “external agents”, namely, the MSICG. On 12 June 2010, the manager in charge of FES in Latin America orally informed Ms Amézquita Garnica that FES had decided to dismiss her from her post as the coordinator of the national and regional trade union branch on the grounds, inter alia, that she had worked during the Conference on presenting Guatemala’s case and that this work had jeopardized the work of her office in Guatemala with the Government; according to the complainant organizations, the grounds for her dismissal were not specified in the written notice of dismissal dated 16 June 2010. In its communication dated 14 February 2012, the complainant organization adds that the date of formal dismissal of 16 June 2010 was acknowledged by the FES during the audience that took place on 14 November 2011 before the First Labour and Social Assistance Court. Furthermore, the FES requested during the audience on 30 January 2012 that criminal proceedings be initiated against the MSICG leader.

**B. The Government’s reply*****Death threats against trade union officers***

- 632.** In its communication dated 30 July 2010, the Government states that the Ministry of Labour and Social Welfare asked the Prosecutor’s Office of the Public Prosecution Service for information on the alleged constant death threats delivered by means of text messages to the mobile telephones of trade unionists Mr Marvin Mejía and Mr Rolando de Jesús Paz Fajardo, and that the Prosecutor’s Office stated that the trade unionists in question had authorized it to shelve the complaint on the grounds that there was insufficient information on the persons who might have been involved.



### **Unilateral amendment by the authorities of the statutes of two trade unions**

633. In its communication dated 13 September 2011, the Government states that the passage referring to the UNSITRAGUA affiliation of the trade unions was deleted because the trade unions in question did not clearly indicate the federation with which they wished to be affiliated, in the light of the current problematic situation in which two federations wish to have the same name, and in order to avoid any chance of the trade unions appearing to be part of a federation other than the one to which they wished to belong.

### **Anti-union discrimination in hiring: Polygraph tests**

634. Regarding alleged anti-union actions taken by enterprises against job applicants in all categories and involving polygraph tests, the Government is transmitting single copies of the General Labour Inspectorate's reports on the cases brought to its attention. The reports show that most of the cases are still unresolved while others were referred for conciliation. In its communication dated 24 November 2011, the Government specifies that the General Labour Inspectorate, acting through its inspection section, processed seven cases in 2010 that related to complaints about polygraph tests including anti-union questions, and concerned private security and industrial enterprises. Six cases filed between January and June 2011 are being processed by inspectors.

## **C. The Committee's conclusions**

635. *The Committee notes that, in this case, the complainant organizations allege death threats against trade union officers, unilateral amendment by the authorities of the statutes of two trade unions, anti-union discrimination in hiring, impediments to the right to organize through the signature of civil contracts for professional services, and an anti-union dismissal.*

### **Death threats against trade union officers**

636. *The Committee notes that the complainant organizations allege that, on 1 July 2009, Mr Marvin Mejía and Mr Rolando de Jesús Paz Fajardo, respectively the Secretary-General and the Disputes Secretary of the Workers' Union of the Office of the Auditor-General, which is affiliated to the CGTG and the MSICG, received death threats in the form of text messages on their mobile telephones, and that the case has not been investigated even though a complaint has been lodged with the Public Prosecution Service. The Committee also notes that the Government states that the Prosecutor's Office of the Public Prosecution Service stated that the trade unionists in question had authorized it to shelve the complaint on the grounds that there was insufficient information on the persons who might have been involved, and the case had therefore been shelved. While noting this information, the Committee emphasizes that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 44].*

## **Unilateral amendment by the authorities of the statutes of two trade unions**

637. *The Committee notes that the complainant organizations state that two trade unions (the Union of Independent Traders of the Cahabón Municipal Market (SITRACAHABON) and the Trade Union of Workers of the National Institute of Forensic Sciences (SITRAINACIF) were set up in 2009, and that it was decided at both founding assemblies to set up the trade union, elect the members of the interim executive committee and adopt the draft statutes, of which section 2 in fine included the following passage “shall be considered to be affiliated with the Trade Union of Workers of Guatemala (UNSITRAGUA)”. The Committee notes that, according to the complainant organizations, the Ministry of Labour and Social Welfare and the General Labour Director unilaterally amended these statutes by deleting the abovementioned passage while disregarding the fact that the statutes had been adopted by founding assemblies.*
638. *The Committee notes that the Government states that the passage referring to the UNSITRAGUA affiliation of the trade unions was deleted because the trade unions in question did not clearly indicate the federation with which they wished to be affiliated, in the light of the current problematic situation in which two federations wish to have the same name, and in order to avoid any chance of the trade unions appearing to be part of a federation other than the one to which they wished to belong. The Committee recalls that the drafting by the public authorities themselves of the constitutions of central workers’ organizations constitutes a violation of the principles of freedom of association, and that amendments to the constitution of a trade union should be debated and adopted by the union members themselves [see **Digest**, op. cit., paras 374 and 381]. The Committee emphasizes that any workers’ organization should have the right to join the federation or confederation of its own choosing. Consequently, the Committee requests the Government to take the necessary measures to ensure that the statutes of the two trade unions mentioned above include the reference to their affiliation with (the new or original) UNSITRAGUA and to consult them in order to determine which of the two federations is the one with which they wish to be affiliated, and to keep it informed in this respect.*

## **Anti-union discrimination in hiring: Polygraph tests**

639. *The Committee notes that the complainant organizations allege that most enterprises in Guatemala require job applicants in all categories to undergo a polygraph test and answer questions about their personal lives, with special emphasis on their trade union affiliation and any involvement in labour disputes, and emphasize that such tests are used to avoid hiring workers who have been members of a trade union or made representations before labour courts and trade union bodies. The Committee also notes the Government’s statement to the effect that the institution responsible for ensuring compliance with the law is the General Labour Inspectorate, of which the inspection section processed seven cases in 2010 that related to complaints about polygraph tests including anti-union questions and concerned private security and industrial enterprises, and six cases filed between January and June 2011, currently being processed by inspectors.*
640. *The Committee expresses its deep concern at the seriousness of the allegations concerning issues that affect people’s private lives, and emphasizes that protection from anti-union discrimination in hiring must be fully guaranteed, in keeping with Article 1 of Convention No. 98. Furthermore, legislation should allow the possibility to appeal against discrimination in hiring, i.e. even before the workers can be qualified as “employees” [see **Digest**, op. cit., para. 784]. The Committee expresses its fear that the use of polygraph tests during hiring interviews may lead to anti-union discriminations, and therefore requests the Government to indicate the conclusions reached and actions taken by the authorities as a result of the reports of the use of polygraphs for anti-union purposes.*

## **Impediments to the right to organize through the signature of civil contracts for professional services**

**641.** *The Committee notes that the complainant organizations state that: (1) the State of Guatemala, in its capacity as an employer, has for years been disguising its labour relations or breaking the law in its hiring practices; (2) at present, workers are hired by means of civil contracts for professional services (State budget line 029); and (3) as a result, workers are deliberately denied the right to organize and to benefit from all labour rights. The Committee regrets that the Government has failed to provide information on this subject. However, the Committee wishes to emphasize that it has already, on a number of occasions, examined the compliance of those contract types with the principles of freedom of association. The Committee reiterates its previous recommendations and emphasizes that, in keeping with Article 2 of Convention No. 87, workers and employers, without distinction whatsoever, shall have the right to establish and to join organizations of their own choosing; workers also enjoy the guarantees provided in Convention No. 98 against acts of anti-union discrimination. Therefore, the Committee once again urges the Government to fully respect Conventions Nos 87 and 98, and in particular to guarantee the trade union rights of the many workers contracted under “line 029” (of the State budget).*

### **Anti-union dismissal**

**642.** *The Committee notes that the complainant organizations state that: (1) Ms Lesbia Guadalupe Amézquita Garnica, who was a member of the MSICG delegation to the 99th Session of the International Labour Conference, accredited by the ITUC, participated by providing technical support to the presentation of Guatemala’s case before the Committee on the Application of Standards on 11 June 2010; (2) she was not present in her capacity as an employee of the FES; (3) on 12 June 2010, a manager in charge of FES in Latin America informed Ms Amézquita Garnica of the decision to dismiss her from her post as the coordinator of the national and regional trade union branch on the grounds that she had worked during the Conference on presenting Guatemala’s case and that this work had jeopardized the work of her office in Guatemala with the Government; (4) the communication dated 16 June 2010 and informing Ms Amézquita Garnica of her dismissal did not specify the reason for the dismissal; and (5) the FES requested during the audience that took place on 20 January 2012 that criminal proceedings be initiated against the MSICG leader.*

**643.** *The Committee observes that neither the Government nor the FES has sent information on this allegation. The Committee requests the Government to send without delay its observations on this matter, including the comments of concerned parties including the FES, and to indicate whether Ms Amézquita Garnica has lodged a complaint in relation with these events. The Committee also requests the Government to provide information concerning the criminal proceedings allegedly requested by the FES.*

### **The Committee’s recommendations**

**644.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) Regarding the unilateral amendment by the authorities of the statutes of two trade unions, the Committee requests the Government to take the necessary measures to ensure that the statutes of the two trade unions mentioned above include the reference to their affiliation with (the new or original) UNSITRAGUA, to consult them in order to determine which of the two*

*federations is the one with which they wish to be affiliated, and to keep it informed in this respect.*

- (b) Regarding the alleged instances of discrimination in hiring, and while expressing its deep concern at the seriousness of the allegations concerning issues that affect people's private lives, the Committee expresses its fear that the use of polygraph tests during hiring interviews may lead to anti-union discriminations, and therefore requests the Government to indicate the conclusions reached and actions taken by the authorities as a result of the reports of the use of polygraphs for anti-union purposes.*
- (c) Regarding the failure to recognize trade union rights as a result of the signature of civil contracts, the Committee urges the Government to fully respect Conventions Nos 87 and 98, and in particular to guarantee the trade union rights of the many workers contracted under "State budget line 029".*
- (d) Regarding the dismissal of Ms Lesbia Guadalupe Amézquita Garnica, the Committee requests the Government to send without delay its observations on this matter, including the comments of concerned parties including the FES, and to indicate whether Ms Amézquita Garnica has lodged a complaint in relation with these events. The Committee also requests the Government to provide information concerning the criminal proceedings allegedly requested by the FES.*

CASE No. 2811

INTERIM REPORT

**Complaint against the Government of Guatemala  
presented by  
the Trade Union of Workers of Guatemala  
(UNSI TRAGUA)**

*Allegations: The anti-union transfer of a trade union official in the National Institute of Forensic Science, anti-union dismissals in the municipality of Chimaltenango, impediments to the negotiation of a new collective agreement in the Higher Electoral Court, and the violation of the provisions of a collective agreement in the agricultural sector*

- 645.** The complaint is contained in two communications from the Trade Union of Workers of Guatemala (UNSI TRAGUA) dated 26 August 2010. The complainant organization sent new allegations in communications dated 10 September and 4 and 10 November 2010.
- 646.** The Government sent its observations in communications dated 23 September 2010 and 14 June 2011.

647. Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Collective Bargaining Convention, 1981 (No. 154).

#### A. The complainant's allegations

648. In its communication dated 26 August 2010, the complainant indicates, in connection with the Trade Union of the National Institute of Forensic Sciences (SITRAINACIF), that the notification of trade union immunity of the members of the Executive Committee was issued on 26 January 2010 but took effect on 20 January. However, on 4 May 2010, Ms Nilda Ivette González Ruiz, who is a member of the Executive Committee and acts as the Social Welfare Secretary at the office in the municipality of Cobán, in the department of Alta Verapaz, was informed that, until further notice, she would have to report for work at the office in the municipality of Poptún, in the department of Petén. The transfer constitutes a change of working conditions and, in the opinion of the complainant, a clear violation of ratified ILO Conventions in retaliation for her trade union activities. The complainant states that Ms Nilda Ivette González Ruiz filed a complaint with the Ministry of Labour, and the corresponding summonses were issued for the purpose of bringing together the parties in a conciliation meeting at which no agreement was reached.
649. In a communication dated 10 September 2010, the complainant states that ever since the Union of Employees of the municipality of Chimaltenango, in the department of Chimaltenango, was established on 9 November 2007, it has been the target of dismissals and anti-union practices. In 2008, following the municipal elections, there was an unjustified mass dismissal of nearly 200 workers, including 55 unionized workers, of whom 36 initiated complaint proceedings before the Labour, Social Welfare and Family Court of First Instance of Chimaltenango department. The complainant reports that following a series of challenges by the employer side, which were dismissed or declared inadmissible, 12 of the 36 workers were reinstated. However, the 12 reinstated workers were then dismissed by the mayor of the municipality of Chimaltenango, who said in an oral statement that there was no way all of the trade union members would be able to return to their jobs. Further complaints concerning the dismissals were filed with the Labour, Social Welfare and Family Court of First Instance of Chimaltenango department.
650. In its communication dated 4 November 2010, the complainant states that: (a) the collective agreement between the Trade Union of Workers of the Higher Electoral Court (SITTSE) and the Higher Electoral Court expired on 13 July 2011; (b) after exhausting the direct channels available for negotiating the collective agreement, SITTSE launched strike action and applied to the Fifth Court of Labour and Social Welfare of the First Economic Zone for the strike movement to be declared legal; (c) to count the strikers, the Court commissioned the labour inspectorate and the magistrate's courts, which failed to carry out the count as instructed, thereby delaying the negotiation of the collective agreement; and (d) the workers lodged a complaint with the Judicial Service Council.
651. In its communication dated 10 November 2010, the complainant refers to the dispute between the Palo Gordo Agricultural, Industrial and Refining Company and the Union of Workers of the Palo Gordo Sugar Refinery, and in particular to the following events: (a) in June 2010, a group of around 250 workers entered the offices of the administrative headquarters of the Palo Gordo sugar refinery with the intention of talking to the chief of agro-industrial relations about the work situation during the so-called repair period (between harvests) provided for in the collective agreement signed by both parties; (b) the trade union indicated that it knew that private enterprises had been hired to carry out repair work without regard for the content of the collective agreement, thereby causing disruption and a number of incidents; (c) in August 2010, the Executive Committee and the Advisory Board of the trade union sent a note to the representative of the Ministry of Labour and

Social Welfare in the region of Suchitepéquez, indicating their opposition to the decision taken by the employer's administration to add contractors and staff to the enterprise's payroll, given that suitable and capable workers were available who had worked during harvest periods and had performed those tasks for years; and (d) negotiations were held on 4 November 2010 during which it was agreed that the harvest would start on 20 November 2010 and that, after the forthcoming general assembly, the trade union side would transmit the corresponding notice to the employer side for direct negotiation of the collective agreement on working conditions.

**652.** Lastly, the complainant refers to its internal dispute in July and August 2010, which was examined under Case No. 2708.

## **B. The Government's reply**

**653.** In its communication dated 14 June 2011, the Government indicates, with regard to the delay in declaring the strike legal or illegal, and the resulting missed opportunity to negotiate a collective agreement on working conditions in the Higher Electoral Court, that the judiciary was asked for information on why the worker count had been delayed, and had received a list of all competent magistrates' courts of first instance, which specified the following on 11 January 2011: (a) the listing provided by the Ministry of Labour and Social Welfare indicates that 195 courts, some of which were mentioned twice or three times, failed to process the court order; (b) the magistrates' courts in El Tejar (Chimaltenango), Colotenango (Huehuetenango), Livingston (Izabal), and Tectitán (Huehuetenango) returned the court order unprocessed because the offices of the Electoral Court were closed; (c) the magistrate's court in Flores (Petén), returned the court order unprocessed because there are no electoral roll offices in that city; (d) the magistrate's court in Chinautla returned the court order unprocessed because the address of the office of the Higher Electoral Court was wrong; (e) the listing included the town of Pueblo Nuevo Tiquisate yet there is no such municipality in the department of Suchitepéquez, although the department of Escuintla does include a municipality called Pueblo Nuevo Tiquisate, where the court complied with the requirement of the Fifth Court of Labour and Social Welfare; and (f) the Fifth Court of Labour and Social Welfare indicated that, on 15 February 2011, the strike movement led by SITTSE was declared legal, and the Higher Electoral Court appealed against that ruling before the Third Chamber of Labour and Social Welfare, which is where the case now stands.

## **C. The Committee's conclusions**

**654.** *The Committee observes that in this case the complainant alleges that a trade union official was the victim of an anti-union transfer in the National Institute of Forensic Science, anti-union dismissals took place in the municipality of Chimaltenango, the negotiation of a new collective agreement in the Higher Electoral Court was impeded, and the provisions of a collective agreement in the agricultural sector were violated.*

**655.** *Regarding the anti-union transfer of a trade union official in the National Institute of Forensic Science, the Committee notes that the complainant states that: (a) on 4 May 2010, Ms Nilda Ivette González Ruiz, who is a member of the Executive Committee and acts as the Social Welfare Secretary of the SITRAINACIF, in its offices in the municipality of Cobán, in the department of Alta Verapaz, was informed that until further notice she would have to report for work at the office in the municipality of Poptún, in the department of Petén; and (b) the trade union official filed a complaint with the Ministry of Labour but the conciliation process was unsuccessful.*

656. *The Committee recalls that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 799]. Regretting that the Government has provided no information on the alleged anti-union transfer of the trade union official Ms Nilda Ivette González Ruiz, the Committee urges the Government to do so without delay and to take the necessary steps to ensure that the abovementioned principle is respected. The Committee requests the Government to keep it informed in this regard.*
657. *Regarding anti-union dismissals in the municipality of Chimaltenango, the Committee notes that the complainant states that: (a) in 2008, nearly 200 workers, including 55 members of the Union of Employees of the municipality of Chimaltenango, were dismissed; (b) 36 of the 55 members filed a complaint and 12 reinstatement orders were issued; and (c) the 12 reinstated workers were again dismissed. The workers submitted new complaints of dismissal before the Labour, Social Welfare and Family Court of First Instance of Chimaltenango department.*
658. *Regretting that the Government has provided no information on the allegation in question, the Committee stresses that no person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities, and it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment [see **Digest**, op. cit., para. 771]. The Committee urges the Government to send without delay its observations concerning this allegation and inform it of the current status of the dismissal cases brought before the Labour, Social Welfare and Family Court of First Instance of Chimaltenango department.*
659. *With regard to the impediments to the negotiation of a new collective agreement, the Committee notes that the complainant states that: (a) the collective agreement between the SITTSE and the Higher Electoral Court expired on 13 July 2011; (b) after exhausting the direct channels available for the negotiation of the collective agreement, SITTSE launched strike action and applied to the Fifth Court of Labour and Social Welfare of the First Economic Zone for the strike movement to be declared legal; (c) to count the strikers, the Court commissioned the labour inspectorate and the magistrates' courts, who failed to carry out the count as instructed, thereby delaying the negotiation of the collective agreement; and (d) the workers lodged a complaint with the Judicial Service Council.*
660. *The Committee notes the Government's corresponding reply, which states that: (a) following various checks, the count took place and, on 15 February 2011, the strike movement led by SITTSE was declared legal; and (b) the Higher Electoral Court appealed against that ruling before the Third Chamber of Labour and Social Welfare, which is where the case now stands. The Committee requests the Government to keep it informed with regard to the appeal submitted by the Higher Electoral Court to the Third Chamber of Labour and Social Welfare. Recalling that unjustified delays in collective bargaining are incompatible with respect for the principle of bargaining in good faith, the Committee requests the Government to keep it informed of developments in the area of the negotiation of the new collective agreement between the Court and the SITTSE.*

- 661.** *Regarding the violation of the provisions of a collective agreement in the agricultural sector, the Committee notes that the complainant refers to the dispute between the Palo Gordo Agricultural, Industrial and Refining Company and the Union of Workers of the Palo Gordo Sugar Refinery, and in particular to the following events: (a) in June 2010, a group of around 250 workers went to the administrative management offices of the Palo Gordo sugar refinery with the intention of talking to the chief of agro-industrial relations about the work situation during the so-called repair period provided for in the collective agreement signed by both parties; (b) the trade union indicated that it knew that private enterprises had been hired to carry out repair work without regard for the content of the collective agreement; (c) in August 2010, the Executive Committee and the Advisory Board of the trade union sent a note to the representative of the Ministry of Labour and Social Welfare in the region of Suchitepéquez, indicating their opposition to the decision taken by the employer's administration to add contractors and staff to the enterprise's payroll even though suitable and capable workers were available who had worked during harvest periods and had performed those tasks for years; and (d) negotiations were held on 4 November 2010 during which it was agreed that the harvest would start on 20 November 2010 and that, after the forthcoming general assembly, the trade union side would transmit the corresponding notice to the employer side for the direct negotiation of the collective agreement on working conditions.*
- 662.** *Regretting that the Government has provided no information on this allegation, the Committee emphasizes that agreements should be binding on the parties and that the failure to implement a collective agreement, even on a temporary basis, violates the right to bargain collectively, as well as the principle of bargaining in good faith [see **Digest**, op. cit., paras 939 and 943]. The Committee urges the Government to send without delay its observations and interested parties, including the concerned enterprise through the relevant employers' organization, to indicate whether all outstanding issues have been resolved.*

### **The Committee's recommendations**

- 663.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) Regarding the alleged anti-union transfer of the trade union official Ms Nilda Ivette González Ruiz, the Committee regrets that the Government has provided no information on this allegation and urges it to do so without delay and to take the necessary steps to ensure that the abovementioned principle is respected. The Committee requests the Government to keep it informed in this regard.*
  - (b) Regarding the alleged anti-union dismissals in the municipality of Chimaltenango, the Committee regrets that the Government has provided no information on this allegation and urges it to do so without delay and to keep it informed of the current status of the dismissal cases brought before the Labour, Social Welfare and Family Court of First Instance of Chimaltenango department.*
  - (c) Regarding the impediments to negotiating a new collective agreement between the Higher Electoral Court and the SITTSE, the Committee requests the Government to keep it informed with regard to the appeal submitted by the Court to the Third Chamber of Labour and Social Welfare,*



*and developments in the negotiation of the new collective agreement between the Court and the SITTSE.*

- (d) *Regarding the violation of the provisions of a collective agreement in the agricultural sector, and regretting that the Government has provided no information on the allegation in question, the Committee urges the Government to do so without delay and interested parties, including the concerned enterprise through the relevant employers' organization, to indicate whether all outstanding issues have been resolved.*

CASE NO. 2875

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Honduras  
presented by**

- **the Unitary Federation of Honduran Workers (FUTH) and**
- **eight national trade unions**

*Allegations: Anti-union dismissals and impediments to collective bargaining, mainly in various public institutions, and failure to comply with provisions of collective agreements*

- 664.** The complaint is contained in a communication from the Unitary Federation of Honduran Workers (FUTH), dated 3 June 2011 and supported by eight Honduran trade unions.
- 665.** The Government sent its observations in communications dated 13 October 2011 and 12 March 2012.
- 666.** Honduras has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainants' allegations**

- 667.** In its communication of 3 June 2011, FUTH states that its complaint was also being presented by eight affiliated trade unions, namely, the Trade Union of Workers of the National Autonomous University of Honduras, with a legal address in the city of Tegucigalpa, Honduras; the Trade Union of Workers of the National Child Welfare Agency (SITRAPANI); the Trade Union of Workers of the National Registry Office (SITRARENAPE); the Trade Union of Workers of the National Agrarian Institute, Branch No. 3, Aguan (SITRAINAINA); the Trade Union of Workers of Industria Cementera Hondureña SA, known as Lafarge INCEHSA; the Trade Union of Workers of the Retirement and Pensions Institute for Public Employees and Civil Servants in the executive branch (STRAINJUPEMP), the Trade Union of Workers of the Municipality of Danlí, El Paraíso; and the Trade Union of Workers of the Venus Confectionery Factory.

- 668.** FUTH alleges that, on 24 January 2011, the Chancellor of the National Autonomous University of Honduras arbitrarily dismissed the worker Marco Antonio Moreno, the President of Branch No. 1 of the Trade Union of Workers of the National Autonomous University of Honduras, and in doing so violated the procedure stipulated in the Labour Code. It also alleges that the university authorities consistently refused to negotiate the 15th collective agreement.
- 669.** Furthermore, FUTH alleges that, on 3 November 2011, the President of SITRAPANI, Mr Pedro Elvir, was attacked and followed all the way to his home by unknown persons riding a motorcycle. The persons responsible for planning and perpetrating the attack are unknown. FUTH considers that the reason for the attack was the trade union's persistent complaints about attempts to privatize the institution.
- 670.** FUTH adds that, on 3 May 2006, the State granted legal personality to SITRARENAPE. However, although it granted legal personality to a trade union of public employees, it also curtailed and restricted its right to collective bargaining by issuing Decree No. 3475, which changed the legal personality of the National Registry Office by curtailing its autonomy and maliciously restricting the right of workers to conclude a collective agreement.
- 671.** Furthermore, FUTH alleges that, on 17 April 2011, 60 workers of the Venus confectionery factory, including the central executive board covered by the legal protection of trade union immunity, were dismissed.
- 672.** On 30 September 2010, one worker, Mr Gerson Daniel Mendoza Martínez, a permanent official of SITRAINA, was dismissed without regard for the procedure stipulated in the collective agreement. This was a violation of due process and the special legal protection afforded by the State to trade union activities.
- 673.** FUTH also states that the Trade Union of Workers of the Retirement and Pensions Institute of Honduras reports repeated violations of the collective agreement and particularly section 20 thereof, in connection with the granting of contracts of indeterminate duration to 100 temporary workers who should, under this section, have acceded to permanent status. As a result, the trade union was forced to initiate administrative and legal proceedings when the contracts of the workers in question were not renewed. One of the workers was even covered by trade union immunity since he was a member of the bargaining committee, in accordance with section 6 of the collective agreement.
- 674.** Lastly, on 4 January 2011, 48 workers of the Municipality of the city of Danlí, El Paraíso, were dismissed without just cause, in violation of the constitutional guarantee of the right to work, the right to trade union immunity and the special legal protection of the State, given that the dismissed workers include members of the full central executive board, members of the honour and discipline committee and trade union officials. Section 7 of the collective agreement was thus also violated.

## **B. The Government's reply**

- 675.** In its communications dated 13 October 2011 and 12 March 2012, the Government refers to the case of the National Autonomous University of Honduras, in which the institution's trade union reported the dismissal of Mr Marco Antonio Moreno, the President of Branch No. 1, alleging violations of Conventions Nos 87 and 98 because of a lack of due process and a failure to follow the procedure set forth in the Labour Code, as well as the refusal by the employer party to negotiate the 15th collective agreement.

- 676.** In this regard, the Government states that: (a) the National Autonomous University of Honduras turned to the labour courts in Francisco Morazán to seek the lifting of the trade union immunity of Mr Marco Antonio Moreno, and the case is now awaiting a ruling following an extraordinary appeal for *amparo* lodged by the abovementioned trade union leader with the Supreme Court of Justice; and (b) bargaining began on 14 February 2001 between the National Autonomous University of Honduras and the trade union of workers of that institution over a collective agreement on working conditions; at present, after two rounds of negotiations, it was agreed to enter the conciliation stage.
- 677.** As regards the case of SITRAPANI, it is stated in the complaint that on 3 November 2010, Mr Pedro Elvir, the President of the trade union was attacked and followed all the way to his home by unknown persons riding a motorcycle. The location of the persons responsible for planning and perpetrating the attack is unknown. It is alleged that the reason for the attack was the trade union's persistent complaints about attempts to privatize the institution.
- 678.** In this regard, the Government states that there is no record of any complaint about the alleged attack on Mr Pedro Elvir being lodged with the institutions responsible, in Honduras, for investigating citizens' reports of offences committed (the Directorate of criminal investigation (DGIC) and the Public Prosecutor's Office). Routine enquiries have uncovered no complaint involving the abovementioned attack on Mr Pedro Elvir.
- 679.** As regards the allegation concerning SITRARENAPE and the restriction on the right to collective bargaining resulting from changes to the legal personality of the National Registry Office, the Government states that: (a) the State of Honduras, acting through the Ministry of Labour and Social Security, recognized the abovementioned legal personality and approved the statutes of the trade union, as a trade union of public employees, in a decision dated 19 April 2005; (b) subsequently, the abovementioned Ministry responded to a written application by Ms Ana Julia Arana Canales, the President of the trade union, by adopting, pursuant to a decision dated 24 November 2006, a comprehensive reform of the statutes of the trade union as a trade organization; (c) on 25 April 2011, following another application by the President of the trade union, a further reform of the statutes was adopted but the trade union's status as a trade organization remained unchanged; and (d) the National Registry Office is now an autonomous institution with its own legal personality, and the status of that institution's trade union as a trade organization remains unchanged. The Government adds that, in light of the above, the State of Honduras has not acted to curtail or restrict the right to collective bargaining of SITRARENAPE, and that any amendment that was approved was made at that trade union's request.
- 680.** As regards the case of the Venus confectionery and chewing gum factory, it is claimed that 60 workers, including the central executive board of the trade union, were dismissed on 17 April 2010, and that the right to job security and the right to freedom of association were correspondingly violated. The Government states that: (a) on 23 March 2010, an application for the recognition and registration of legal personality was filed with the Ministry of Labour by the Trade Union of Workers of the Venus Confectionery and Chewing Gum Factory; (b) the Ministry issued a decision on 20 April 2010 in which it recognized and granted the requested legal personality, which was made public on 23 April 2010 and is recorded in the register of trade union organizations; (c) the full executive board continues to be made up of six trade union officers; and (d) the General Labour Inspectorate in the Ministry of Labour carried out an inspection in the factory on 12 July 2010 and placed on record its observations on instances of intimidation and violations of the legislation, specifically: the dismissal of a number of workers for having stated their intention to establish a trade union under the protection of the State, the failure to allow a number of workers to go on leave, the failure to pay a 13th month's wages as a bonus to a number of workers, and the withholding of a fourteenth month's wages as social

compensation for 2009; to date, the Department of Conciliation, Mediation and Arbitration has processed 13 applications for conciliation from workers of the factory who have fully utilized this body and instead referred their case to the judicial authorities. According to the Government, its actions have been consistent with its duty to protect trade union immunity, the right to job security and the right to freedom of association.

- 681.** Regarding the allegation that, on 30 September 2010, one worker, Mr Gerson Mendoza Martínez, a permanent official of Branch No. 3 of the Trade Union of Workers of the National Agrarian Institute, was dismissed without regard for the procedure set forth in the collective agreement, thereby violating due process and trade union immunity, the Government states that the worker in question referred his case to the Labour Court on the grounds that he had been illegally dismissed because he was entitled to trade union immunity; he was reinstated in compliance with a judicial order and is currently working at the Institute. The employer lodged an appeal against the reinstatement order, but the appeal was dismissed.
- 682.** Regarding the complaint by the STRAINJUEMP concerning the violation of section 20 of the collective agreement that entered into force on 1 January 2009, as a result of the indefinite extension of the temporary contracts of 100 workers, including the dismissal of one worker who was entitled to trade union immunity because he was a member of the bargaining committee under section 6 of the collective agreement, the Government states, with regard to the complaint about the violation of section 20 of the collective agreement currently in force, that the section in question stipulates the following: “Temporary contracts. The Institute shall conduct an analysis to determine the need for posts and approach the relevant bodies with a view to granting permanent status to all non-permanent employees (12,100).” It is clear from the wording of the section that, after having conducted the analysis, the Institute will decide whether or not posts need to be created in order to absorb staff on temporary contracts and grant them permanent status, while taking into consideration the institution’s needs and financial resources; furthermore, the STRAINJUEMP has taken legal action through the Labour Court in Francisco Morazán to secure compliance with section 20, and the Retirement and Pensions Institute for Public Employees and Civil Servants in the executive branch (INJUEMP) will respect, in other words comply with, the ruling of that judicial body in a spirit of respect for the principle of legality and the rule of law.
- 683.** Regarding the dismissal of a member of the bargaining committee negotiating the new collective agreement, the Government states that the dismissal of Mr Nerli Gonzales Baquedano did have a just cause and did not take place until negotiations in the direct settlement stage had been exhausted. Notwithstanding the above, the worker used the legal mechanisms provided by the State and referred his case to the Labour Court on 16 March 2011, applying for reinstatement. For this reason, the ordinary courts of the Republic of Honduras will determine the correct outcome in accordance with the law, and the INJUEMP, as a State institution, will fully comply with the court order.
- 684.** Regarding the alleged dismissal without explanation of 48 workers of the Municipality of the city of Danlí, El Paraíso, on 4 January 2011, in violation of the right to trade union immunity, because the dismissal of the members of the central executive board, members of the honour committee and trade union officials violated section 7 of the collective agreement, the Government states that as a result of the dismissals denounced by the workers, the Ministry of Labour and Social Security, acting through the Directorate-General for Labour, intervened with the intention of securing a conciliatory settlement that protected the workers’ rights, but no such conciliatory settlement was achieved and as a result the workers referred their case to the Labour Court in Francisco Morazán. The proceedings are now at the evidentiary stage and if the court rules in favour of the workers, the Municipality of Danlí, El Paraíso, will be obliged to comply.

### C. The Committee's conclusions

- 685.** *Regarding the allegations relating to the National Autonomous University of Honduras (refusal by the university authorities to negotiate the 15th collective agreement, and the dismissal of trade union officer Marco Antonio Moreno), the Committee notes the Government's statements to the effect that: (1) negotiation of the collective agreement has started and has entered the conciliation stage, and (2) the University authorities have initiated legal proceedings to seek the lifting of the trade union immunity of Mr Marco Antonio Moreno, and the case is now awaiting a ruling from the Supreme Court of Justice following an extraordinary appeal for amparo. The Committee requests the Government to inform it of the amparo ruling and of the outcome of the legal proceedings initiated by the National Autonomous University to seek the lifting of the trade union immunity of Mr Marco Antonio Moreno, and to send it information on the progress of collective bargaining – currently in the stage of conciliation – between the University and the trade union.*
- 686.** *Regarding the alleged restriction of collective bargaining at the National Registry Office arising from Decree No. 3475, which allegedly curtailed the freedom of that institution to bargain collectively, the Committee notes the Government's statements according to which: (1) the National Registry Office is an autonomous institution with a legal personality; (2) no action has been taken to curtail the right to collective bargaining; and (3) the trade union continues to have the status of a trade organization, and the amendments to the trade union's statutes were adopted at the trade union's request. The Committee considers that FUTH has failed to explain how Decree No. 3475 restricts the right to collective bargaining at the National Registry Office, and will not pursue its examination of this allegation unless FUTH provides new evidence.*
- 687.** *Regarding the alleged attack on Mr Pedro Elvir, the President of SITRAPANI, who was followed by unknown persons, allegedly because of the trade union's complaints about attempts to privatize the institution, the Committee takes note of the Government's statements, from which it is clear that trade union officer Mr Pedro Elvir has not lodged a complaint with the authorities concerning this incident. The Committee invites the complainants to report the incident to the national authorities responsible for criminal prosecutions, and requests to be kept informed in this regard.*
- 688.** *Regarding the dismissal, on 17 April 2010, of 60 workers of the Venus confectionery and chewing gum factory, including the members of the central executive board of the trade union, the Committee takes note of the Government's statements, according to which: (1) the General Labour Inspectorate has placed on record, among other violations of the legislation, the dismissal of a number of workers for having stated their intention to establish a trade union; and (2) the administrative authorities have processed 13 conciliation applications submitted by workers who then referred their case to the judicial authorities once they had exhausted their options with that body. The Committee observes that the Government does not recognize that 60 workers have been dismissed but indicates that the inspection revealed dismissals of many workers and that only 13 conciliation applications have been submitted. The Committee expresses its concern over the alleged dismissal of all the members of the central executive board of the trade union, and over the fact that there has been no judicial ruling since the dismissals occurred (in April 2010). The Committee firmly expects that the judicial authorities will hand down their decision without delay and requests the Government to keep it informed of the eventual ruling. The Committee requests the Government and the complainant to indicate whether there have been other dismissals which have not yet been addressed and to provide information in this regard.*

- 689.** *Regarding the dismissal on 30 September 2010 of Mr Gerson Mendoza Martínez, a trade unionist in the Trade Union of Workers of the National Agrarian Institute, without regard for the procedure stipulated in the collective agreement, the Committee notes the Government's statement according to which the abovementioned trade unionist was reinstated in compliance with a judicial order within the framework of the legal proceedings he had initiated.*
- 690.** *Regarding the alleged violations by the INJUPEMP of the collective agreement in force and particularly section 20 thereof, which jeopardized 100 workers with temporary contracts who should have been granted contracts of indeterminate duration and currently have no contracts (including a trade union representative who, as a member of bargaining committee, is also protected by section 6 of the collective agreement), the Committee observes that the Government indicates that the granting of permanent status to temporary workers under section 20 of the collective agreement is subject to an analysis of the institution's needs and financial resources. The Committee also notes that the Government confirms that the trade union initiated legal proceedings and that the trade union representative in question, Mr Nerli Gonzales Baquedano, has also filed a legal application for reinstatement, even though the Government states that the dismissal did have a just cause and did not take place until negotiations in the direct settlement stage had been exhausted. The Committee requests the Government to inform it of the rulings made by the judicial authorities.*
- 691.** *The Committee observes that in this case, allegations have been made on the basis of problems with the interpretation of certain sections of collective agreements. The Committee suggests that the Government should take the necessary steps to ensure that the examination of these problems is entrusted to an independent commission trusted by both parties, or take measures to encourage parties to collective bargaining to include voluntary mechanisms for resolving conflicts over the interpretation of collective agreements.*
- 692.** *Regarding the allegation that, on 4 January 2011, 48 workers of the Municipality of the city of Danlí, El Paraíso, were dismissed without just cause, in violation of the collective agreement, and that the dismissed workers included members of the central executive board, members of the honour and discipline committee and trade union representatives, the Committee notes that the Government indicates that the administrative authorities did intervene, albeit unsuccessfully, in an attempt to arrive at a conciliatory settlement, and that as a result, the workers concerned took legal action. The Committee requests the Government to inform it of the eventual rulings.*
- 693.** *In general, the Committee observes that in two of the cases in this complaint, entire trade union councils have been dismissed. The Committee wishes to express its concern with regard to this situation and recall the principle that no person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities, and it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 771], as well as the fact that rapid and effective protection against anti-union discrimination is particularly necessary in the case of trade union officials.*

### **The Committee's recommendations**

- 694.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

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- (a) *The Committee requests the Government to inform it of the rulings handed down in the legal proceedings initiated by the National Autonomous University to seek the lifting of the trade union immunity of trade union official Mr Marco Antonio Moreno and in the appeal proceedings for amparo recently initiated by the trade union leader before the Supreme Court of Justice, as well as to provide information on the progress of collective bargaining between the University and the trade union.*
- (b) *Regarding the alleged attack on Mr Pedro Elvir, the President of the Trade Union of Workers of the National Child Welfare Agency, who was followed by unknown persons, allegedly because of the trade union's complaints about attempts to privatize the abovementioned institution, the Committee invites the complainant organizations to report the incident to the authorities responsible for criminal prosecutions, and requests to be kept informed in this regard.*
- (c) *Regarding the allegations of anti-union dismissals, on 17 April 2010, at the Venus confectionery and chewing gum factory, the Committee expresses its concern at the dismissal of 13 workers, including, according to the allegations, all of the members of the central executive board of the trade union, and that there has been no judicial ruling since the dismissals occurred (in April 2010). The Committee firmly expects that the judicial authorities will hand down their decision without delay and requests the Government to keep it informed of the eventual ruling. The Committee requests the Government and the complainant to indicate whether there have been other dismissals which have not yet been addressed and to provide information in this regard.*
- (d) *The Committee requests the Government to inform it of the rulings made by the judicial authorities in the ongoing proceedings concerning the dismissal of trade unionist Mr Nerli Gonzales Baquedano and the failure to renew the contracts of 100 workers of the INJUPEMP, who should have been granted contracts of indeterminate duration under the relevant provision of the collective agreement in force.*
- (e) *The Committee observes that in this case, allegations have been made on the basis of problems with the interpretation of certain sections of collective agreements. The Committee suggests that the Government should take the necessary steps to ensure that the examination of these problems is entrusted to an independent commission trusted by both parties, or take measures to encourage parties to collective bargaining to include voluntary mechanisms for resolving conflicts over the interpretation of collective agreements.*
- (f) *Regarding the allegation that, on 4 January 2011, 48 workers of the Municipality of the city of Danlí, El Paraíso, were dismissed without just cause, in violation of section 7 of the collective agreement, and that the dismissed workers included members of the central executive board, members of the honour and discipline committee and trade union representatives, the Committee requests the Government to inform it of the eventual rulings.*

- (g) *In general, the Committee observes that in two of the cases in this complaint, entire trade union councils have been dismissed, and the Committee wishes to express its concern with regard to this situation and recall the principle that no person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities, and it is important to forbid and penalize in practice all acts of anti-union discrimination, a protection that is particularly necessary and should be rapid and effective in the case of trade union officials.*

CASE NO. 2740

INTERIM REPORT

**Complaint against the Government of Iraq  
presented by  
the Iraqi Federation of Industries**

*Allegations: The complainant organization alleges acts of interference by the Government, including the seizure of organizational funds, preventing the election of board members, appointing persons to manage the organization and the storming of the organization's headquarters in 2009*

- 695.** The Committee already examined the substance of this case at its November 2010 meeting, when it presented an interim report to the Governing Body [358th Report, paras 644–660, approved by the Governing Body at its 309th Session (November 2010)].
- 696.** The Government provided its observations in a communication dated 28 April 2011.
- 697.** Iraq has ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), but not the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

**A. Previous examination of the case**

- 698.** At its November 2010 meeting, the Committee made the following recommendations [see 358th Report, para. 660]:
- (a) The Committee requests the Government to indicate the steps taken to annul Decree No. 8750 and urges the Government to return without delay all funds to the Iraqi Federation for Industries as well as to the other organizations affected by the Decree.
  - (b) The Committee urges the Government to provide its observations on the allegations concerning the storming and occupation of the premises of the Iraqi Federation of Industries by members of the preparatory committee for the holding of the elections of the Federation under the protection of the local police.
  - (c) The Committee requests the Government to annul the regulations concerning the appointment of members of preparatory committees of federations, trade unions, associations and occupational organizations and to ensure in the future that the Iraqi



Federation of Industries can conduct elections of its leaders in accordance with its statutes, without intervention by the authorities.

- (d) The Committee requests the Government and the complainant to provide information on any court decision following the complaint brought by the Iraqi Federation of Industries.

## B. The Government's reply

699. In its communication dated 28 April 2011, the Government recalls that it has established a preparatory committee to speed up the conduct of the elections of the members of the Iraqi Federation of Industries board of directors. In this regard, it indicates that it has given instructions to the preparatory committee which aim at having the elections conducted in accordance with the rules established by the Council of Ministers.

700. The Government adds that meetings were organized between governmental representatives and officials of the Iraqi Federation of Industries, in particular that the President of the Federation met with the legal adviser of the Ministry of State for the Affairs of Civil Society Organizations to agree on convenient dates for the holding of free elections for Iraqi industrialists.

## C. The Committee's conclusions

701. *The Committee recalls that the present case concerns the following allegations: (i) the seizure of the Iraqi Federation of Industries' funds, amounting to US\$1,500,000 collected from membership fees and paid service, by Decision No. 8750 of 8 August 2005 of the Government; (ii) the appointment to the Federation's board of members who do not have the legal status and legitimacy to manage it; and (iii) the occupation of the Federation's premises by a group of individuals under the protection of local security forces.*

702. *The Committee notes that, in its communication, the Government provides information only on the issue of the election of the members of the Iraqi Federation of Industries board of directors. The Government indicates that it has instructed the preparatory committee to ensure that the elections are conducted in accordance with the rules established by the Council of Ministers. While also noting the Government's indication that, during a meeting held with the President of the Federation, agreement was sought on convenient dates for the holding of free elections for Iraqi industrialists, the Committee is bound to once again recall that it is the prerogative of workers' and employers' organizations to determine the conditions for electing their leaders and the authorities should refrain from any undue interference in the exercise of the right of workers' and employers' organizations freely to elect their representatives, which is guaranteed by Convention No. 87 [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 390]. The Committee is bound to reiterate that a regulation which provides for the election of members of a preparatory committee for preparing permanent elections to the executive committee of a trade union, a federation, an association or an occupational organization is inconsistent with the above principles and constitutes a clear interference in the election process. Thus, the Committee urges the Government to annul the regulations concerning the appointment of members of preparatory committees of federations, trade unions, associations and occupational organizations and to ensure in the future that the Iraqi Federation of Industries can conduct elections of its leaders in accordance with its statutes, without intervention by the authorities.*

703. *More generally, the Committee once again recalls that legislative provisions which regulate in detail the internal functioning of workers' and employers' organizations pose a serious risk of interference by the public authorities. Where such provisions are deemed*

necessary by the public authorities, they should simply establish an overall framework in which the greatest possible autonomy is left to the organizations in their functioning and administration. Restrictions on this principle should have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organizations. Furthermore, there should be a procedure for appeal to an impartial and independent judicial body so as to avoid any risk of excessive or arbitrary interference in the free functioning of organizations [see *Digest*, op. cit., para. 369]. The Committee firmly expects that the Government will bear these principles in mind when drafting proposals concerning the manner in which trade unions or employers' organizations should function, operate and organize, and that it will fully ensure, in law and in practice, the right of workers and employers to form and join organizations of their own choosing, as well as the free functioning and administration of these organizations.

**704.** *The Committee further notes with regret that the Government does not provide any specific answer to its previous requests with regard to allegations concerning the seizure of the Iraqi Federation of Industries' funds, and the occupation of the Federation's premises by a group of individuals under the protection of local security forces. Under these circumstances, the Committee finds itself obliged to reiterate the recommendations it made when it examined these allegations at its meeting in November 2010 [see 358th Report, para. 660].*

### **The Committee's recommendations**

**705.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee urges the Government to annul the regulations concerning the appointment of members of preparatory committees of federations, trade unions, associations and occupational organizations and to ensure in the future that the Iraqi Federation of Industries can conduct elections of its leaders in accordance with its statutes, without intervention by the authorities.*
- (b) The Committee urges the Government to indicate the steps taken to annul Decree No. 8750 and strongly urges the Government to return without delay all funds to the Iraqi Federation of Industries as well as to the other organizations affected by the Decree.*
- (c) The Committee once again urges the Government to provide its observations on the allegations concerning the storming and occupation of the premises of the Iraqi Federation of Industries by members of the preparatory committee for the holding of the elections of the Federation under the protection of the local police.*
- (d) The Committee once again requests the Government and the complainant to provide information on any court decision following the complaint brought by the Iraqi Federation of Industries.*

CASE NO. 2807

INTERIM REPORT

**Complaint against the Government of the Islamic Republic of Iran  
presented by  
the International Trade Union Confederation (ITUC)**

*Allegations: The complainant alleges that the accreditation of the Coordinating Center of Workers' Representatives (CCR) as the workers' delegation of the Islamic Republic of Iran to the International Labour Conference is inconsistent with the requirements of the ILO Constitution, as the organization is unknown to the complainant and to independent workers' groups within the country*

- 706.** The Committee last examined the substance of this case at its March 2011 meeting, when it presented an interim report to the Governing Body [see 359th Report, paras 684–705, approved by the Governing Body at its 310th Session (March 2011)].
- 707.** The Government sent its observations in a communication received in the Office on 29 February 2012.
- 708.** The Islamic Republic of Iran has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), nor the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

- 709.** In its previous examination of the case, the Committee made the following recommendations [see 359th Report, para. 705]:
- (a) The Committee urges the Government to deploy all efforts for the rapid amendment of the labour legislation so as to bring it into full conformity with the principles of freedom of association by ensuring that workers may freely come together, without government interference, to form organizations of their own choosing. It requests the Government to provide information on the recent steps taken in this regard.
  - (b) The Committee expects that the Government will avail itself of the technical assistance of the Office with respect to all the freedom of association matters pending before it.

**B. The Government's reply**

- 710.** In its communication received in the Office on 29 February 2012, the Government observes that, as Note 4 of article 131 of Chapter VI of the Labour Law provides that “workers of a unit may enjoy the membership of either of the workers' organizations, for example, the Islamic Labour Council, and/or Labour Guild, and/or, at their discretion, choose individual workers to represent their trade union rights”, the workers' preference in choosing either of the above forms of workers' representation at the workplace is only limited to the respective unit, and not, as indicated in the Committee's report, to a province. The Government adds that workers can organize their own associations at the

township, city, and provincial levels, and establish a National Assembly of Workers' Representatives.

- 711.** According to the Government, the workers of any given unit that, at their own free will and discretion and for reasons such as paucity of member workers in small units, tend not to form any type of traditional workers' associations provided for in the Labour Law, may freely choose individual workers to represent them at the work place. The Government indicates that, based on the vast and genuine support of other fellow workers mostly from unrepresented or under-represented workplaces, the workers' representatives from different provinces have called publicly for a free and democratic election to establish the High Assembly of Workers' Representatives and that no other workers' organizations legally challenged and/or contended their authenticity as a workers' association. The Government therefore considers that the National High Assembly of the Workers' Representatives, that suits the customs and labour culture of Iranian workers, may be regarded as a genuine association of workers.
- 712.** The Government adds that it continues to consult the most representative social partners' organizations to designate their genuine most representative organizations to attend different national, regional and international meetings, assemblies and/or conferences, including the 99th International Labour Conference (ILC). Accordingly, the Government contends with the argument of the Committee on legitimacy and authenticity of the Iranian workers' representative attending the above ILC on behalf of the High Assembly of the Workers' Representatives.
- 713.** The Government further indicates that the Law of the Fifth Development Plan of the Islamic Republic of Iran (2011–15), and particularly articles 25 and 73 thereof, legally requires it to take necessary steps to formulate a national Decent Work Country Programme, in compliance with the guidelines and principles of the ILO, labour rights and the workers' and employers' trade union rights, and reiterates the need for addressing the amendment of Labour Law and Social Security by the end of 2011–12.
- 714.** The Government also indicates that together with its social partners it has collectively negotiated amendments of the Labour Law and that it is strongly hoped that the newly drafted Labour Law that is expected to be approved by the Parliament also addresses the core concerns of the Committee of Freedom of Association.
- 715.** The Government further indicates that some paragraphs of the Code of Practice on the Formation, Scope of Duties, Authorities and Method of Performance of Trade Unions and Related Associations, had been duly amended and were later approved by the Cabinet of Ministers under Bill No. 37292T/176477 on 30 October 2010.
- 716.** Finally, the Government indicates that it welcomes the opportunity of receiving technical cooperation, particularly in relation to the amendment of the Labour Law.

## **C. The Committee's conclusions**

- 717.** *The Committee recalls that the present case was referred to it by the International Labour Conference in June 2010 upon a proposal of the Credentials Committee – made in accordance with article 26bis, paragraph 6, of the Conference Standing Orders – to refer the issues raised by the ITUC in its objection concerning the nomination of the Workers' delegation of the Islamic Republic of Iran to the Committee on Freedom of Association. The Credentials Committee had observed that it did not appear possible, under the national legislation, to form more than one organization of workers' representatives in each province and had further raised queries as to whether the Coordinating Center of Workers' Representatives (CCR) could be considered as a genuine workers' organization.*

- 718.** *With regard to the scope of application of article 131 of the Labour Law, the Committee observes, from the report of the Credentials Committee, that it was on the basis of the Government's response submitted at the time that the Credentials Committee noted that it did not appear possible to form more than one organization of workers' representatives in each province. The Committee notes that, in its communication, the Government indicates that the workers' preference in choosing either of the forms of workers' representation provided for in article 131 of the Labour Law is only limited to the respective unit. In any case, the Committee is bound to recall that it has considered the issue of organizational monopoly, as enshrined in article 131 of the Labour Law, on several occasions and concluded that the organizational monopoly required by the law appeared to be at the root of the freedom of association problems in the country [see Cases Nos 2508 and 2567]. The Committee recalls that in Case No. 2508, while the Government confirmed that the existing legal framework did not permit the existence of both an Islamic Labour Council and a union at the same enterprise, it expressed its intention to amend the Labour Law to address this issue [see para. 1190, 346th Report, Case No. 2508]. Subsequently, the Committee had noted proposed amendments to article 131 of the Labour Law which appeared to permit trade union multiplicity, including at the workplace and national levels [see paras 912 and 946, 354th Report, Cases Nos 2508 and 2567, respectively]. The Committee notes with deep regret that these amendments have not yet been adopted, nor has any draft been transmitted to the Committee for its consideration. While the Government indicates that, together with its social partners, it has collectively negotiated amendments of the Labour Law and that it strongly hopes that the newly drafted Labour Law that is expected to be approved by the Parliament also addresses the core concerns of the Committee of Freedom of Association, the Committee trusts that the Government will avail itself of the technical assistance of the ILO, as a matter of urgency, so as to ensure that the Bill before the Parliament will be in full conformity with the principles of freedom of association. The Committee urges the Government to keep it informed of the progress made in amending article 131 of the Labour Law and firmly expects that the legislation will be brought into conformity with freedom of association principles in the very near future.*
- 719.** *The Committee also notes the Government's indication that some paragraphs of the Code of Practice on the Formation, Scope of Duties, Authorities and Method of Performance of Trade Unions and Related Associations, had been amended and were later approved by the Cabinet of Ministers under Bill No. 37292T/176477 on 30 October 2010. The Committee requests the Government to provide a copy of the amended Code of Practice.*
- 720.** *In its previous examination of the case, the Committee also noted with concern that the new issues raised in this case related to the genuine representation of workers by the CCR. In its communication, the Government refers to the High Assembly of Workers' Representatives. The Committee requests the Government to clarify any difference there is between these two bodies. The Committee notes the Government's indication that, based on the vast and genuine support of other fellow workers mostly from unrepresented or under-represented workplaces, the workers' representatives from different provinces have called publicly for a free and democratic election to establish the High Assembly of Workers' Representatives and that no other workers' organizations legally challenged and/or contended their authenticity as a workers' association. The Government therefore considers that the National High Assembly of the Workers' Representatives, that suits the customs and labour culture of Iranian workers, may be regarded as a genuine association of workers. The Committee further notes that the Government indicates that it continues to consult the most representative social partners' organizations to designate their genuine most representative organizations to attend different national, regional and international meetings, assemblies and/or conferences. The Committee recalls that the principle of trade union pluralism, which the Iranian Government has been called to ensure in law and in practice on many occasions, is grounded in the right of workers to come together and form*

organizations of their own choosing, independently and with structures which permit their members to elect their own officers, draw up and adopt their bylaws, organize their administration and activities and formulate their programmes without interference from the public authorities and in the defence of workers' interests. Given the continuing legally binding force of article 131 of the Labour Law, it appears to the Committee that the monopolistic structure at the unit level upon which any workers' representation is based hinders the possibility of pluralism at the national level and a meaningful and freely chosen determination of workers' representation.

**721.** *The Committee reiterates its deep concern at the apparent absence of workers' organizations' delegates, appointed in the full spirit of freedom of association, among the official delegation to the International Labour Conference. It is therefore a matter of utmost urgency, in view of the upcoming session of the International Labour Conference, that the Government deploy all efforts, with the technical assistance of the ILO, for the rapid amendment of the labour legislation, in the manner indicated above.*

### **The Committee's recommendations**

**722.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) *Noting the Government's indication that, together with its social partners, it has collectively negotiated amendments of the Labour Law and that it strongly hopes that the newly drafted Labour Law that is expected to be approved by the Parliament also addresses the core concerns of the Committee of Freedom of Association, the Committee trusts that the Government will avail itself of the technical assistance of the ILO, as a matter of urgency, so as to ensure that the Bill before the Parliament will be in full conformity with the principles of freedom of association. The Committee urges the Government to keep it informed of the progress made in amending article 131 of the Labour Law and firmly expects that the legislation will be brought into conformity with freedom of association principles in the very near future.*
- (b) *The Committee requests the Government to provide a copy of the amended Code of Practice on the Formation, Scope of Duties, Authorities and Method of Performance of Trade Unions and Related Associations.*
- (c) *The Committee requests the Government to clarify any difference there is between the Coordinating Center of Workers' Representatives (CCR) and the High Assembly of Workers' Representatives. Reiterating its deep concern at the apparent absence of workers' organizations' delegates, appointed in the full spirit of freedom of association, among the official delegation to the International Labour Conference, the Committee stresses that it is a matter of utmost urgency, in view of the upcoming session of the International Labour Conference, that the Government deploy all efforts, with the technical assistance of the ILO, for the rapid amendment of the labour legislation.*

CASE NO. 2780

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Ireland  
presented by**

**the Irish Congress of Trade Unions (ICTU)**

**on behalf of**

- **the Irish Airline Pilots Association (IALPA) and**
- **the Irish Municipal Public and Civil Trade Union (IMPACT)**

**with the support of**

- **the International Trade Union Confederation (ITUC) and**
- **the International Transport Worker’s Federation (ITF)**

*Allegations: The complainant alleges acts of anti-union discrimination and the refusal to engage in good faith collective bargaining on the part of the enterprise Ryanair, as well as the failure of the labour legislation to provide adequate protection against acts of anti-union discrimination and promote collective bargaining*

**723.** The complaint dated 4 May 2010 is contained in a communication from the Irish Congress of Trade Unions (ICTU) on behalf of the Irish Airline Pilots Association (IALPA) and the Irish Municipal Public and Civil Trade Union (IMPACT). In communications dated 4 August and 24 May 2011 respectively, the International Trade Union Confederation (ITUC) and the International Transport Workers’ Federation (ITF) associated themselves with the complaint.

**724.** The Government submitted its observations on 11 July and 26 October 2011 and has forwarded additional information on 7 December 2011 and 5 January 2012.

**725.** Ireland has ratified the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainants’ allegations**

**726.** In its communication dated 4 May 2010, the complainant alleges long-standing and continuing violations of Convention No. 98, including acts of anti-union discrimination and interference and the refusal to engage in good-faith collective bargaining on the part of the enterprise, the low-cost airline Ryanair based in Dublin (“the company”). The complainant organization also exposes a number of failures in Irish law in this respect.

**727.** The complainant states that the ICTU is the representative voice of trade unions in Ireland, with 55 unions affiliated and a total membership of 833,486. The IALPA was formed in 1946 and currently has a total of approximately 1,000 members in at least six different airlines. It is the only trade union representing commercial pilots in Ireland and has members employed by the company. The IALPA is now a branch of IMPACT, which is one of ICTU’s largest affiliates and one of Ireland’s largest public service trade unions, but

also represents workers in the private sector, notably in aviation, telecommunications and health.

**728.** The complainant alleges the following steps taken by the company to deny pilots the right to be represented by the IALPA: (i) certain benefits have been offered subject to the condition that the company remains “union-free”; (ii) the Employee Representative Council (ERC) is a sham which has been established by the company and operates to exclude genuine collective bargaining; and (iii) the company has refused to enter into voluntary bargaining arrangements with the IALPA or its workplace representatives, in the absence of provisions in Irish law promoting collective bargaining.

**729.** The complainant further alleges that the Government has not taken any measures to guarantee that workers may exercise freely their right to organize and engage in collective bargaining. Moreover, Irish law does not ensure protection against the abovementioned practices nor provides for a procedure to require an employer to recognize a trade union.

### **Conditional benefits**

**730.** The complainant states that the company requested pilots to participate in mandatory retraining following an upgrade of the Dublin fleet. According to the complainants, unless Dublin pilots signed “an agreement whereby the company paid for it on condition that it was not forced to deal with the IALPA for the next five years”, they were told to pay the training costs themselves, which the company estimated at €15,000. Pilots, other than those based in Dublin, received free training without conditions. A number of Dublin pilots wrote to the company to protest against the terms of the retraining offer and the company justified its policy by referring to a “collective bargaining process”. The complainant indicates that pilots further responded asking for clarification as “to the best of our knowledge there has been no bargaining process with pilots in [the company] for some time. We certainly do not consider the arbitrary imposition of terms on groups of pilots to be any form of collective bargaining”. The complainant expresses concern that it is not unlawful in Ireland for an employer to make terms and conditions of employment conditional on the workers individually or collectively withholding their support for collective bargaining.

**731.** The complainant further states that the dispute over training allowances was referred to the Labour Court by IMPACT/IALPA in 2004 for investigation under the procedure established by the Industrial Relations (Amendment) Act 2001 (“IRA 2001”) and the Industrial Relations (Miscellaneous Provisions) Act 2004 (“IRA 2004”). The complainant indicates that, while the Labour Court, and then the High Court, ruled that it was a trade dispute over which it had jurisdiction to investigate, the Supreme Court took a different view and quashed the decision of the Labour Court in a decision of 1 February 2007 (*Ryanair v. Labour Court* [2007] IESC 6). According to the complainants, the Supreme Court held against the jurisdiction of the Labour Court to investigate the case on three grounds: (i) there was no trade dispute; (ii) there was no evidence that the company did not engage in collective bargaining; and (iii) there was no evidence that internal dispute resolution procedures had failed to resolve the dispute.

**732.** The complainant concludes that the retraining offer made by the company, on the condition that the money would have to be repaid if the company was required to enter into a collective bargaining relationship with a trade union, is an act of anti-union discrimination.



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**Employee Representative Council (ERC)**

- 733.** The complainant organization states that the ERC has been established by the company as a non-union forum for dealing with its employees. In the complainant's view, the ERC is a sham as it has no constitution, no funds, no members and is wholly dependent on the company. The complainant indicates that, in August 2004, the Dublin representatives of the ERC withdrew "as a result of disillusionment with their impotence and inability to advance the position of the Dublin pilots" and, to the knowledge of the complainant, there has not been any ERC in existence for pilots at the company ever since.
- 734.** The complainant alleges that the ERC has only played a consultative role and is not a trade union, nor a body, that has the capacity to conduct collective bargaining as understood under Convention No. 98. According to the complainant, the company's attitude towards collective bargaining is revealed by a document supplied by the company to the US Securities and Exchange Commission and referred to by the Labour Court, where it indicated that "although [the company] currently consults with groups of employees, including pilots, through [ERCs] regarding work practices and conditions of employment, it does not conduct formal binding negotiations with collective bargaining units, as is the case with many other airlines". The complainant acknowledges, however, that, in an affidavit by a company official referred to by the Supreme Court, the company describes its relationship with the ERC as a "continual process" whereby the company negotiates with representatives of its employees "for the purpose of concluding collective agreements which fixes pay and other conditions of employment" and as a system whereby employees, including pilots, elect employee representatives to ERCs and that the various ERCs negotiate directly with the company on an ongoing basis in relation to all terms and conditions of employment.
- 735.** The complainant emphasizes that, under Irish law, employers are allowed to establish staff associations or workplace forums which are given consultation or negotiation rights as an inducement to workers not to support collective bargaining with a bona fide trade union, even though such bodies do not conduct democratic elections or operate under any obligation to consult the workers they purport to represent.
- 736.** The complainant further alleges that the existence of a body such as the ERC gives the company immunity from legal proceedings available in the IRA 2001, section 2(1) of which provides that the Labour Court may only establish jurisdiction over a "trade dispute" if it is satisfied that "it is not the practice of the employer to engage in collective bargaining negotiations in respect to the grade, group or category of workers who are party to the trade dispute and the internal dispute resolution procedures (if any) normally used by the parties concerned have failed to resolve the dispute". In this regard, the complainant expresses concern at the interpretation of the definition of "trade dispute" and "collective bargaining" made by the Supreme Court in its 2007 decision where it found that there was no trade dispute between the union and the employer.
- 737.** In particular, the Supreme Court ruled that "the Labour Court in considering whether there was a trade dispute should have investigated whether there was internal machinery for resolving the perceived problem and whether that machinery had been exhausted". According to the complainant, the Supreme Court considered that this precondition of the Labour Court's jurisdiction had not been met taking the view that the Labour Court had insufficient evidence to conclude that internal procedures had failed to resolve the dispute, even though the pilots had withdrawn from the ERC. The complainant disagrees with this reading of the statute and states that, if a trade dispute can exist only where internal procedures have first been exhausted, it would render the other precondition of the Labour Court's jurisdiction redundant (see below). Furthermore, as there is no evidence, according to the complainants, that the Dublin pilots ERC was effectively operating at the time of the

dispute and that it was mandated to act as an internal dispute resolution procedure, the complainant questions this finding of the Supreme Court.

- 738.** The complainant further indicates that the Supreme Court held that a different definition of collective bargaining applies when it takes place in the absence of a trade union and that “if there is a machinery in [the company] whereby the pilots may have their own independent representatives who sit around the table with representatives of [the company] with a view to reaching agreement if possible, that would seem to be collective bargaining”. The Supreme Court took the view that “just because [the company] may have, from an administrative perspective, organized the elections and may have had a rule against renewal of a term of a representative, which was the case, did not in any way mean that the pilots acting through the committee were doing so anything other than independently”. While insisting that the company was, at best, consulting with its staff through the ERC, but did not engage in collective bargaining as such, the complainant indicates that the Supreme Court found in this respect that “there was insufficient evidence on which the Labour Court would have been entitled to find that the ERCs did not perform the function contended for by [the company]”. Furthermore, the Supreme Court determined that the Labour Court procedure was, overall, fundamentally unfair to the company because no pilot or other employee of the company appeared in Court to support the allegations of the Union. In this context, the complainant expresses deep concern at the Supreme Court’s requirement that employees of a multinational company come forward and publicly give evidence against their employer in a dispute between a trade union and their employer.
- 739.** The Supreme Court concluded that there were no grounds for the Labour Court to conclude that the company did not engage in collective bargaining through the ERC and thus no grounds for the Labour Court to assert jurisdiction. The complainant states that the effect of the decision was thus to prevent the anti-union activities of the company from being challenged before the Labour Court.
- 740.** Finally, the complainant indicates that, since the decision of the Supreme Court, a number of steps have been taken to revive the ERC, steps which reinforce the view of the complainants that it is a sham procedure designed, at least in part, to frustrate trade union activities and that the ERC operation is subject to interference by the employer. As of 23 May 2008, documents were circulated to the Dublin pilots announcing that the re-establishment of an ERC to represent Dublin-based pilots was being considered, and that the company had been asked to assist in the election process due to take place between 3 and 6 June. However, according to the complainant, no election took place. One of the candidates wrote to the company to ask when the election would take place (the published schedule having elapsed). The complainant has enclosed the reply in their complaint. Accordingly, the company denied being informed or involved in any way and referred him to the Dublin pilots ERC. The letter states, among others, “we have frankly neither the time nor the interest to engage with you, either on the issue of ERC structures, or any other attempt by you to create further mischief following your union’s total defeat in the Supreme Court, their latest failed attempt to impose union recognition on [the company] ... respect for this company’s constitutional right to deal with its employees directly and without the interference of third parties, such as pilot trade unions”. The complainant organization states that, as far as it is aware, there was no Dublin pilot ERC at this time, the purpose of the elections being to re-establish one. According to the complainant, it is unclear who distributed the documents and was involved in the process but it appears likely that the company was somewhat involved considering that the documents were posted through a secure company website to which only the company has access, that the documents repeatedly mentioned the company, including names of staff in the personnel department, and that elections were to be held on company premises.

741. The complainant states that another attempt to initiate ERC elections was made in late 2008, this time by a number of pilots. Two documents on proposed election procedures were distributed by Captain Goss, a pilot involved in the process and candidate to the previous attempted ballot. According to the complainant, disciplinary proceedings were then initiated against Captain Goss who was charged and fined for “unauthorized use of company pigeonholes” on the basis of the company’s CCTV system. In the meantime, the documents were removed from the pigeonholes of pilots and another letter was circulated to inform pilots that the documents previously distributed had not been sent by the Dublin pilots ERC. With regard to the elections, although nominations were received, the process was aborted in a climate of hostility. Captain Goss wrote to the company on 9 January 2009 to inquire as to how he might communicate with people who claimed to be ERC members or how to contact staff about ERC business, as well as to seek authorization to contact staff via their pigeonholes. The complainant indicates that the response of the Director of the personnel department, dated 3 February 2009, read as follows: “Any distribution [in the pigeonholes] of non-company material (which would include, for example, ERC communications) can only take place via pigeonholes with the company’s prior permission. I note your request for permission to use the crew room mailboxes. Permission is denied. If you have any issues you wish to discuss with the Dublin pilots ERC, then please contact them personally. Communication between Dublin pilots ERC and individual Dublin pilots is a matter for the Dublin pilots ERC and Dublin pilots. This is not something the company is, or should be, involved in, however, we have [sic] and may continue to facilitate ERC communications and/or elections when requested by the Dublin pilots ERC to do so.”
742. The complainant organization further alleges that the operation of the ERC is subject to interference by the employer in multiple ways: (i) the ERC has no formal constitution to which workers have access; (ii) the ERC has no funds other than those provided by the employer to representatives; (iii) the ERC has no resources or access to external sources of support unacceptable by the company; and (iv) the employer appears to have a role in determining when elections will be held, how many elected positions there will be, who may stand for election, who may vote in the election, where voting will take place and who will supervise the conduct of the election. In the complainant’s view, the establishment of the ERC is, therefore, an act of interference by the employer, as the ERC is not a bona fide trade union.

### ***Non-recognition of the union for collective bargaining purposes***

743. The complainant organization believes that the ERC is an inappropriate body for collective bargaining and should not be permitted to exclude a trade union from bargaining. It alleges that there is a violation of voluntary collective bargaining, since workers are not free to choose their bargaining representatives, and the employer imposes a particular structure of negotiations with persons who have not been selected or elected by the workforce. The complainant further indicates that it remains unclear whether a Dublin pilots ERC has been effectively operating since 2004, as the pilots mentioned above do not seem to have been able to identify ERC representatives, or to contact them, or to have ever been consulted on or informed of ERC activities.
744. In respect of the company’s policy, the complainant alleges that it is widely known that the company has a policy of not negotiating with trade unions (although it does not mean that it will not permit its employees to be members of trade unions). The Supreme Court pointed out in its 2007 decision that it is the company’s “policy to deal only directly with its own employees and not through outside agencies, including unions”. In the complainant’s view, the company is an “aggressively anti-union company, which proudly runs what it considers to be a union-free business”. According to the complainant, pilots at

the company are denied the right to be represented by a trade union in grievance and disciplinary matters, to have their trade union make representations and negotiate on their behalf, whether individually or collectively.

- 745.** The complainant also alleges that there is no obligation for the employer to recognize a trade union for the purpose of voluntary collective bargaining under Irish law, and that companies have “a right to operate in a union-free way”. It is not unlawful for an employer to refuse to recognize a trade union for the purposes of collective bargaining regardless of the level of support for the union in question in the workplace. The complainants further note that, under the IRA 2001 and 2004, the Labour Court (when it has jurisdiction) can make recommendations or determinations to resolve disputes but has no power to provide for arrangements for collective bargaining.
- 746.** Finally, the complainant expresses serious concern with regard to the 2007 Supreme Court decision which, in its view, consecrated a new constitutional right for companies to operate free of unions, as illustrated by the following excerpt of the decision: “It is not in dispute that as a matter of law [the company] is perfectly entitled not to deal with trade unions nor can a law be passed compelling it to do so. There is an obvious danger, however, in a non-unionized company that employees may be exploited ... given their purpose [of the IRA 2001 and 2004], they [both IRAs] must be given a proportionate and constitutional interpretation so as not unreasonably to encroach on [the company’s] right to operate a non-unionized company.”
- 747.** According to the complainant, the effect of the Supreme Court decision is to deny employees the right to be represented by the representatives of their choice, whether individually or collectively. While the company is believed to have a constitutional right not to deal with trade unions, there is no countervailing right of citizens to be represented by a trade union in their dealings with the company. The complainant organization insists that collective bargaining should only take place with an independent trade union. It denounces that, currently in Ireland, an employer is free to establish or facilitate the establishment of a “representative” body which has neither members nor resources and to enter into negotiations with this virtual body, thus ensuring that it would not have to deal with trade unions and securing immunity against legislation designed to enable unions to submit grievances against employers who do not recognize a trade union. In the complainant’s view, the provisions of the IRA 2001, as interpreted by the Supreme Court, have become a vehicle for union busting.

## **B. The Government’s reply**

- 748.** In its communication dated 11 July 2011, the Government requested additional time for its submission to be completed due to the change of circumstances arising as a consequence of a recent change in government. The Government informed the Committee that the new Government was committed in its programme “to reform the current law on employee’s right to engage in collective bargaining (the Industrial Relations (Amendment) Act 2011), so as to ensure compliance by the State with recent judgments of the European Court of Human Rights”.
- 749.** In its communication dated 26 October 2011, the Government states that the ICTU complaint deals with the interpretation of the Industrial Relations (Amendment) Act 2001 as adopted by the Supreme Court of Ireland in the case of *Ryanair Ltd v. Labour Court* [2007] IESC 6 (the Ryanair case). It emphasizes that its submission is a formal legal response to the ICTU’s complaint against the Government of Ireland. The Government does not consider that Ireland is in breach of Convention No. 98 and will explain its position below. Since, at a political level, the Government is involved in an ongoing review of the procedures under the Industrial Relations (Amendment) Act 2001,

particularly in the light of the Ryanair case, and cannot pre-empt its outcome, the Government states, however, for the avoidance of doubt, that the Government's reply should not be taken as an indication that the Government will not be proposing any changes to the current law.

- 750.** The Government contends that the ICTU has fundamentally misunderstood both the import of the Ryanair case and the nature of the procedure before the Committee. In the Government's view, the Ryanair case turned on the fact that the union involved failed to establish certain factual propositions concerning industrial relations in Ryanair, a failure which does not place Ireland in breach of Convention No. 98. According to the Government, the ICTU appears to use its complaint as an opportunity to re-litigate its dispute with Ryanair, at one point almost inviting the Committee to overturn the judgment of the Irish Supreme Court as an incorrect interpretation of Irish law.
- 751.** The Government underlines that Articles 1–4 of Convention No. 98 do not require the imposition of any obligation on employers to recognize trade unions or to negotiate with trade unions. The Convention aims at, as is clear from Article 4, voluntary negotiation between employers' and workers' organizations. This is facilitated by ensuring, through Articles 1 and 2, that workers can be in a position to negotiate voluntarily and freely by adopting machinery to ensure respect for the right to organize, i.e. the right to protection from acts of anti-union discrimination and interference. According to the Government, however, voluntary negotiation cannot be compelled, and nothing in Articles 1–4 seeks to do so.

### **The Ryanair case**

- 752.** The Government believes that the ICTU adopts a particular reading of the Supreme Court judgment in *Ryanair Ltd v. Labour Court* [2007] IESC 6, assumes that this precludes any further applications to the Labour Court on behalf of Ryanair pilots and, as a result, concludes that Ireland is in breach of its obligations under Convention No. 98. As such, the entirety of the ICTU case rests on its interpretation of the Supreme Court judgment, an interpretation which, in its view, is entirely flawed.
- 753.** The Government states that, for the purposes of this complaint, the facts must be taken to be those established by the Supreme Court. Ryanair decided to upgrade its fleet of aeroplanes, which required special training of the pilots who were going to fly the new aircraft. Ryanair decided to offer eight senior Dublin-based pilots such training on particular terms and conditions. The Dublin-based pilots who received the offer for retraining were unhappy with some of the terms and conditions and entered into correspondence with the management.
- 754.** According to the Government, the Supreme Court accepted Ryanair's evidence that, in Ryanair, collective bargaining is a continual process whereby Ryanair negotiates with representatives of its employees for the purposes of concluding collective agreements which fix pay and other conditions of employment. Employees elect employee representatives to ERCs; the various ERCs negotiate directly with the company on an ongoing basis in relation to all terms and conditions of employment. There was an ERC for Dublin-based pilots and it was up to them to elect or appoint pilots to this ERC but, in August 2004, the pilot representatives had withdrawn and no new pilots had been appointed.
- 755.** The Government further indicates that, on 3 November 2004, the President of the IALPA (a branch of IMPACT), himself an employee of Aer Lingus, wrote to the Chief Executive of Ryanair setting out three issues (terms and conditions of employment, aircraft/type variant conversion, and redundancy) in respect of which IMPACT wished to enter into

discussions with Ryanair. The Chief Executive refused to engage with the IALPA, stating that the IALPA would not be involved with Ryanair's internal discussions with their pilots. There was then an exchange of letters between the Labour Relations Commission (LRC) and the Chief Executive, the result of which was that Ryanair would not engage with the LRC.

- 756.** The Government states that, on 19 November 2004, the eight Dublin-based pilots wrote a letter to the management concerning the offer (made on 12 November 2004) of a place on the training course, raising several concerns, including the fact, as they saw it, that the terms of the offer would leave them liable to repay the costs of their training if Ryanair were compelled to engage in collective bargaining with any trade union within five years of their conversion training. They also queried whether there was any disadvantage to their continuing to fly the 200 fleet until such time as they were phased out. Ryanair replied in a letter that is stamped as received by the IALPA on 23 November 2004 denying that the pilots were being asked to sign something outside their control and stating that they were merely being given an offer. The letter agreed to a meeting in relation to additional information sought but insisted on certain deadlines in relation to the conversion; made clear that in the event that the pilots did not accept the offer they would continue to fly the old fleet until phased out; and referred to a collective bargaining process within Ryanair.
- 757.** According to the Government, there then appears to have been a meeting between the pilots and the Chief Executive. On 29 November 2004, the pilots responded by letter. They took issue with the reference to collective bargaining in Ryanair, saying "to the best of our knowledge there has been no bargaining process with pilots in Ryanair for some time". The Supreme Court interpreted this to refer to the situation which arose as a result of the two pilot representatives resigning from the Dublin pilots ERC. Seven days prior to this letter, on 22 November 2004, IMPACT applied to the Labour Court on behalf of all pilots of Ryanair who were members of the union. These members were never identified during the procedure before the Labour Court or before the High Court and the Supreme Court.
- 758.** As regards section 2 of the Industrial Relations (Amendment) Act 2001, as amended by the Industrial Relations (Miscellaneous Provisions) Act 2004 (hereinafter, the 2001 Act), the Government indicates that this provision grants the Labour Court jurisdiction to investigate a trade dispute, if certain requirements are met. "Trade dispute" is defined in section 3 of the Industrial Relations Act 1946 as "any dispute or difference between employers and workers or between workers and workers connected with the employment or non-employment, or the terms of the employment, or with the conditions of employment, of any person". The requirements that must be met under section 2 of the 2001 Act essentially involve two positive requirements relating to conduct on the part of the employer ((a) and (b)) and two negative conditions relating to conduct on the part of the trade union ((c) and (d)): (a) it is not the practice of the employer to engage in collective bargaining negotiations in respect of the grade, group or category of workers who are party to the trade dispute and the internal dispute resolution procedures (if any) normally used by the parties concerned have failed to resolve the dispute; (b) the employer has not utilized voluntary procedures to resolve the trade dispute; (c) the trade union not acting in such a manner as to frustrate the employers' efforts to observe a code of practice; and (d) the union not taking industrial action following a reference to the Labour Relations Commission. Section 3 allows the Labour Court to investigate whether those requirements were met, either as a preliminary hearing or as part of the main hearing. The Government concludes that the 2001 Act provides a mechanism for resolving problems between employers and workers where that cannot be done through existing procedures. It also highlights that the Labour Court can issue a recommendation and, subsequently, a binding determination, but cannot direct the employer to engage in collective bargaining.

- 759.** The Government underlines that, under section 2(1) of the 2001 Act, the jurisdiction is to investigate a “trade dispute” – an issue addressed by the Supreme Court, and there are four cumulative conditions for jurisdiction, all of which must be met. Only condition (a) which contains within it two sub-conditions relating to an absence of collective bargaining and the failure of internal dispute resolution mechanisms to resolve the dispute, was at issue. Accordingly, what IMPACT had to establish in order for the Labour Court to have jurisdiction were the following three points: (i) there was a trade dispute; (ii) it was not the practice of Ryanair to engage in collective bargaining in respect of the pilots who were party to the trade dispute; and (iii) the internal dispute resolution procedures (if any) normally used by the parties concerned had failed to resolve the dispute. The Supreme Court held that none of these points had been established. The Government concludes that, since these conclusions and the underlying reasons constitute Irish law and thus the only basis on which Ireland could be said to be in breach of its obligations under Convention No. 98, they must be addressed in detail.
- 760.** *Trade dispute.* According to the Government, the Labour Court held that the phrase “or difference” was a broader definition of the term “dispute”. The Supreme Court rejected this analysis finding that the Labour Court in considering whether there was a “trade dispute” should have investigated whether there was internal machinery for resolving the perceived problem and whether that machinery had been exhausted. It was not satisfied that this issue was investigated in that way, particularly without evidence from at least one of the employee pilots in dispute. The Government concludes that the Labour Court had not established that there was a trade dispute and therefore had not established its jurisdiction on the first point.
- 761.** *Practice of collective bargaining.* According to the Government, the Labour Court had given the words of section 2(1)(a) a literal interpretation, the effect of which was that, if a category of employees such as the Dublin-based pilots decided not to engage in collective bargaining negotiations with Ryanair, then, ipso facto, it could not be the practice of Ryanair to engage in collective bargaining negotiations. The Supreme Court considered that this would be inconsistent with the purpose of the Act as it would allow employees to invoke the Labour Court jurisdiction simply by boycotting whatever collective bargaining machinery the company had put in place. It concluded that “practice” means, therefore, in this context that the machinery was in place and not ad hoc, and that the Labour Court’s jurisdiction would only be invoked where collective bargaining arrangements were not in place and the parties are not engaged in talks, which was not the case in relation to Ryanair.
- 762.** The Government further indicates that the Supreme Court proceeded to examine whether the machinery established by Ryanair did involve “collective bargaining negotiations” for the purposes of section 2. It considered that the Labour Court had taken the incorrect approach of interpreting “collective bargaining negotiations” in accordance with the meaning that the term would bear in the industrial relations context, and rejected its conclusion that collective bargaining negotiations under the Act means negotiation with whatever body the group of employees who were party to the trade dispute wish to represent them. The Supreme Court held that the relevant grade, group or category of employees would seem to be the Dublin pilots who may or may not be members of the union, and that the company, as is its right, does not negotiate with the union but claims that it does negotiate with the Dublin pilots via the ERCs and that in so far as that cannot be done at present, it is only because the pilot representatives have themselves withdrawn. The Supreme Court concluded that this may or may not be correct but it has never been properly investigated by the Labour Court whether there were in place adequate collective negotiation procedures (giving an ordinary meaning to that expression) within Ryanair. It thus took the view that, if there is a machinery in Ryanair whereby the pilots may have their own independent representatives who sit around the table with representatives of

Ryanair with a view to reaching agreement if possible, that would seem to be “collective bargaining” within an ordinary dictionary meaning, considering that it would be strange to impose definitions peculiar to union negotiations on non-unionized companies.

**763.** According to the Government, the Supreme Court viewed the notion of independent representatives as crucial to the concept of collective bargaining. When assessing the ERCs in this light, it rejected the suggestion that independence was in any way undermined by Ryanair’s administrative organization of elections to the ERCs and the fact that Ryanair had a rule against renewal of a term for a representative. In understanding the Court’s conclusions on this issue, it is necessary to understand the manner in which the point was litigated. Ryanair’s officers who attended the Labour Court hearing gave evidence that the ERCs performed the function of collective bargaining. No pilots from the company ever gave evidence that this was not the case, either before the Labour Court or before the High Court and Supreme Court. The Labour Court had concluded that Ryanair did not engage in collective bargaining on the basis of arguments made by IMPACT and a number of Ryanair documents that tended to emphasize consultation with staff rather than negotiation with staff, and thus that ERCs were consultative bodies. Ultimately, the Supreme Court’s conclusion was procedural, holding that there was insufficient evidence on which the Labour Court would have been entitled to find that the ERCs did not perform the function contended for by Ryanair, particularly in the absence of evidence from at least one relevant employee of Ryanair. This conclusion was not a definitive determination that the ERCs operated by Ryanair were sufficiently independent as to amount to collective bargaining. Instead, it was a conclusion that there was insufficient evidence before the Labour Court for it to reach an opposite conclusion, in the face of the clear evidence adduced by Ryanair’s officers. The Supreme Court emphasized that the Labour Court did not adopt fair procedures by permitting complete non-disclosure of the identity of the persons on whose behalf the union was purporting to be acting.

**764.** *Failure of internal procedures to resolve the dispute.* According to the Government, the Labour Court, when addressing this issue, had relied on the non-functioning of the ERCs. The Supreme Court rejected this fact as a relevant factor in this case. While, in the Labour Court’s view, the matter before it had a bearing on the terms on which all pilots would be offered that training now or in the future. The Supreme Court reasoned that it was unfair and virtually impossible for the Labour Court to make a determination on the issue without ascertaining what pilots were in dispute. It held that the real dispute was related to the eight pilots who were still trying amicably to deal with the company at the stage of the reference to the Labour Court, and that the Labour Court did not have the evidence before it on which it could conclude that the internal procedures failed to resolve the dispute.

**765.** The Government considers that the Ryanair judgment helpfully clarifies the following aspects of the procedure established under the 2001 Act: (i) the Labour Court cannot conclude that a trade dispute is in existence without first establishing that internal machinery for resolving the perceived problem has been exhausted; evidence from an affected employee is necessary to this end; (ii) the concept of “collective bargaining negotiation” does not require an employer to negotiate with a union of the employees’ choice but rather that the employees have their own representatives who can act independently in the negotiations with the company; the Supreme Court did not establish that Ryanair’s ERC procedure met this test but rather that it was not open to the Labour Court, in the absence of any evidence from an employee of Ryanair, to reject the evidence to opposite effect given by the officials of Ryanair; and (iii) the Labour Court cannot conclude that internal dispute resolution mechanisms have failed to resolve a trade dispute in the absence of evidence from employees to that effect. The Government highlights that the Supreme Court judgment does not in any way preclude persons from making further complaints about Ryanair’s procedures but rather provides guidance on how the different



components of section 2 can be established in the future, in keeping with procedural fairness.

#### The current complaint

- 766.** Regarding the statement that the complaint relates to a number of steps taken by Ryanair to deny pilots the right to be represented by the IALPA within the meaning of Convention No. 98, the Government finds the formulation telling for two reasons: (i) it is unclear what the ICTU understands by the “right to be represented” given that it cannot be referring to a right to have Ryanair negotiate with pilots through the IALPA (as Articles 1–4 seek to protect voluntary negotiation); and (ii) the focus of the ICTUs’ complaint being Ryanair rather than Ireland, it is not sufficient for the ICTU to identify anti-union positions adopted by Ryanair and then jump to the conclusion that Ireland is in breach of its obligations. Ireland has established industrial relations machinery for the purposes, inter alia, of meeting its obligations under international law, and only if that machinery has been used and definitively found wanting could the ICTU claim that Ireland is in breach of its obligations under the Convention.
- 767.** The first concern in the complaint relates to the issue of retraining pilots and “the provision of benefits which were tied to a condition that the company should remain ‘union free’”. As seen above, this was the issue that was percolating among pilots immediately prior to and after IMPACT’s application to the Labour Court pursuant to section 2 of the 2001 Act. According to the Government, however, this was not at issue in the Ryanair case and it is quite possible that such conditions might be unenforceable, as a matter of Irish law. In its view, Ireland cannot be held to be in breach of the Convention on account of a position adopted by a particular employer, the legality of which has not been determined by the Irish Courts. Further, the ICTU does not identify any Article of the Convention that is engaged by this behaviour.
- 768.** The second concern relates to the claiming that ERCs are a sham and operated to exclude genuine collective bargaining. The Government believes that the analysis contained in the complaint, according to which the Supreme Court’s finding that Ryanair may have had a rule against the renewal of a term for a representative does tend to reveal a level of interference with the affairs of the ERC by the employer which undermines any suggestion that this was an autonomous organization which was free from interference in its “establishment, functioning or administration” (Convention No. 98, Article 2), is premised on the mistaken assumption that the ERCs are in fact workers’ organizations for the purposes of the Convention. In the Government’s view, Ryanair’s position is not to negotiate with trade unions, and the Convention, in its recognition that collective negotiation must be voluntary, respects this right; Ryanair does engage in discussions with its employees through its own ERCs, which do not amount to workers’ organizations and are therefore not subject to Article 2 of the Convention.
- 769.** The third concern relates to the lack of steps available in Irish law to encourage the company to enter into voluntary bargaining arrangements. The ICTU takes issue with Ryanair’s union-free business model and the fact that Irish labour law does not provide an automatic statutory right to be accompanied by a trade union official at internal disciplinary or grievance hearings held by an employer, nor a right to make representations to an employer through one’s union, nor a right to be represented by this trade union in matters relating to their employment. The Government criticizes in this regard that the ICTU identifies no provision of the Convention that is breached, which in its view, is presumably because, while the true import of the Convention relates to voluntary collective bargaining, what the ICTU seeks is compulsory collective bargaining. Regarding the concern expressed by the ICTU about the possible crystallization of an emerging constitutional right to operate a non-unionized company, the Government states that it

derives from a questionable interpretation of the judgment of the Supreme Court and is clearly premature in the context of the current complaint.

- 770.** The Government observes that the complaint notes the procedure under the 2001 Act as a valuable provision that might be said to be consistent with the State's duty under Article 4 of the Convention but that is rendered ineffective by the Supreme Court decision in the Ryanair case: "[I]n practice, a well-intentioned provision has become a vehicle for union busting. This is because the Supreme Court has held that an employer who engages with a body such as the Ryanair ERC is an employer who, for the purposes of the 2001 Act, engages in collective bargaining negotiations. So, not only is Ryanair not required by Irish law to permit pilots to be represented by the trade union of their choice, by establishing the ERC it has an immunity from Labour Court proceedings applicable to employers who do not recognize a trade union." In the Government's view, this displays a fundamental misunderstanding of what the Supreme Court decided. The Supreme Court did not conclusively determine whether Ryanair's ERCs were such as to remove Ryanair from the remit of the 2001 Act. Rather the Court identified a criterion of independence and then held that, in the particular case and on the basis of the factual evidence put forward by Ryanair and the lack of factual evidence put forward by IMPACT, it was not open to the Labour Court to come to the conclusion that it reached. Moreover, in a wholly unexceptionable part of its judgment, the Court held that employees could not create jurisdiction for the Labour Court through the tactic of failing to engage with the internal collective negotiation machinery of the company. Explicitly leftover by the judgment is the question of whether Ryanair's ERCs are sufficiently independent. The Government considers the ICTU submission wholly untenable as it asks the Committee to make a determination about Irish law on the basis of factual assertions that have never been proved; given that, if those factual assertions had been proved before the Irish courts, the ICTU might not actually object to the position in Irish law.
- 771.** Regarding the ICTU's view that it is an alarming position for the Court to take, effectively to require employees of a multinational company to come forward and publicly give evidence against the employer in a dispute between a trade union and their employer. Noting that this is the first point in the complaint at which it is alleged that the Supreme Court judgment is inconsistent with the Convention, again without citing any of its Articles, the Government submits that, for the reasons advanced in the judgment, it is not tenable for a legal system to operate on the basis that factual propositions can be taken as established without direct evidence.
- 772.** The complaint then lists a number of developments in industrial relations at Ryanair since 2007, and this account begins with the assertion that the effect of the Supreme Court decision "was thus to prevent the anti-union activities of Ryanair being challenged before the Labour Court". However, in the Government's view, this is a clear misreading of the judgment, which was much more restricted. The Court did not assess how Ryanair conducts its business and reached no conclusion that disputes at Ryanair could not, in the future, be referred to the Labour Court.
- 773.** It is claimed that Article 1 is breached by Ryanair's acts of anti-union discrimination in so far as an offer of retraining was made to pilots on condition that the money would have to be repaid if the company was required to enter into a collective bargaining relationship with a trade union. According to the Government, this is a complaint about Ryanair not about Ireland, which has put in place a system for dealing with trade disputes at companies where collective bargaining has failed to take place. In its view, an attempt was made to utilize this system, which failed because IMPACT could not establish certain factual propositions.

- 774.** The complaint then contends that Article 2 is breached by an act of interference by the employer in workers' organizations. In this regard, the contention appears to be that there has been interference in the ERC and that the union is wrongly excluded from the procedures under the 2001 Act. Again, however, this is a complaint against Ryanair, not a complaint against Ireland. It is also wrongly premised on the assumption that ERCs are workers' organizations.
- 775.** The complaint then contends that Article 3 is breached because Ireland has failed to take steps to establish machinery for the purposes of protecting the right to organize as protected by Articles 1 and 2. However, in the Government's view, Ireland has provided such a procedure under the 2001 Act, whereby, since the Convention explicitly does not require compulsory negotiation with trade unions, those employers who do not engage in collective bargaining may end up with a binding determination about the terms and conditions of employment in their company. The Government believes that the failure of IMPACT to access the procedure in one case, on account of a failure to prove certain facts, does not amount to a breach of Article 3.
- 776.** Finally, the complaint contends that there has been a failure to promote the principle of voluntary collective bargaining as required by Article 4 and that Irish law is in breach of Article 4 of the Convention because Ryanair's ERCs cannot conclude collective agreements. According to the Government, the complaint relies in this regard on the non-binding Collective Agreements Recommendation, 1951 (No. 91), rather than the binding Convention, in order to avoid the Convention's requirement that the collective bargaining be voluntary. In its view, Ireland has not breached Article 4 and, moreover, a positive and aspirational duty of the type found in Article 4 cannot be considered breached by reference to the idiosyncratic facts of one particular case. Ireland has, in general, taken many steps to promote collective bargaining and, indeed, for many years has operated a system of social partnership in which trade unions play a significant role, unparalleled in most other countries. The Government concludes that there is no substance to the ICTU's complaint that Ireland has failed to promote collective bargaining by reason of the outcome to the Ryanair case.

#### Irish Business and Employers Confederation's (IBEC) observations

- 777.** Furthermore, the Government forwards information in relation to the complaint, which was communicated by the Irish Business and Employers Confederation (IBEC).
- 778.** IBEC stresses that it does not represent the position or interests of Ryanair, the specific enterprise subject of the complaint. However, as the national representative body of Irish employers and as a national social partner, it is keen to ensure that all relevant information is made available to the Committee. The IBEC strongly refutes the allegation that Ireland is in breach of Convention No. 98. There is a highly developed body of legislation in place in Ireland, in addition to constitutional law, which gives effect to the principles outlined in the Convention.
- 779.** The IBEC states that the main grievances appear to arise from the dispute with Ryanair – grievances which already have remedies under current Irish law, provided the claims can be substantiated. The ICTU complaint neglects to outline many of the statutory measures and remedies available to workers in Ireland which are well known and widely utilized by workers and unions within the established industrial relations framework in Ireland. This raises questions as to why these measures have not only not been utilized by the complainants but also why these measures have not been mentioned in the complaint submitted.

- 780.** IBEC submits that, rather than a concern about Ireland's compliance with Convention No. 98, the complaint is an attempt to revisit the facts of an individual case which has already been determined by the Supreme Court, and to extend the meaning of the Convention far beyond the interpretation of the Committee in previous cases. Finally, the criticisms of the Supreme Court decision suggest that the complainants object to the application to employers of Article 6 (right to a fair trial) of the European Convention on Human Rights (ECHR).
- 781.** With reference to Article 1 of Convention No. 98, IBEC indicates that, in Ireland, workers enjoy the strongest possible legal protection against acts of anti-union discrimination. The Constitution of Ireland, specifically article 40.6.1, guarantees liberty for the exercise, subject to public order and morality, of the right of the citizens to form associations and unions. This constitutional right of association, which has been bolstered by a range of legislative measures outlined below, does not, however, imply any duty on the employer beyond respecting that right in itself. It does not extend to obliging the employer to negotiate with any association which may be formed by employees. The absence of a legal obligation to engage with a particular trade union, or indeed any union, is entirely consistent with ILO Conventions on freedom of association. In particular, IBEC notes that, as previously enounced by the Committee, the principle of free and voluntary collective bargaining, the voluntary negotiation of collective agreements, and therefore the autonomy of the bargaining partners, is a fundamental aspect of the principles of freedom of association. IBEC submits that the acknowledgement of Ryanair's "right to operate a non-unionized company" by the Supreme Court is entirely consistent with the above. In its view, the ICTU complaint seeks to undermine the voluntary nature of collective bargaining as enshrined in the Convention.
- 782.** Regarding the allegation that it is not unlawful in Ireland for an employer to make terms and conditions of employment conditional on the workers individually or collectively withholding their support for collective bargaining, IBEC states that this assertion is untrue. The Industrial Relations Act 1990 (Code of Practice on Victimisation) (Declaration) Order 2004 specifically prohibits any adverse or unfavourable treatment arising from an employee's membership or non-membership, activity or non-activity on behalf of a trade union or an "excepted body". This also applies to any other employee in situations where negotiating arrangements are not in place and where collective bargaining fails to take place. Examples of adverse treatment referred to in the statutory instrument include acts of omission or commission, including an employee suffering any unfavourable change in his or her conditions of employment or acts that adversely affect the interest of the employee. Part 5 of the Code outlines the procedure for addressing complaints of victimization, and provides redress including compensation of up to two years' remuneration in respect of the employee's employment, and a direction that the conduct complained of must cease.
- 783.** Concerning the allegation that it is not unlawful in Ireland for an employer to establish a staff association or workplace forum which is given consultation or negotiating rights as an inducement to workers not to support collective bargaining with a bona fide trade union, IBEC indicates that, in any case, where inducements are offered with a view to discouraging particular trade union membership or activity on the part of an employee, that employee may have recourse to the remedies provided by the 2004 Order referred to above. However, there is nothing in Convention No. 98 (or in any ILO Convention) which prohibits the establishment of staff associations or workplace forums. Indeed, an employer may be required, for example by EU Directive, to establish such associations or forums.
- 784.** As regards the allegation that it is not unlawful in Ireland for an employer to establish a staff association or workplace forum which does not conduct democratic elections or operate under any obligation to consult those workers it purports to represent, IBEC states

that staff associations and workplace forums established pursuant to the EU Directives referred to above, as transposed into Irish law, are governed by certain statutory requirements with regard to the appointment of employee representatives. By way of example, the Employees (Provision of Information and Consultation) Act 2006 requires that employees' representatives be elected, or otherwise be appointed by the employees "... and the basis on which that appointment is made may, if the employees so determine, be such as agreed by them with the employer". The aim of these provisions is to ensure that "the representatives are democratically elected or appointed by the employees and are representative of them". It is a criminal offence for an employer to fail to arrange for the election or appointment of employees' representatives as required by the legislation. Such associations are also required to consult on certain matters as prescribed in the relevant legislation, and failure to do so is also a criminal offence. Possible sanctions on conviction include a fine of up to €30,000 or imprisonment for a term not exceeding three years. If such associations do not engage in a genuine practice of collective bargaining, and where a trade dispute arises, it is open to a trade union or "excepted body" to call upon the Labour Court to investigate the trade dispute pursuant to the provisions of section 2 of the 2001 Act.

- 785.** With respect to the allegation that it is not unlawful in Ireland to refuse to recognize a trade union for the purposes of collective bargaining, regardless of the level of support for the union in question in the workplace, IBEC indicates that this is accurate. However, the complaint fails to mention that there is nothing in international law, or any ILO Convention, which requires Ireland to legislate for mandatory recognition of a trade union for collective bargaining purposes. The ILO's approach, in particular, acknowledges that countries have discretion as to how they arrange industrial relations. IBEC submits that the Committee also supports the philosophy that collective bargaining must be voluntary to be properly effective, and that legislation which compels mandatory conciliation runs contrary to the Convention. The ICTU complaint states that an employer's right not to recognize a trade union is "in clear breach of international law", but fails to identify any specific law which Ireland has breached. As to the reference in the complaint to a case decided by the European Court of Human Rights, the IBEC states that the Court refused to find that the freedoms enshrined in Article 11 of the ECHR extended to requiring contracting States to legislate for mandatory collective bargaining or trade union recognition, and found that the absence of an obligation on employers to engage in collective bargaining did not give rise to a violation of the Convention.
- 786.** Concerning the alleged absence of a legal requirement that workers be entitled to trade union representation in the context of individual grievance and disciplinary issues, the IBEC states that there is nothing in Convention No. 98 that suggests the introduction of such a requirement. Under Irish law, if an employer refuses to allow representation, or places practical obstacles in the way of employees securing appropriate representation, the Labour Court may intervene, as it has done on many occasions, to ensure compliance with the Code of Practice on Grievance and Disciplinary Procedures, which includes as examples of "employee representative", "a colleague of the employee's choice and a registered trade union". Failure to allow for appropriate representation may also result in a challenge to the compliance of the process with the principles of natural justice and fair procedures as protected by the Constitution of Ireland, 1937. Finally, the Irish Employment Appeals Tribunal is likely to find that any dismissal based on deficient procedures, including the absence of proper representation, is unfair, as they are empowered to do under section 5 of the Unfair Dismissals (Amendment) Act 1993.
- 787.** IBEC draws particular attention to other measures which Ireland has put in place to give effect to the additional protection provided in Convention No. 98 against acts of anti-union discrimination. Section 6 of the Unfair Dismissal Act 1977 provides that where a dismissal is caused wholly or mainly by such membership or activity, it will automatically be

deemed to be unfair, and may result in the employee being reinstated in his or her position with the employer, or being awarded damages at a level of up to two years' remuneration. There are severe penalties for penalization of employee representatives, including the prohibition of dismissal or any unfavourable change to his or her conditions of employment or any unfair treatment, or any other action prejudicial to his or her employment. Any breach of these provisions constitutes a criminal offence under Irish law.

**788.** With regard to acts of interference as referred to in Article 2 of Convention No. 98, under Irish law, trade unions enjoy generous protection against such interference, as compared with other countries. Unions enjoy wide discretion as to how ballots for industrial action are conducted under section 14 of the Industrial Relations Act 1990, which provides no remedy to an employer who may harbour a suspicion that the ballot has been conducted in an undemocratic way. Trade unions in Ireland are given a free hand in the exercise of their functions as compared with other jurisdictions. IBEC submits that acts of interference, if properly raised under the 2001 Act, and supported by adequate evidence, would result in a decision that the employer was not engaging in bona fide collective bargaining, and leave that employer open to the rigours of that Act. This mechanism, along with the Code of Practice on Victimization, addresses the issues raised in the complaint with regard to acts of interference.

**789.** With reference to Articles 3 and 4 of Convention No. 98, IBEC indicates that, in Ireland, an extensive framework has been established for the orderly conduct of industrial relations, with a range of statutory bodies created to this end, including the LRC and the Labour Court. The LRC was established by the Industrial Relations Act 1990 and offers a range of services to all Irish workplaces preventing and resolving workplace disputes and disagreements involving groups of workers, individual workers, employers and their representatives. The primary services include: advisory services; conciliation; workplace mediation; Rights Commissioner Service (investigation of grievances and claims); and training. The Labour Court was established in 1946 and since then has played a major role in dispute resolution in Ireland. It is an independent body consisting of representatives of employers and workers participating on an equal basis, which operates as an industrial relations tribunal and issuing recommendations setting out its opinion on the dispute and the terms on which it should be settled. Ultimately, however, responsibility for the settlement of a dispute rests with the parties. The role of the Labour Court in dispute resolution is to act as a court of last resort. In other words, local dispute resolution arrangements in the company or organization, and the other dispute resolution machinery of the State (LRC, Rights Commissioner Service) should have been fully utilized before a case comes before it. The Labour Court investigates disputes by requiring the parties to a dispute to provide it with written submissions of their positions in relation to the dispute and, subsequently, to attend hearings. The structures described above, including the ability to conclude collective agreements which may be given legal effect, illustrate the extent to which Ireland has given effect to Articles 3 and 4 of the Convention. However, the industrial relations system in Ireland respects the diversity of arrangements of information and consultation, negotiation and collective bargaining which employers and their employees may wish to reach. This is entirely consistent with the principles of Convention No. 98.

**790.** The IBEC emphasizes that the main issue which gave rise to the decision of the Supreme Court in the Ryanair judgment was the absence of any evidence adduced by the union in support of its allegations. The judgment in Ryanair provides a legal analysis of just a small part of the statutory framework designed to support the orderly conduct of industrial relations and collective bargaining in Ireland – the 2001 Act. Certain preconditions are required before the Court can be considered to have jurisdiction to conduct an investigation under the Act. The Supreme Court found that the preconditions listed above had not been satisfied in this particular case and that it was difficult to see how the Labour Court could

arrive at any conclusion without hearing evidence from at least one relevant employee from Ryanair. According to IBEC, the judgment then gives useful guidance as to what constitutes collective bargaining, in that a practice of collective bargaining would require that there be some machinery in place for that purpose, and that such arrangements could not be “ad hoc”. While the presence of independent employee representatives was deemed significant for genuine collective bargaining to be considered to take place, it was disputed that Ryanair’s role in facilitating the election of these representatives operated, in itself, to undermine the independence of the representatives.

- 791.** However, in IBEC’s view, the judgment is not a definitive description of collective bargaining with which all relevant bodies must now comply. The complaint initiated by the union against Ryanair failed by reason of the complete absence of evidence to support the claims. Ryanair, or any other employer, is not now “immune” from proceedings under the 2001 Act. It remains open to a trade union or excepted body to challenge the practices within the company in the event of a trade dispute. However, the Labour Court must be satisfied that the preconditions in section 2 are met. Any applicant will also have to support its claim with evidence.
- 792.** IBEC concludes that the main grievance is against an individual private company, Ryanair, rather than against the Government of Ireland. The complaint fails to identify any breach of Convention No. 98, or any other Convention or principle of international law, on the part of the Government. Ireland has a highly-advanced, well-resourced system in place to promote collective bargaining and to prohibit anti-union discrimination. A range of statutory protections are available to workers who believe that they have been dismissed or otherwise disadvantaged by reason of their trade union membership or activity, and there are penalties in place for employers in this regard. The offer of incentives to abandon these entitlements is prohibited by legislation. There are also legal and industrial relations consequences for employers who fail to engage in any practice of bona fide collective bargaining. However, there is nothing in the Convention which supports the ICTU’s interpretation that collective bargaining can only be with an independent trade union. IBEC thus invites the Committee to reject the complaint and find that Ireland is not in breach of Convention No. 98.

#### Ryanair’s observations

- 793.** Lastly, the Government forwards information in relation to the complaint from the enterprise concerned, Ryanair. The company denounces that no effort has been made to establish the accuracy of the factual basis upon which the alleged conduct of Ryanair was advanced.
- 794.** The company indicates that article 40 of the Irish Constitution guarantees every citizen of Ireland the right to freedom of association. Both EU and Irish legislation also protect workers from acts of anti-union discrimination, acts of interference by employers and any acts which deny the principle of voluntary collective bargaining. The enterprise claims that during its 28 years of operation, it has never been found in breach of this constitutional freedom and the relevant legislation and has fully respected the rights of its employees to join (or not join) unions.
- 795.** According to the company, while a number of employees are members of trade unions, the overwhelming majority in various work groups (pilots, cabin crew, engineers, etc.) freely participate in direct collective bargaining between themselves and the airline. This collective bargaining takes the form of multi-year pay and benefits agreements negotiated by the ERCs which are directly elected and/or appointed by the employees in each section, and then voted on in secret ballots by all members of each group. In the case of pilots, there is a pilot ERC appointed by the pilots at each of Ryanair’s 45 bases and these ERCs

have been in place since the early 1990s. The enterprise states that the Dublin pilot ERC negotiated pay and working conditions directly with Ryanair in 1997, 2000, 2007, 2009 and again in 2011, and that these multi-year pay agreements were voted on by the Dublin pilots in a secret ballot, with substantial majorities in favour of these agreements.

- 796.** The company underlines that collective bargaining arrangements in the United Kingdom were, in 2001, the subject of a campaign by the British Airline Pilots Association (BALPA) seeking recognition for collective bargaining purposes in Ryanair. The pilots participated in a secret ballot, in which less than 20 per cent voted in favour of the recognition claim and 80 per cent preferred to continue their successful collective bargaining through ERCs directly with Ryanair.
- 797.** In the company's view, from 2004 to 2007, the IALPA, IMPACT and the ICTU sought to exploit the then new 2001 Act to collapse the Dublin pilots ERC, in order to claim that there was a "trade dispute" which could be referred to the Labour Court for investigation, to persuade the Labour Court that, because the Dublin pilots had collapsed the Dublin ERC, it was "not the practice of the employer to engage in collective bargaining negotiations" and, accordingly, to make the Labour Court impose mandatory trade union recognition upon Ryanair and all of its pilots. This matter was subsequently investigated and considered by the Supreme Court of Ireland, which found that it was the practice of the enterprise to engage in collective bargaining, that its multiplicity of ERCs did constitute an accepted body for the purposes of collective bargaining, and that the attempt by the IALPA/IMPACT/ICTU to collapse the Dublin ERC in order to exploit a loophole in the Irish legislation (to impose union recognition) should not be allowed to detract from the well-established collective bargaining mechanisms which existed in the company.
- 798.** In the enterprise's view, the complaint is inaccurate, seeks to clearly and deliberately mislead by omitting relevant and more up-to-date facts and makes false and defamatory allegations against the company, given that the Supreme Court of Ireland has found that the enterprise does recognize the right of all of its employees to join trade unions and fully engages in collective bargaining with its pilots through the sophisticated and extensive ERC structures which are accepted bodies, and that there was no failure of internal procedures to resolve this dispute. According to the enterprise, no evidence of union resistance activity has been submitted by the complainant, and the withdrawal from the Dublin ERC in 2004 was found to be a ruse by the Dublin pilots and their union to exploit the 2001 Act, since the ERCs for non-Dublin pilots and all other groups continued to operate effectively and successfully both before, during and after 2004. The company further submits that its pilots continue to participate actively in these collective bargaining negotiations and on every occasion, over the past 15 years, where there has been a secret ballot, they have approved and endorsed these negotiations and the pay and conditions improvements directly negotiated by their ERCs. Following the Supreme Court decision, the Dublin pilots ERC reformed and re-engaged in collective bargaining with the airline which led to successful pay and condition agreements being concluded in September 2007.
- 799.** Ryanair believes that the ruling of the Supreme Court clearly disproves the false claims made in this complaint, and proves that Ryanair complies with the constitution and laws of Ireland (and the EU), and continues to negotiate successfully with its pilots and cabin crew in a process of collective bargaining on rates of pay and conditions. The Irish Supreme Court has identified that there is a right, under the Irish Constitution, to non-recognition in relation to union representation. Such an entitlement to non-recognition is enshrined in itself in article 11 of the ECHR. As there is no factual basis for this complaint, it should be immediately dismissed.



## C. The Committee's conclusions

- 800.** *The Committee notes that this case concerns allegations of acts of anti-union discrimination and the refusal to engage in good faith collective bargaining on the part of the enterprise Ryanair, as well as the allegations of a failure of Irish labour legislation to provide adequate protection against such acts of anti-union discrimination and to promote collective bargaining.*
- 801.** *The Committee notes from the allegations that, according to the complainant, the company: (i) requested Dublin pilots in 2004 to participate in a mandatory retraining following a fleet upgrade. The Dublin pilots were told that they could either meet the €15,000 training costs themselves or sign “an agreement whereby the company paid for it on condition that it was not forced to deal with IALPA for the next five years”; and (ii) established the Employee Representative Council (ERC) as a non-union forum for dealing with its employees, which is a sham and wholly dependent on the company; moreover, the company has refused to enter into voluntary bargaining arrangements with IALPA.*
- 802.** *The Committee further notes the complainant’s allegation that: (i) the ERC has no formal constitution to which workers have access; (ii) the ERC has no funds other than those provided by the employer to representatives; (iii) the ERC has no resources or access to external sources of support unacceptable to the company; (iv) the ERC has no members; and (v) the employer appears to have a role in determining when elections will be held, how many elected positions there will be, who may stand for election, who may vote in the election, where voting will take place and who will supervise the conduct of the election. The Committee notes that, according to the complainant, since August 2004, there has not been any ERC in existence for pilots or, at least, the ERC has no longer been effectively operating. The Committee notes the allegations that, on the occasion of an unsuccessful attempt in 2008 to revive the ERC, the company was involved in various election arrangements (time and place of ballot, eligibility to vote, voting system, auditing etc.), which the company subsequently denied.*
- 803.** *As regards the refusal to enter into collective bargaining with IALPA, the Committee notes the complainant’s allegations that the ERC operates to exclude genuine collective bargaining; that workers are not free to choose their bargaining representatives and the employer imposes a particular structure of negotiations with persons who have not been selected or elected by the workforce; and that the ERC has only played a consultative role and is not an appropriate body to conduct collective bargaining as understood under Convention No. 98. According to the complainant, pilots at the company are also denied the right to be represented by a trade union in grievance and disciplinary matters, to have their trade union make representations and negotiate on their behalf, whether individually or collectively.*
- 804.** *Furthermore, the Committee notes that, while the Labour Court (and then the High Court in appeals) ruled that it had jurisdiction to investigate the dispute over training allowances, the Supreme Court quashed the decision on the grounds that neither of the three criteria required under section 2(1) of IRA 2001 was met: (1) there was no trade dispute; (2) there was no evidence that the company did not engage in collective bargaining; and (3) there was no evidence that internal dispute resolution procedures had failed to resolve the dispute. In particular, the Committee notes that, according to the Supreme Court, the Labour Court had not adequately investigated the company’s contention that its ERCs represent a forum for collective bargaining negotiations. The Committee notes that the complainant expresses serious concerns at the implications of this decision denouncing that: (i) the company’s anti-union activities cannot be challenged before the Labour Court, since the existence of a body such as the ERC gives the company*

*immunity from legal proceedings under the IRA 2001; (ii) employees of a multinational company are required to come forward and publicly give evidence against their employer in a dispute between a trade union and their employer; and (iii) companies are granted a new constitutional right not to deal with trade unions, whilst there is no countervailing right of citizens to be represented by a trade union in their dealings with the company. The Committee notes the complainant's view that the provisions of the IRA 2001, as interpreted by the Supreme Court, have become a vehicle for union-busting.*

- 805.** *The Committee notes that the Government considers that Ireland is not in breach of Convention No. 98, that the ICTU's interpretation of the Supreme Court judgment is flawed, that its criticisms of the judgment are unacceptable and that the ICTU has misunderstood the nature of the procedure before the Committee as it appears to use its complaint as an opportunity to relitigate its dispute with the company. The Committee notes that, according to the Government: (i) the Supreme Court held that none of the points IMPACT had to establish in order for the Labour Court to have jurisdiction had been established; this conclusion was procedural in that there was insufficient evidence to justify the Labour Court's conclusions, particularly in the absence of any evidence from at least one employee of the company; (ii) the Supreme Court established that the concept of "collective bargaining negotiations" does not require an employer to negotiate with a union of the employees' choice but rather that the employees have their own representatives who can act independently in the negotiations with the company; the Supreme Court did not establish that the company's ERC procedure met this test but rather that the Labour Court could not reject the evidence to the contrary given by the management, in the absence of any evidence from an employee of the enterprise; the Supreme Court also rejected the suggestion that the independence of the representatives was undermined by the company's administrative organization of elections to the ERCs and its rule against renewal of a term for a representative; (iii) the Supreme Court judgment does not in any way preclude persons from making further complaints about any anti-union activities and procedures of the enterprise; the Supreme Court merely struck down the Labour Court decision due to insufficient evidence but did not assess how the company conducts its business; (iv) regarding the alleged breach of Article 1 through the "provision of benefits which were tied to a condition that the company should remain 'union free'", this matter was not at issue in the case before the court and it is quite possible that such conditions could be unenforceable, as a matter of Irish law; Ireland cannot be held to be in breach of the Convention on account of a position adopted by a particular employer, the legality of which has not been determined by the courts; (v) as to the alleged breach of Article 2 through an act of interference by the employer in the ERC which is a sham and operated to exclude genuine collective bargaining, the complaint is wrongly premised on the assumption that ERCs are workers' organizations; thus, Article 2 according to which such organizations must be autonomous and free from interference in their "establishment, functioning or administration" would not apply; (vi) with respect to the alleged breach of Article 3 through the failure to take steps to establish machinery for the purposes of protecting the right to organize under Articles 1 and 2, such a procedure is provided under the 2001 Act; the inability of IMPACT to access the procedure in one case, on account of its failure to prove certain facts, does not amount to a breach by Ireland of Article 3; (vii) as regards the alleged breach of Article 4 due to the lack of steps available under Irish law to encourage the company to enter into voluntary collective bargaining arrangements, the ICTU takes issue with the lack of an automatic statutory right for workers to be accompanied by a trade union official at internal disciplinary or grievance hearings held by the employer and of a right to make representations to an employer through one's union or to be represented by the trade union in matters relating to their employment; the ICTU seeks compulsory collective bargaining and relies on the non-binding Collective Agreements Recommendation, 1951 (No. 91) to avoid the Convention's requirement that collective bargaining be voluntary; position of the company is not to negotiate with trade unions, and the Convention, in its recognition that collective*

*negotiation must be voluntary, respects this right; Ireland has not breached Article 4, and has, in general, taken many steps to promote collective bargaining; (viii) regarding the denounced requirement of employees of a multinational company to publicly give evidence in a dispute between their employer and a trade union, it is not tenable for a legal system to operate on the basis that factual propositions can be taken as established without direct evidence; (ix) the complaint is wholly untenable as it asks the Committee to make a determination about Irish law on the basis of factual assertions that have never been proved; and, if those factual assertions had been proved before the Irish courts, the ICTU might not actually object to the position that would have been taken under Irish law; (x) it is not sufficient to identify anti-union positions adopted by a company and then conclude that Ireland is in breach of its obligations; Ireland has established industrial relations machinery for the purposes, inter alia, of meeting its obligations under international law, and only if that machinery has been used and definitively found wanting could it be claimed that Ireland is in breach of its obligations.*

**806.** *The Committee notes from the information forwarded by the Government that the employers' organization concerned, IBEC, shares the Government's position and, in addition, states that: (i) the main grievances arising from the dispute with the company already have remedies under Irish law provided the claims can be substantiated; (ii) the complaint neglects to outline many of the statutory measures and remedies available to workers in Ireland; (iii) as regards Article 1 of Convention No. 98, workers enjoy strong legal protection against acts of anti-union discrimination, granted under article 40 of the Constitution of Ireland, the Industrial Relations Act 1990 (Code of Practice on Victimization) (Declaration) Order 2004 and the Unfair Dismissal Act; the assertion that it is not unlawful in Ireland for an employer to make terms and conditions of employment conditional on the workers individually or collectively withholding their support for collective bargaining is untrue; (iv) with regard to Article 2, under Irish law, trade unions enjoy generous protection against acts of interference; if properly raised under the 2001 Act and supported by adequate evidence, such acts result in a decision that the employer was not engaging in bona fide collective bargaining; however, there is nothing in any ILO Convention which prohibits the establishment of staff associations or workplace forums; indeed, an employer may be required by an EU Directive to establish such bodies; (v) as regards Articles 3 and 4 of Convention No. 98, an extensive framework has been established for the orderly conduct of industrial relations, with a range of statutory bodies created to this end, including the LRC and the Labour Court; however, the industrial relations system in Ireland respects the diversity of arrangements of information and consultation, negotiation and collective bargaining; there is nothing in any ILO Convention which provides that collective bargaining can only be with an independent trade union or which requires to legislate for mandatory recognition of a union for collective bargaining purposes; the acknowledgement of the company's "right to operate a non-unionized company" by the Supreme Court is entirely consistent with the voluntary nature of collective bargaining as enshrined in the Convention; (vi) the company in this case, or any other employer, is not now "immune" from proceedings under the 2001 Act, and it remains open to a trade union or excepted body to challenge the practices within the company in the event of a trade dispute; however, the preconditions in section 2 must be met and any applicant will have to support its claim with evidence; (vii) the main grievance is against an individual private company rather than against the Government of Ireland, and the complaint fails to identify any breach of Convention No. 98 or any other Convention or principle of international law, by the Government.*

**807.** *The Committee notes from the information forwarded by the Government that the company concerned adds that: (i) article 40 of the Irish Constitution and both EU and Irish legislation protect workers from acts of anti-union discrimination, acts of interference by employers and any acts which deny the principle of voluntary collective bargaining; (ii) during its 28 years of operation, the company has never been found in breach of the*

relevant legislation and has fully respected the rights of its employees to join (or not join) unions, and the complainant has submitted no evidence of union resistance activity; (iii) while some employees are members of trade unions, the overwhelming majority of workers in various categories freely participate in direct collective bargaining between themselves and the airline, which results in multi-year pay and benefits agreements that are negotiated by ERCs directly elected and/or appointed by employees and are then voted on in secret ballots by all members of each group; (iv) the Dublin pilot ERC negotiated pay and working conditions directly with the company in 1997, 2000, 2007, 2009 and again in 2011, and these multi-year pay agreements were voted on in secret ballots with substantial majorities in their favour; (v) from 2004 to 2007, IALPA, IMPACT and ICTU sought to exploit a loophole in the then new 2001 Act by collapsing the Dublin pilots ERC to persuade the Labour Court that it was “not the practice of the employer to engage in collective bargaining negotiations”; the Supreme Court came to the opposite conclusion finding that the company’s multiple ERCs did constitute an accepted body for the purposes of collective bargaining, and that there is a right, under the Irish Constitution, to non-recognition in relation to union representation.

- 808.** *The Committee first wishes to point out that it has not been called upon to reconsider the interpretation of the Irish law by the Supreme Court of Ireland but rather to ensure respect for the principles of freedom of association. It is in this spirit that the Committee sets out the considerations below.*
- 809.** *The Committee notes the seriousness of the alleged practice whereby a company would offer certain benefits to pilots subject to the condition that the company remains “union-free”, and notes that the Government and the enterprise concerned confine themselves to indicating, respectively, that this allegation has not been at issue before the courts and that no evidence of union resistance activity has been adduced. The Committee recalls that, as regards allegations of anti-union tactics in the form of bribes offered to union members to encourage their withdrawal from the union and the presentation of statements of resignation to the workers ..., the Committee has always considered such acts to be contrary to Article 2 of Convention No. 98, which provides that workers’ and employers’ organizations shall enjoy adequate protection against any acts of interference by each other or each other’s agents in their establishment, functioning or administration [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 858]. The Committee considers that the alleged offer of conditional benefits by the company provided that it would not be required to enter into a collective bargaining relationship with the union, if true, would be tantamount to employer interference in the right of workers to form and join the organization of their own choosing to represent their occupational interests. As the information available is insufficient to determine whether such an act occurred and, if it occurred, whether it would have been considered to be contrary to Irish law if proven, the Committee requests the Government to ensure that the protection available against anti-union discrimination would adequately cover such acts including through a thorough review of the protective measures with the social partners concerned.*
- 810.** *The Committee further notes the serious allegation that the company has established a sham ERC and has significantly interfered in its operation with a view to precluding the union from collective bargaining. The Committee notes that this allegation has been indirectly examined by the national judiciary, including the Supreme Court, in the framework of the procedural decision as to whether the Labour Court has jurisdiction to deal with the matter, in particular as to whether the machinery established by the company did involve “collective bargaining negotiations”.*

- 811.** *In this respect, the Committee notes that, according to the Supreme Court, the term “collective bargaining negotiations” should not be interpreted in line with its meaning in the industrial relations context but rather in an ordinary dictionary meaning as it would be strange to impose definitions peculiar to union negotiations on non-unionized companies, and “if there is a machinery in [the company] whereby the pilots may have their own independent representatives who sit around the table with representatives of [the company] with a view to reaching agreement if possible, that would seem to be collective bargaining”. In addition, the Supreme Court found that “just because [the company] may have from an administrative perspective organized the elections and may have had a rule against renewal of a term of a representative, which was the case, did not in any way mean that the pilots acting through the committee were doing so anything other than independently”. The Supreme Court concluded that there were no grounds for the Labour Court to conclude that the company did not engage in collective bargaining through the ERC and thus no grounds for the Labour Court to assert jurisdiction. The Committee also notes that the Supreme Court, observing that it is the company’s “policy to deal only directly with its own employees and not through outside agencies including unions”, held that: “It is not in dispute that as a matter of law [the company] is perfectly entitled not to deal with trade unions nor can a law be passed compelling it to do. There is an obvious danger, however, in a non-unionized company that employees may be exploited. With a view to curing this possible mischief, the Industrial Relations Acts, 2001 and 2004 were enacted. Given their purpose, they must be given a proportionate and constitutional interpretation so as not unreasonably to encroach on [the company]’s right to operate a non-unionized company.”*
- 812.** *In this regard, the Committee wishes to recall that Article 2 of Convention No. 98, ratified by Ireland, establishes the total independence of workers’ organizations from employers in exercising their activities; accordingly, since the creation of works councils can constitute a preliminary step towards the setting up of independent and freely established workers’ organizations, all official positions in such councils should, without exception, be occupied by persons who are freely elected by the workers concerned [see **Digest**, op. cit., para. 404]. As regards the specific acts allegedly undertaken by the company concerned and the overall allegation of an anti-union climate due to a determination by the enterprise not to engage in collective bargaining with a workers’ organization, the Committee takes due note of the indication of the Government and of IBEC that the company concerned is not immune from future complaints under the 2001 Act since the Supreme Court has not conclusively determined that there is a practice of collective bargaining in the enterprise but has rather concluded that the evidence to the contrary was insufficient. In view of the seriousness of the allegations as regards the extent of interference on the part of the employer, the Committee requests the Government to carry out an independent inquiry without delay into the alleged acts of employer interference in order to establish the facts in this specific case and, if necessary, to take the necessary measures to ensure full respect of the principles of freedom of association. It requests the Government to keep it informed of the outcome of such inquiry.*
- 813.** *With regard to the enterprise’s refusal to enter into discussions with IALPA preferring the ERC mechanism and the “right to operate a non-unionized company”, the Committee firmly recalls that direct negotiation between the undertaking and its employees, bypassing representative organizations where these exist, might in certain cases be detrimental to the principle that negotiation between employers’ and workers’ organizations should be encouraged and promoted. The Workers’ Representatives Convention, 1971 (No. 135), and the Collective Bargaining Convention, 1981 (No. 154), also contain explicit provisions guaranteeing that, where there exist in the same undertaking both trade union representatives and elected representatives, appropriate measures are to be taken to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned [see **Digest**, op. cit., paras 945*

and 946]. The Committee invites the Government to review the mechanisms available with the social partners concerned with a view to promoting machinery for voluntary negotiation between employers' and workers' organizations for the determination of terms and conditions of employment.

- 814.** *In light of the above, and noting with interest the Government's statement, contained in its communication from 11 July 2011, that the administration is committed in its Programme for Government to reform the current law on employees' right to engage in collective bargaining (the Industrial Relations (Amendment) Act 2011) so as to ensure compliance by the State with recent judgments of the European Court of Human Rights, as well as the Government's subsequent indication that its reply should not be taken as an indication that the Government will not be proposing any changes in the framework of the ongoing review of the procedures under the Industrial Relations (Amendment) Act 2001, particularly in the light of the Ryanair case, the Committee invites the Government, in full consultation with the social partners concerned, to review the existing framework and consider any appropriate measures, including legislative, so as to ensure respect for the freedom of association and collective bargaining principles set out in its conclusions. In this regard, the Committee recalls that Article 4 of Convention No. 98, ratified by Ireland, provides that measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements. The Committee firmly believes that the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent [see **Digest**, *op. cit.*, para. 881]. Moreover, the Committee recalls that the Collective Agreements Recommendation, 1951 (No. 91), defines the term "collective agreements" as all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more representative workers' organizations, or, in the absence of such organizations, the representatives of the workers duly elected and authorized by them in accordance with national laws and regulations, on the other. The Recommendation, just as Article 4 of Convention No. 98, emphasizes the role of workers' organizations as one of the parties in collective bargaining: only the Recommendation refers to representatives of unorganized workers and grants them a role in collective bargaining solely when no workers' organization exists.*

## **The Committee's recommendations**

- 815.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *Considering that the alleged offer of conditional benefits by the company provided that it would not be required to enter into a collective bargaining relationship with the union, if true, would be tantamount to employer interference in the right of workers to form and join the organization of their own choosing to represent their occupational interests, and as the information available is insufficient to determine whether such an act occurred, and, if it occurred, whether it would have been considered to be contrary to Irish law if proven, the Committee requests the Government to ensure that the protection available against anti-union discrimination would adequately cover such acts, including through a thorough review of the protective measures with the social partners concerned.*

- (b) *In view of the seriousness of the allegations as regards the extent of interference on the part of the employer, the Committee requests the Government to carry out an independent inquiry without delay into the alleged acts of employer interference in order to establish the facts in this specific case, and, if necessary, to take the necessary measures to ensure full respect of the principles of freedom of association. It requests the Government to keep it informed of the outcome of such an inquiry.*
- (c) *In light of the above, and noting with interest the Government's statement, contained in its communication from 11 July 2011, that the administration is committed in its Programme for Government to reform the current law on employees' right to engage in collective bargaining (the Industrial Relations (Amendment) Act 2011) so as to ensure compliance by the State with recent judgments of the European Court of Human Rights, as well as the Government's subsequent indication that its reply should not be taken as an indication that the Government will not be proposing any changes in the framework of the ongoing review of the procedures under the Industrial Relations (Amendment) Act 2001, particularly in the light of the Ryanair case, the Committee invites the Government, in full consultation with the social partners concerned, to review the existing framework and consider any appropriate measures, including legislative measures, so as to ensure respect for the freedom of association and collective bargaining principles set out in its conclusions, including through the review of the mechanisms available with a view to promoting machinery for voluntary negotiation between employers' and workers' organizations for the determination of terms and conditions of employment.*

CASES NOS 2177 AND 2183

INTERIM REPORT

### **Complaints against the Government of Japan presented by**

- **the Japanese Trade Union Confederation (JTUC–RENGO) and**
- **the National Confederation of Trade Unions (ZENROREN)**

*Allegations: The complainants allege that the upcoming reform of the public service legislation, developed without proper consultation of workers' organizations, further aggravates the existing public service legislation and maintains the restrictions on the basic trade union rights of public employees, without adequate compensation*

**816.** The Committee examined these cases at its November 2002, June 2003, March 2006, June 2008, June 2009 and June 2010 meetings, where it presented interim reports, approved by the Governing Body at its 285th, 287th, 295th, 302nd, 305th and 308th Sessions [see 329th Report, paras 567–652; 331st Report, paras 516–558;

340th Report, paras 925–999; 350th Report, paras 1167–1221; 354th Report, paras 951–992 and 357th Report, paras 709–730].

**817.** The Japanese Trade Union Confederation (JTUC–RENGO) (Case No. 2177) submitted additional information in a communication dated 8 September 2011. The National Confederation of Trade Unions (ZENROREN) submitted additional information in a communication dated 21 September 2011.

**818.** The Government submitted its observations in communications dated 13 May and 16 September 2011.

**819.** Japan has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

## **A. Previous examination of the case**

**820.** At its June 2010 meeting, the Committee made the following recommendations:

(a) The Committee welcomes with interest the institutionalized tripartite discussions that have taken place, and trusts that they will continue to take place in a continuing spirit of social dialogue and in the context of the ongoing reform process, particularly as regards the formulation of the Amendment Bill for the National Public Service Employee Law and the committee established under the Ministry of Internal Affairs and Communications to study the issue of the right to organize of firefighters. The Committee once again strongly reiterates its previous recommendations that the Government continue to take steps to ensure the promotion of full social dialogue aimed at effectively, and without delay, addressing the measures necessary for the implementation of the freedom of association principles embodied in Conventions Nos 87 and 98, ratified by Japan, in particular as regards:

- (i) granting basic labour rights to public servants;
- (ii) granting the right to organize to firefighters and prison staff;
- (iii) ensuring that public employees not engaged in the administration of the State have the right to bargain collectively and to conclude collective agreements, and that those employees whose bargaining rights can be legitimately restricted enjoy adequate compensatory procedures;
- (iv) ensuring that those public employees who are not exercising authority in the name of the State can enjoy the right to strike, in conformity with freedom of association principles, and that union members and officials who exercise legitimately this right are not subject to heavy civil or criminal penalties; and
- (v) the scope of bargaining matters in the public service.

The Committee requests the Government to keep it informed of developments on all the above issues.

- (b) The Committee once again reminds the Government that it may avail itself of the technical assistance of the Office, if it so desires.
- (c) The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.

## **B. Additional information from the complainants**

**821.** In its communication of 8 September 2011, JTUC–RENGO states that on 14 December, 2010, the Ministry of Internal Affairs and Communications released a report compiled by the Committee on the Right to Organize of Fire Defence Personnel at its 9th session held



on 3 December. According to the report, the final decision on whether or not to grant firefighters the right to organize should be made by the Government after further examination, however, the Committee believed that it was able to come up with a product which could contribute to the design of the system, should the right to organize be restored. JTUC-RENGO regretted that the Report did not go as far as stating that fire defence personnel should be granted the right to organize. However, the complainant indicated that in 10 June 2011, during a meeting attended by the Internal Affairs and Communications Minister and the Minister for Civil Service Reforms, the Chief Cabinet Secretary had indicated that the Government's official position was "to grant the right to organize to fire defence personnel" in response to the complainant's request. Recalling that the issue of the right of firefighters to organize has been pending since the 1960s, the complainant observed that although measures taken regarding this issue have been moving steadily forward and should be commended, at present, the relevant legislation has yet to be adopted and the right of fire defence personnel to organize is still not a reality.

- 822.** With regard to the right to strike of National Public Service Employees, the complainant indicates that the Government had set up, on 26 November 2010, the Advisory Group on Basic Labour Rights (Right to Strike) of National Public Service Employees, as a private advisory group to the Minister for civil service reform. The Group met five times and released a report on 24 December 2010. According to the report, one possible option would be to determine the timetable for granting the right to strike, considering the actualities and issues surrounding labour-employer negotiations, however the final decision on whether or not to grant the right to strike and the design of a concrete system etc. would be left to the Government. The complainant welcomes the establishment of the Advisory Group as evidence of a change in the Government's attitude which had, for 38 years, adhered to the Supreme Court ruling that denying public service employees the right to strike was not unconstitutional.
- 823.** The complainant adds that the Autonomous Labour-Employer Relations System Reform Draft was released on 24 December 2010. On 5 April, 2011, the Headquarters for Promoting Civil Service Reform formally adopted the "whole picture" of the reform based on the National Civil Service Reform Law, etc. Then, on 3 June 2011, the Cabinet adopted the Four Bills related to Civil Service Reform as a step toward establishing the Autonomous Labour-Employer Relations System, and the Bills were presented to the Diet. Although the Ministry of Internal Affairs and Communications released the "Basic vision of labour-management system for local public service employees" on 2 June 2011. However, no related bills were drawn up or presented. The complainant indicates that the Government and JTUC-RENGO as well as the Alliance of Public Services Workers Unions (APU) have had meaningful consultations throughout these series of events.
- 824.** The complainant commended the presenting of the Reform Bills in the Diet as an historic first step towards opening the possibility of restoring fundamental workers' rights. However, recalling that at the present stage, the Reform Bills have not yet been debated in the Diet and that bills for local public service employees have not yet been drawn up, the complainant expresses the hope that the Government will treat the Committee's recommendations set out in this case seriously and act in good faith to implement them by moving ahead with the discussion of the Reform Bills in the Diet and by drawing up bills for local civil service employees at the earliest possible opportunity.
- 825.** In its communication of 21 September 2011, ZENROREN acknowledged progress – though limited – in the Government's action in studying several labour relations systems and preparing necessary bills introduced to the Diet. ZENROREN views the change in the Government's attitude toward the recovery of the basic labour rights in the public sector as closely linked to the repeated recommendations from the Committee on Freedom of Association.

- 826.** In the decision making process of the “Overall Picture” adopted in April 2011, there were consultation meetings between the Government and ZENROREN, however the complainant indicates that they turned out to be unsatisfactory for the union since the consultations were held only a month after the Government plan was made public. In addition, they took place in a confused situation after the Great East Japan Earthquake which occurred in March 2011. ZENROREN declares that it had expressed its disappointment in April, on the eve of the adoption of the “Overall Picture”, for the lack of efforts and faithfulness on the part of the Government on several points expressed during the negotiation. ZENROREN regrets that the Government remained reluctant to take its remarks into consideration. The four bills related to the public personnel system would therefore be presented and adopted without any of the changes ZENROREN had asked for. ZENROREN further observes that the debate over the recovery of basic labour rights for local government employees has not progressed since the hearings sessions of the stakeholders held from April to May 2011 by the Ministry of Public Management and Home Affairs, the authority responsible for the management of local government personnel. In this regard, ZENROREN recalls the viewpoints expressed during the hearings by its affiliate organizations (the Japan Federation of Prefectural and Municipal Workers’ Union (JICHIROREN) and the All Japan Federation of Teachers’ and Staff Unions (ZENKYO)).
- 827.** Regarding the right to organize of firefighting personnel, ZENROREN indicates that the report issued by the Study Committee on the Right to Organize of Firefighting Personnel on December 2010 merely presented five possible scenarios including the recognition of the right to organize alone, the recognition of the right to organize and the labour–management consultation, the recognition of the right to organize and the right to negotiate with the employing authority (without the right to conclude collective labour agreement), along with a scenario of “improving the Fire Defence Personnel Committee System instead of the recovery of the right to organize”. In ZENROREN’s point of view, the Government has not succeeded in convincing those who are negative to the return of the right to organize of firefighting personnel, and it has not yet adopted a proper position for promoting the recovery of the basic labour rights by taking into consideration the differences between firefighters and policemen as advised by the ILO.

### **C. The Government’s reply**

- 828.** In its communication of 13 May 2011, the Government states that in April 2011, the “whole picture of the reform based on the Civil Service Reform Law, etc.” was formally adopted on April 2011 by the Headquarters for Promoting Civil Service Reform, headed by the Prime Minister and comprised of all Ministers of State. The purpose of the ongoing reforms of the civil service system is to realize efficient and high-quality government services which meet the needs of the people, responding to changing social and economic circumstances. The “whole picture” is a package of government policies on detailed measures and the schedule for the realization of all the reforms specified in the Civil Service Reform Law, including the introduction of an autonomous labour–employer relations system. The Government declares that in the process of drawing up the “whole picture”, it held discussions with JTUC–RENGO/RENGO–PSLC, ZENROREN, and KOKKOROREN at various levels. The “whole picture” also took public opinion into consideration via public consultation on the autonomous labour–employer relations system which was conducted from December 2010 to January 2011, prior to the April 2011 decision.
- 829.** The Government gives further details on the main contents of the measures of the autonomous labour–employer relations system in the “whole picture”. According to the Government, in order to foster the motivation and abilities of personnel and secure and utilize a skilled workforce, the current framework has to be transformed to a new one

where, with increased awareness, both parties of labour–employer relations negotiate the issue of working conditions autonomously and promote reform of the personnel management and remuneration system, responding to changing circumstances and new political issues. Additionally, the Government seeks to establish a framework for determining working conditions which allows personnel to take part in the process and requires them to share responsibility. Also, this framework should be transparent and should be supported by understanding of the public with regard to the quality of personnel output.

**830.** The Government has determined its policy on granting the right to conclude collective agreements to national public service employees in the non-operational sector (excluding police officials and officials working for the Japan Coast Guard and penal facilities, and administrative vice-ministers, director-generals of agencies and director-generals of bureaus of ministries), and establishing the matters to be handled by collective bargaining as well as the parties thereto and procedures thereof, the validity of collective agreements, and procedures for conciliation, mediation, and arbitration by the Central Labour Relations Commission. To this end, a new “Act on Labour Relations of National Public Service Employees (provisional title)” is to be enacted.

**831.** The Government indicates that this new Act on Labour Relations of National Public Service Employees would provide for the following with the aim of creating a framework in which decisions on the working conditions of personnel can be taken autonomously via labour–employer negotiations:

- The Act will specify the response to be given by the authorities when they receive a proposal from a labour union certified by the Central Labour Relations Commission for lawful collective bargaining with regard to the working conditions of personnel or labour–employer relations such as collective bargaining procedures.
- In cases in which a collective agreement is entered into between a certified labour union and a competent authority, this shall be enforceable. In cases in which a collective agreement is entered into which includes matters necessitating the establishment or revision of a law or cabinet order providing for working conditions, the Cabinet shall be obliged to submit relevant bills to the Diet or enact or revise relevant cabinet orders.
- Unfair labour practices such as the treatment of staff in a disadvantageous manner by authorities, refusal of collective bargaining, financial assistance to or interference with the management of labour unions are prohibited. When the Central Labour Relations Commission receives allegations pertaining to unfair labour practices from a certified labour union, it shall make a judgment on the case and, if necessary, issue a relief order.
- The Act will give the authority to the Central Labour Relations Commission to conduct conciliation, mediation and arbitration in which certified labour unions can take part. Specifically, it sets the requirement for initiation of arbitration as an application from both relevant parties, application from a relevant party where no settlement is found to a dispute after a period of two months since the initiation of conciliation or mediation, or a decision by the Central Labour Relations Commission on an ongoing case of conciliation or mediation.

**832.** Furthermore, in the Government’s view, in order to respond to changing social and economic circumstances and to realize efficient and high-quality government services, the necessary personnel administration functions are to be centralized, and a Civil Service Office is to be established which handles the functions of the structures and operations of the government as well. To this end, a “Civil Service Office Establishment Act” is to be

enacted. The Civil Service Office is to have responsibility for the overall personnel management and remuneration system and undertake negotiations with labour unions as the employer.

- 833.** The Government adds that following the granting of the right to conclude collective agreements and the establishment of the employer organization (Civil Service Office), the National Personnel Authority and its recommendation functions will be abolished. A Personnel Fairness Committee (provisional title) is to be established under the jurisdiction of the Prime Minister, as a third party organization which will be responsible for ensuring fairness in personnel administration, and is to deal with personnel complaints, restrictions on personnel regarding political or commercial activities, and provide recommendations on improvements to personnel administration to the relevant ministers. The National Public Service Act is to be revised to accommodate measures relating to the autonomous labour–employer relations system.
- 834.** In its latest communication of September 2011, the Government indicates that, following the formal adoption of the “whole picture” of the reform based on the Civil Service Reform Law, etc., on April 5 2011, the Government drafted four civil service reform-related bills and submitted them to the Diet on 3 June 2011. However the Bills were not deliberated during the said session and will be carried over to the next session. The Reform Bills consist of four bills, namely: (i) the Amendment Bill for the National Public Service Employees Law; (ii) the Draft Act on Labour Relations of National Public Service Employees; (iii) the Draft Act for Establishment of the Civil Service Office; and (iv) the Draft Act on Arrangement of Relevant Acts Incidental to Enforcement of the Amendment Bill for the National Public Service Employees Law. In the process of establishing the Bills, the Government held discussions, since December 2010, with JTUC–RENGO and RENGO–PSLC at various levels. Discussions were also held with ZENROREN and KOKKOROREN at various levels. The Government specifies that the various opinions expressed during the discussions were reflected in the Reform Bills.
- 835.** The Government gives full details on concrete provisions that would help create a framework in which decisions on the working conditions of personnel can be taken autonomously via labour–employer negotiations. These provisions relate to: (i) the organization of labour unions; (ii) the certification of labour unions; (iii) the system of leaves of absence for full-time union officers; (iv) collective bargaining; (v) obligations involved in concluding a collective agreement; (vi) the prohibition and examination, etc. of unfair labour practices; (vii) conciliation, mediation, and arbitration by the Central Labour Relations Commission; and (viii) effect of arbitration awards.
- 836.** With regard to the issue of granting the right to strike of National Public Service Employees, the Government indicates that a supplementary provision of the Draft Act on Labour Relations of National Public Service Employees provides that “taking into consideration the status of enforcement of this Act including the status of operation of collective bargaining and the status of operation of the system for conciliation, mediation, and arbitration, and the status of public opinion on the implementation of the autonomous labour–employer relations system, the Government shall examine the right to strike of national public service employees. And then, necessary measures are to be taken based on the outcome of the examination”.
- 837.** The Government adds that an Advisory Group on Basic Labour Rights (Right to Strike) of National Public Service Employees was set up in November 2010 under the Minister of Civil Service Reform, composed of experts including a member related to labour unions, etc. In the Advisory Group, without prejudicing the conclusions to be drawn, the examination focused on the following points: the meaning of the right to strike in light of the autonomous labour–employer relations system; points to note on the decision on

whether to grant the right to strike; and points to note for exercising prudence in concrete system design for cases in which the right to strike is granted. A report summarizing model cases to balance the right to strike and public nature of the functions and matters specific to the civil service was released on December 2010. The Government then conducted public consultation on measures for the autonomous labour–employer relations system from December 2010 to January 2011, using the draft on the reform for autonomous labour–employer relations and the report of the Advisory Group listed as reference materials. 217 comments, including comments from those connected to labour unions, were collected.

- 838.** As a result, the Government compiled the “whole picture” in April 2011 in which the policy is expressed as follows: “An examination is to be conducted on the right to strike of national public service employees, taking into consideration the actualities of collective bargaining under the newly implemented autonomous labour–employer relations system and public opinion on the implementation of the system. Necessary measures are to be taken based on the outcome of the examination”. After further legal examination, the Government established the above provision in the Reform Bills.
- 839.** With regard to the basic rights of local public service employees, the Government indicates that the “whole picture” stipulates for a prompt study to be conducted on the basic labour rights of local public service employees in regular service with the advice of relevant parties, based on the characteristics of local public service employee systems in a manner consistent with measures for the labour–employer relations system of national public service employees. As such, a “meeting for hearing opinions of relevant parties concerning the basic labour rights of local public service employees” was held at the Ministry of Internal Affairs and Communications to hear the opinions of relevant parties. After taking into consideration the opinions heard at this meeting and the contents of bills concerning national public service employees, the “Basic Concept of the Labour–Employer Relations System for Local Public Service Employees” was compiled and published on 2 June 2011. The Government details the key contents of the system.
- 840.** Finally, with regard to right to organize of fire defence personnel, the Government provides information on the Report of the Committee on the right to organize of fire defence personnel (Appendices three and four of its May communication). It also indicates that further examination will be made in the future in accordance with the “Basic Concept of the Labour–Employer Relations System for Local Public Service Employees” towards the realization of system reform.
- 841.** In conclusion, the Government states that it is doing its utmost to have meaningful discussions to achieve the civil service reform, bearing in mind the basic idea that frank exchanges of views and coordination with relevant organizations are necessary. The Government will also continue to refer to the recommendations of the Committee on Freedom of Association and provide the Office with timely and relevant information on the situation.

#### **D. The Committee’s conclusions**

- 842.** *The Committee recalls that these cases, initially filed in March 2002, concern the current reform of the public service in Japan. The Committee notes the latest comments from the Committee of Experts on the Application of Conventions and Recommendations on the implementation of Conventions Nos 87 and 98 which relate to the legislative aspects of the reform.*

- 843.** *With regard to the civil service reform, the Committee notes that, pursuant to its last examination of the case in June 2010, the Government has taken the following steps forward: (i) the Government adopted on 5 April 2011 the “whole picture of the reform based on the Civil Service Reform Law, etc.” which is a package of government policies on detailed measures and the schedule for the realization of all the reforms specified in the Civil Service Reform Law, including the introduction of the autonomous labour–employer relations system; (ii) the Government drafted four civil service reform related bills “the Reform Bills” on the basis of the whole picture: the Amendment Bill for the National Public Service Employees Law, the Draft Act on Labour Relations of National Public Service Employees, the Draft Act for Establishment of the Civil Service Office and the Draft Act on Arrangement of relevant Acts Incidental to Enforcement of the Amendment Bill for the National Public Service Employees Law were all submitted to the Diet on 3 June 2011; and (iii) on 2 June 2011, the Ministry of Internal Affairs and Communications released its Basic Concept of the Labour–Employer Relations System for Local Public Service Employees.*
- 844.** *The Committee notes from the information provided by the complainants and the Government that throughout the abovementioned process, the Government held consultations with employees’ organizations including JTUC–RENGO, RENGO–PSLC, ZENROREN and KOKKOROREN at various levels, although ZENROREN has expressed its lack of satisfaction with the consultation process and its outcome.*
- 845.** *The Committee notes that, according to the Government, once the four Reform Bills are adopted by the Diet, a new framework will be established in the national public service where both parties of labour–employer relations negotiate and determine autonomously the issue of working conditions and promote reform of the personnel management and remuneration system, responding to changing circumstances and new political issues. The Committee observes in particular that the new framework includes granting the right to conclude collective agreements to national public service employees in the non-operational sector, establishing a Civil Service Office and suppressing the National Personnel Authority and its recommendation functions, treatment of the right to strike of national public service employees and basic labour rights of local public service employees.*
- 846.** *The Committee observes that the Reform Bills were not brought under deliberation during the 177th ordinary session of the Diet which ended in August 2011, but takes due note of the Government’s indication that they will be deliberated at the next session of the Diet.*
- 847.** *While commending the efforts of the Government to hold systematic consultations with interested parties throughout the reform process, the Committee encourages the Government to maintain full, frank and meaningful consultations with all interested parties on any remaining issues. The Committee expects that the Government will pursue its efforts to complete the ongoing civil service reform in a continuing spirit of social dialogue in order to find mutually acceptable solutions to all the issues raised. It requests the Government to continue to provide information on the progress made in the deliberation of those Bills, and on any relevant law adopted by the Diet.*
- 848.** *With regard to the right to strike of National Public Service Employees, the Committee notes that the Government had set up, on 26 November 2010, the Advisory Group on Basic Labour Rights (Right to Strike) of National Public Service Employees, as a private advisory group to the Minister for Civil Service Reform. The Group met several times and released a report on 24 December 2010. According to the report, one possible option would be to determine the timetable for granting the right to strike, considering the actualities and issues surrounding labour–employer negotiations, however the final decision on whether or not to grant the right to strike and the design of a concrete system*

*etc. would be left to the Government. The Committee observes that JTUC–RENGO welcomed the establishment of the Advisory Group as evidence of a change in the Government’s attitude towards the issue.*

- 849.** *With regard to its long-standing comments concerning the need to recognize the right to organize for firefighting personnel, the Committee notes the Government’s indication that further examination will be made in the future in accordance with the “Basic Concept of the Labour–Employer Relations System for Local Public Service Employees” toward the realization of system reform. The Committee also notes JTUC–RENGO and ZENROREN indications that the Ministry of Internal Affairs and Communications released a report in December 2010 compiled by the Committee on the Right to Organize of Fire Defence Personnel. According to the said report, the final decision on whether or not to grant firefighters the right to organize should be made by the Government after further examination. The report – provided by the Government in annex to its communication – also presented possible scenarios including the recognition of the right to organize alone, the recognition of the right to organize and the labour–management consultation, the recognition of the right to organize and the right to negotiate with the employing authority (without the right to conclude collective labour agreement), along with a scenario of “improving the Fire Defence Personnel Committee System instead of the recovery of the right to organize”. However, the Committee notes that JTUC–RENGO regretted that the Report did not go as far as stating that fire defence personnel should be granted the right to organize. The Committee also notes that in ZENROREN’s point of view, the Government has not succeeded in convincing those who are negative to the return of the right to organize to fire fighting personnel, and it has not yet adopted a proper position for promoting the recovery of the basic labour rights by taking into consideration the differences between firefighters and police as advised by the ILO. Finally, the Committee notes that while it acknowledges that measures taken regarding the issue of granting the right to organize to fire defence personnel have been moving steadily forward, JTUC–RENGO observed that at present, the relevant legislation has yet to be adopted and the right of fire defence personnel to organize is still not a reality.*
- 850.** *The Committee observes that no specific information has been provided In respect of granting the right to organize to prison officers. It wishes to recall once again the importance it attaches to the right of all workers, including prison officers, to form and join organizations of their own choosing.*
- 851.** *The Committee welcomes the continuing institutionalized tripartite discussions concerning the various issues raised in the present case. It expresses the firm hope that the Government will vigorously pursue its efforts to complete the ongoing civil service reform process in a spirit of social dialogue in order to find mutually acceptable solutions aimed at effectively, and without delay, addressing the measures necessary for the implementation of the freedom of association principles embodied in Conventions Nos 87 and 98, ratified by Japan, in particular as regards: (i) granting basic labour rights to public servants; (ii) fully granting the right to organize and to collective bargaining to firefighters and prison staff; (iii) ensuring that public employees not engaged in the administration of the State have the right to bargain collectively and to conclude collective agreements, and that those employees whose bargaining rights can be legitimately restricted enjoy adequate compensatory procedures; (iv) ensuring that those public employees who are not exercising authority in the name of the State can enjoy the right to strike, in conformity with freedom of association principles, and that union members and officials who exercise legitimately this right are not subject to heavy civil or criminal penalties; and (v) the scope of bargaining matters in the public service. The Committee requests the Government to keep it informed of developments on all the above issues.*

## The Committee's recommendation

852. *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendation:*

*The Committee welcomes the continuing institutionalized tripartite discussions concerning the various issues raised in the present case. While commending the efforts of the Government to hold systematic consultations with interested parties throughout the reform process, the Committee encourages the Government to maintain full, frank and meaningful consultations with all interested parties on any remaining issues. It expresses the firm hope that the Government will vigorously pursue its efforts to complete the ongoing civil service reform process in a spirit of social dialogue in order to find mutually acceptable solutions aimed at effectively, and without delay, addressing the measures necessary for the implementation of the freedom of association principles embodied in Conventions Nos 87 and 98, ratified by Japan, in particular as regards:*

- (i) granting basic labour rights to public servants;*
- (ii) fully granting the right to organize and to collective bargaining to firefighters and prison staff;*
- (iii) ensuring that public employees not engaged in the administration of the State have the right to bargain collectively and to conclude collective agreements, and that those employees whose bargaining rights can be legitimately restricted enjoy adequate compensatory procedures;*
- (iv) ensuring that those public employees who are not exercising authority in the name of the State can enjoy the right to strike, in conformity with freedom of association principles, and that union members and officials who exercise legitimately this right are not subject to heavy civil or criminal penalties; and*
- (v) the scope of bargaining matters in the public service.*

*The Committee requests the Government to keep it informed of developments on all the above issues.*



CASE NO. 2850

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Malaysia  
presented by  
the Malaysian Trade Union Congress (MTUC)**

***Allegations: The complainant organization alleges that the Minister of Human Resources registered an in-house union in the Malayan Banking Berhad (Maybank) to represent the same category of workers represented by the National Union of Bank Employees (NUBE) and that the NUBE Vice-President and the NUBE Treasurer-General have been dismissed following a meeting with the Minister of Human Resources***

- 853.** The complaint is contained in a communication from the Malaysian Trades Union Congress (MTUC) dated 8 April 2011 and 28 February 2012.
- 854.** The Government forwarded its response to the allegations in communications dated 22 June and 5 October 2011.
- 855.** Malaysia has ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), but has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

**A. The complainants' allegations**

- 856.** In a communication dated 8 April 2011, the complainant organization indicates that the present complaint is a case of union busting and deals with the arbitrary, unfair and unacceptable decision of the Minister of Human Resources and the Director-General of Trade Unions (DGTU) to register an in-house union in the Malayan Banking Berhad (Maybank) representing the same category of workers as represented by the National Union of Bank Employees (NUBE). The complainant supports NUBE's calls for the cancellation of the registration of the in-house union Maybank Non-Executive Employees Union (MAYNEU).
- 857.** The complainant criticizes that MAYNEU was registered despite full knowledge that NUBE was already representing the same category of workers in Maybank, and that the registration has caused great strife, animosity and industrial disharmony among workers in Maybank who have been represented by NUBE for more than 50 years and are confused by the sudden arrival of an in-house union. According to the complainant, the registration results in duplicity of trade unions representing the very same workers, although the intention of the law is clear in that there ought not to be such duplicity.
- 858.** The complainant further indicates that NUBE denounces the manner in which the registration of the in-house union was approved. There was no consultation whatsoever by the DGTU with NUBE prior to the registration of MAYNEU. The application for the

registration of MAYNEU was submitted in November 2010, and the DGTU registered the in-house union within two months of receiving the application on 3 January 2011. However, the complainant states that, in the case of NUBE seeking amendments to its Constitution, the DGTU rejected the amendments after more than two years of submission, and NUBE's appeal filed on 28 January 2011, stating the reasons for the amendments, was eventually rejected. With reference to a similar case of registration of an in-house union at another bank, the complainant denounces union-busting tactics by the DGTU.

- 859.** The complainant highlights the grounds given by the DGTU for approving the application for registration of the in-house union MAYNEU in Maybank as follows: (i) the seven individuals who applied to register the in-house union were not members of NUBE; (ii) a large population of workers in Maybank cannot join NUBE; (iii) an in-house union can better represent workers in Maybank; and (iv) the law allows another union to seek recognition for collective bargaining purposes after a period of three years. The complainant believes that the DGTU was erroneous in its decision for the following reasons: (i) out of the seven individuals who applied for the registration of the in-house union, six were members of NUBE at the time of the application. NUBE has expelled and taken legal action against three of them in December for publishing and disseminating false and defamatory statements regarding NUBE and its officials. One of the seven persons concerned continued to be a member of NUBE until January 2011; (ii) one of the seven individuals who applied for the registration of the in-house union had not joined NUBE for personal reasons, which cannot be the basis for the DGTU to register an in-house union; (iii) NUBE represented, as at 31 January 2011, a total of 5,153 workers out of approximately 6,000 workers in Maybank. There was therefore no question of NUBE not representing the majority of the workers capable of being represented; and (iv) there is no evidence of any kind to show that NUBE has failed in its duties as a union in representing its members in Maybank. In the complainant's view, the DGTU has thus taken into consideration irrelevant matters and wrong information in arriving at its decision to register the in-house union.
- 860.** The complainant believes that the provisions of the MCBA–NUBE Collective Agreement have been violated by Maybank, particularly section 6 which reads: “The union is the sole negotiation body.” Moreover, according to the complainant, the CEO of Maybank admitted in a CEOs meeting that the formation of the in-house union was with the intention of crippling NUBE's influence in the banking industry. The complainant asserts that Maybank has granted several individuals who claimed to be MAYNEU members trade union leave, which they used to go to Maybank branches around the country to try to convince and compel NUBE members to resign from NUBE and instead join MAYNEU, and Maybank managers have also assisted to facilitate the recruitment by providing these persons with managers' or meeting rooms to enable them to hold meetings with NUBE members during office hours.
- 861.** In addition, the complainant claims that Maybank managers were used to coerce NUBE members to resign from NUBE and sign up with MAYNEU, and that Maybank has taken a stand by not allowing NUBE officials to enter Maybank premises to meet members and hold meetings. Furthermore, Maybank, while having rejected the provision of better benefits during collective bargaining with NUBE with the excuse that it has a large workforce, is now willing to provide better benefits to the in-house union. Finally, the complainant alleges that Maybank security guards and the police were used to harass and intimidate NUBE Officials.
- 862.** The complainant also explains that it was compelled to file an Application for Judicial Review in the High Court on 12 February 2011. The complainant indicates that, prior to filing the application, it wrote to the DGTU on 27 and 28 January 2011, but to date has not received any response; and that it appealed on 28 January 2011 to the Deputy Secretary

General (Operations) in accordance with section 71A of the Trade Unions Act, 1967, without receiving any response; thus having no other alternative than to file an application for judicial review, in order to avoid any technical objections with regard to filing court proceedings within a certain time of getting to know of the registration of the in-house union by the DGTU (e.g. time-barred application). According to the complainant, a meeting with the Minister of Human Resources and other Ministry officials was held on 28 February 2011. Despite assurances to revert to it within two weeks, no response has been received concerning the appeal to cancel the registration of the in-house union.

**863.** Finally, in its communication dated 28 February 2012, the complainant indicates that the case was heard at the High Court and the Appellate Court, and that a second meeting took place on 30 January 2012 between the Ministry of Human Resources and high-level MTUC and NUBE officials without achieving any concrete results. According to the complainant, the bank management dismissed, contrary to the protection provided by law, the NUBE Vice-President Mr Abdul Jamil Jalaludeen and the NUBE Treasurer-General Mr Chen Ka Fatt, on the day following the meeting, in order to intimidate the remaining union members. The complainant further states that the Government failed to listen to the concerns raised by the MTUC in connection with the amendments to the Employment Act 1995.

## **B. The Government's reply**

**864.** In its communications dated 22 June and 5 October 2011, the Government observes that the complaint criticizes the registration of an establishment-based union in Maybank, namely the MAYNEU.

**865.** The Government indicates that the 1959 Trade Union Act: (i) provides for the existence of more than one union; (ii) guarantees workers the right to determine the union of their choice through a secret ballot vote; (iii) stipulates that the union that obtains the majority of the votes will represent the workers; and (iv) allows other unions to seek recognition after three years.

**866.** The Government concludes that these provisions are intended to grant free formation of trade unions (freedom of association) by workers. There are many instances where national unions have sought recognition where establishment-based unions existed. In its view, the ultimate solution in these cases is the right of workers to choose the union that should represent them, which is actually in the spirit of freedom of association and not union busting.

**867.** Furthermore, the Government states that the registration of a trade union is under the DGTU's jurisdiction. The Trade Union Act confers on the DGTU the general supervision, direction and control on matters relating to trade unions. Under section 71A of the Trade Unions Act, any aggrieved party may appeal before the Minister of Human Resources against any decision by the DGTU to register or not to register a particular union. The aggrieved party may also make an application for judicial review or injunction before the High Court against the DGTU's or the Minister's decision.

**868.** According to the Government, the decision of the DGTU to register MAYNEU was challenged in the High Court, and the High Court has decided that the registration is valid and within the power of DGTU. However, the decision of the High Court is being appealed by NUBE to the Court of Appeal. Furthermore, there is a defamation suit filed by Maybank against NUBE in the High Court. The Government indicates that it is therefore not in a position to comment further until these cases are finally disposed off.

### C. The Committee's conclusions

- 869.** *The Committee notes that, in the present case, the complainant criticizes that the Minister of Human Resources registered MAYNEU, an in-house union at Maybank, to represent the same category of workers as represented by NUBE.*
- 870.** *The Committee notes the complainant's allegations that: (i) the decision of the Minister and the DGTU to register MAYNEU results in duplicity of trade unions representing the same workers; (ii) contrary to the DGTU's statement that the seven individuals who applied for the registration of the in-house union were not members of NUBE, six were NUBE members at the time of application; (iii) contrary to the DGTU's statement that a large population of workers in the bank cannot join NUBE and an in-house union can better represent workers in the bank, NUBE represents, as at 31 January 2011, the majority of the workers capable of being represented (5,153 out of approximately 6,000 workers) and there is no evidence that NUBE had failed in its duties as a union; (iv) the registration of MAYNEU was approved without any prior consultation with NUBE within two months of receiving the application, whereas the DGTU rejected the amendments sought by NUBE to its Constitution after more than two years of submission, which, in the complainant's view, illustrates the union-busting tactics of the DGTU; (v) the bank's CEO admitted that the formation of the in-house union aimed at crippling NUBE's influence in the banking industry; (vi) the bank has granted several individuals claiming to be MAYNEU members trade union leave, which they used to try to convince and compel NUBE members in several branches of the bank to resign and instead join MAYNEU; (vii) the management has facilitated the recruitment by providing managers' or meeting rooms to enable these persons to hold meetings with NUBE members during office hours; (viii) the management was used to coerce NUBE members to resign and sign up with MAYNEU; (ix) NUBE officials were not allowed to enter the bank's premises to meet members and hold meetings; (x) the bank, while having rejected the provision of better benefits during collective bargaining with NUBE, is now willing to provide better benefits to the in-house union; and (xi) the bank's security guards and the police were used to harass and intimidate NUBE officials. The Committee also notes that, in the absence of a response from the DGTU and the Minister of Human Resources concerning the appeal against the registration of the in-house union, the complainant filed an application for judicial review in the High Court.*
- 871.** *The Committee notes that, in the Government's view, the provisions of the Trade Union Act that allow for the existence of more than one union in an establishment, are in the spirit of freedom of association and not of union busting. The Committee notes the Government's indication that the High Court has decided that the registration of MAYNEU is valid and within the powers of the DGTU, that this ruling is being appealed by NUBE, and that, in addition, there is a defamation suit against NUBE filed by the bank before the High Court. The Committee notes that the Government states that it is not in a position to comment in more detail until these cases are disposed of.*
- 872.** *As regards the registration by the DGTU of MAYNEU, which is denounced by the complainant as an act of union busting against NUBE, the Committee notes that, according to section 12 of the Trade Union Act, the DGTU may refuse to register a trade union in respect of a particular establishment, if he is satisfied that there is already in existence a union representing the workers in that establishment and if it is not in the interest of those workers that there be another union. In this regard, the Committee notes that the DGTU has considered that the registration of an in-house union would be in the interest of the workers and that the registration has been ruled valid by the High Court. Moreover, the Committee wishes to highlight that it has always held that a provision authorizing the refusal of an application for registration if another union, already registered, is sufficiently representative of the interests which the union seeking*

registration proposes to defend, means that, in certain cases, workers may be denied the right to join the organization of their choice, contrary to the principles of freedom of association. Consequently, the Committee has previously suggested that States should amend their legislation so as to make it clear that when a trade union already exists for the same employees as those whom a new union seeking registration is organizing or is proposing to organize, this cannot give rise to objections of sufficient substance to justify the registrar in refusing to register the new union [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 326 and 328]. The Committee has already requested, in the framework of Case No. 2301, the revision of certain provisions of national legislation in this respect, including section 12. The Committee therefore considers that the registration by the DGTU of an additional trade union (the in-house union MAYNEU), despite the existence of a representative union at the bank (NUBE), does not in itself give rise to a violation of freedom of association. However, the Committee wishes generally to recall that any favourable or unfavourable treatment by the public authorities of a particular trade union as compared with others, if it is not based on objective pre-established criteria of representativeness and goes beyond certain preferential rights related to collective bargaining and consultation, would constitute an act of discrimination which might jeopardize the right of workers to establish and join organizations of their own choosing. The Committee trusts that due account is being taken of this principle. It further requests the Government to provide information as to the impact of the registration of MAYNEU on the recognition of NUBE as bargaining agent in the light of its apparent majority representation, which has not been contested by the Government, and the previously existing collective bargaining agreement, which recognizes NUBE as the bargaining partner. The Committee also requests to be kept informed of the final outcome of the ongoing judicial proceedings.

- 873.** *With respect to the alleged acts of harassment and intimidation against NUBE officials by the bank's security guards and the police, the Committee notes with regret the Government's failure to provide any information concerning these serious allegations. The Committee wishes to recall that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected [see **Digest**, op. cit., para. 44]. The Committee requests the Government to swiftly conduct an independent inquiry into the allegations of harassment and intimidation of NUBE officials and keep it informed of its outcome.*
- 874.** *The Committee further regrets that the Government has not provided its observations in relation to the other measures allegedly taken by the bank. In these circumstances, the Committee notes the seriousness of the allegations that the bank, the management of which allegedly admitted that the formation of the in-house union was aimed at crippling NUBE's influence in the banking industry, would have coerced NUBE members to resign and sign up with MAYNEU, granted trade union leave to several MAYNEU members for the purpose of trying to convince or compel NUBE members to resign and instead join MAYNEU, and provided manager or meeting rooms in order to facilitate such recruitment of NUBE members during office hours. In this regard, the Committee reminds the Government that respect for the principles of freedom of association requires not only that the public authorities exercise great restraint in relation to intervention in the internal affairs of trade unions. It is even more important that employers exercise restraint in this regard. They should not, for example, do anything which might seem to favour one union at the expense of another. As regards allegations of anti-union tactics in the form of bribes offered to union members to encourage their withdrawal from the union and the presentation of statements of resignation to the workers, as well as the alleged efforts made to create puppet unions, the Committee has always considered such acts to be contrary to Article 2 of Convention No. 98, which provides that workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each*

*other or each other's agents in their establishment, functioning or administration [see **Digest**, op. cit., paras 859 and 858]. In light of the above freedom of association principles and the Government's obligation under Articles 1 and 2 of Convention No. 98, ratified by Malaysia, to ensure the adequate protection of workers' organizations against acts of interference on the part of employers, the Committee requests the Government to institute without delay an independent investigation into the alleged acts of interference against NUBE by the bank and to keep it informed of the results.*

- 875.** *Concerning the allegation that NUBE officials were not allowed to enter the bank's premises to meet members and hold meetings, the Committee reminds the Government that, for the right to organize to be meaningful, the relevant workers' organizations should be able to further and defend the interests of their members, by enjoying such facilities as may be necessary for the proper exercise of their functions as workers' representatives, including access to the workplace of trade union members [see **Digest**, op. cit., para. 1106]. The Committee requests the Government to take the necessary measures to guarantee the access of NUBE representatives to the bank's premises and to keep it informed in this regard.*
- 876.** *Lastly, expressing concern at the alleged anti-union dismissal of the NUBE Vice-President Mr Abdul Jamil Jalaludeen and the NUBE Treasurer-General Mr Chen Ka Fatt on 31 January 2012, the Committee requests the Government to provide its observations concerning the allegations contained in the latest communication of the complainant, as well as to supply the relevant decisions of the High Court and the Appellate Court.*

### **The Committee's recommendations**

- 877.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) As regards the registration of MAYNEU, the Committee requests the Government to provide information as to the impact of the registration of MAYNEU on the recognition of NUBE as bargaining agent in the light of its apparent majority representation and the previously existing collective bargaining agreement recognizing NUBE as the bargaining partner; as well as to keep it informed of the final outcome of the ongoing judicial proceedings.*
  - (b) With respect to the allegations of harassment and intimidation of NUBE officials by the bank's security guards and by the police, the Committee requests the Government to swiftly conduct an independent inquiry into these allegations and to keep it informed of its outcome.*
  - (c) In light of the Government's obligation under Convention No. 98 to ensure the adequate protection of workers' organizations against acts of interference on the part of employers, the Committee requests the Government to institute without delay an independent investigation into the alleged acts of interference against NUBE by the bank and to keep it informed of the results.*
  - (d) The Committee requests the Government to take the necessary measures to guarantee the access of NUBE representatives to the bank's premises and to keep it informed in this regard.*

- (e) *Expressing concern at the alleged anti-union dismissal of the NUBE Vice-President Mr Abdul Jamil Jalaludeen and the NUBE Treasurer-General Mr Chen Ka Fatt on 31 January 2012, the Committee requests the Government to provide its observations concerning the allegations contained in the latest communication of the complainant, as well as to supply the relevant decisions of the High Court and the Appellate Court.*

CASE No. 2828

DEFINITIVE REPORT

**Complaint against the Government of Mexico  
presented by  
the Independent Union of Workers of the San Luis  
Potosí State Government (SITTGE)  
and supported by  
the World Federation of Trade Unions (WFTU)**

*Allegations: Arrest of trade unionists,  
prosecution of a trade union official, and violent  
clearance by the police of a protest camp  
established by the complainant union*

- 878.** The complaint is contained in a communication dated 10 September 2010 from the Independent Union of Workers of the San Luis Potosí State Government (SITTGE), supported by the World Federation of Trade Unions (WFTU) through a communication dated 20 December 2010.
- 879.** The Government sent its observations in communications dated November 2011.
- 880.** Mexico has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

- 881.** In its communication dated 20 December 2010, SITTGE alleges that since February 2010 it has been calling on the Governor of San Luis Potosí State to reinstate 12 of its members who were dismissed from their employment and to honour agreements signed by the previous governor. However, the Governor and other authority figures have so far refused to receive representatives of the union or engage in dialogue, despite their obligations towards the general public. SITTGE adds that on 24 May 2010, Ms Francisca Reséndiz Lara, the General Secretary of the union, was arrested. The latter was also detained by public security officials for six hours on 1 June 2010 when, having attempted to enter Palacio de Gobierno (Government House), together with other union members, to be received by a representative of the Governor, she was accused of committing various offences, namely threatening behaviour, assault, affronts to authority and rebellion. On 2 June 2010 she was detained and brought to the Centre for Prevention and Social Rehabilitation, remaining at the disposal of the authority on accusations of rebellion and affronts to authority. On 7 June 2010 the judicial authority issued a release order since

there were insufficient grounds for prosecution. This shows the criminalization of the Union protest at San Luis Potosí.

**882.** Finally, the complainant union adds that on 28 July 2010, in an operation involving more than 50 officers of the state police, the protest camp opposite Government House which had been occupied by SITTGE for more than five months was cleared for the fourth time. The demonstrators were jostled and kicked, and two were dragged across the Plaza de Armas by police officers who tried to put them into the patrol cars. An operation involving more than 50 male and female officers of the state police caught various SITTGE members unawares and the latter were taken into custody. The members concerned were Mónica Ayala Esquivel, María Guadalupe Cervantes Saavedra, Alicia Loredó Macías and Marcelo Alejandro Reséndiz Reséndiz, who were responsible for the union camp opposite the state government building where they were calling for the reinstatement of the 12 workers who had been wrongfully dismissed. These five union members remained in the building of the Municipal Directorate for Public Security for several hours and were released around 9 p.m. They immediately sought medical treatment, since three of them bore the marks of violence inflicted on them during the clearance of the camp. Ms Guadalupe Cervantes Ávalos, who had bruises on her face and an eye that was bleeding, stated that in addition to being dragged away she had been punched by one of the (female) police officers.

## **B. The Government's reply**

**883.** In its communications of November 2011, the Government sends its observations regarding the complaint submitted by SITTGE.

**884.** As regards the alleged administrative detention of Ms Francisca Reséndiz Lara, the Government states that the municipal police of San Luis Potosí State detained Ms Francisca Reséndiz Lara on 24 May 2010 for causing a breach of the peace at the office of the State Secretary-General. At no time was she detained for engaging in trade union activities, as incorrectly stated by the complainant. In letter No. CR/3889/10 of 24 May 2010, police officer Mr Anselmo Márquez Sánchez of the central region command of the State Directorate-General for Public Security stated that on the afternoon of that day Ms Francisca Reséndiz Lara entered the office of the Secretary-General of the State Government, whom she demanded to see, shouting as she did so. When her demand was rejected, she refused to leave the office, thus causing a breach of the peace.

**885.** In view of the fact that this conduct infringed section 17(VII) of the Police and Government Code of San Luis Potosí Municipality, "The following shall be considered infringements of the moral integrity of the individual and the family irrespective of whether they are considered criminal offences: VII. Lack of due respect or consideration towards any person", Ms Reséndiz Lara was brought before the municipal magistrate.

**886.** The municipal magistrate has the authority to investigate and assess administrative infringements of the Police and Government Code committed by citizens. He is responsible for the municipal detention cells and imposes penalties ranging from verbal cautions to fines, which can be commuted into detention of up to 36 hours. In this case, the magistrate decided just to caution Ms Reséndiz Lara, granting her unconditional release a few hours after she had been detained.

**887.** As regards the alleged detention of Ms Reséndiz Lara on 1 June 2010, the Government declares that this resulted from the aggression to which the police officers guarding the entrance to Government House were exposed. This aggression consisted of physical assault and verbal abuse, which occurred when a number of SITTGE members and Ms Reséndiz Lara tried to enter Government House with folding chairs and plastic benches and, when asked by the police to leave these objects outside the building, they responded



aggressively to the restrictions placed on them, throwing the aforementioned objects at the police officers and shouting slogans against the State Governor and other authority figures. Having committed actions that appeared to constitute, among others, assault and affronts to authority, Ms Reséndiz Lara and the other violent demonstrators were brought before the judicial authority so that the Public Prosecutor's Office could determine whether or not there was sufficient evidence to substantiate the offences and the probable liability of the accused. Accordingly, by letter No. H-009/2010 of 1 June 2010, the police officials attached to the State Directorate-General for Public Security referred Ms Reséndiz Lara to the public prosecutor on charges that included assault and affronts to authority. Letter No. P.I.H4120/10 is attached, as are the certificates of physical integrity of the police officers who were injured.

- 888.** The preliminary inquiry was then opened (at the detention centre attached to the Directorate-General for Preliminary Inquiries) on the basis of the complaint citing the offences of assault, rebellion and affronts to authority, state institutions and the emblems of public authority, as provided for in sections 115(I), 249 and 256 of the Penal Code of San Luis Potosí State:

Section 115. Any person who, by external means, disturbs or damages the health of another person commits the offence of assault. The offence shall incur penalties as follows:  
I. Any person who inflicts an injury that does not endanger the life of the victim and from which recovery takes less than 15 days shall be liable to imprisonment of one to three months or a fine equivalent to five to 15 days' minimum wage ... .

Section 256. Any person who directly or indirectly expresses himself/herself, or performs actions, with the purpose of denigrating, slandering or offending public servants in the actual or attempted performance of their duties, the emblems of the State or municipality or any related institutions, commits an affront to authority, the institutions of the State and the emblems of public authority.

- 889.** The Government indicates that considering that there were good grounds for supposing that the accused were responsible for the offences committed, the Public Prosecutor's Office referred them to the first criminal court judge, who, on analysing preliminary inquiry No. AP/D/XII/1149/2010, criminal case No. 133/2010, considered that the requirements for holding a criminal trial were not met and therefore issued a release order on 7 June for lack of the necessary elements for bringing a prosecution, thereby granting Ms Reséndiz Lara her freedom.
- 890.** The Government states that the above shows that the periods spent in custody by Ms Reséndiz Lara were in no way connected with her union activities. Accordingly, it is recalled that the Committee on Freedom of Association has stated that: "Although the exercise of trade union activity or the holding of trade union office does not provide immunity as regards the application of ordinary criminal law, the continued detention of trade unionists without bringing them to trial may constitute a serious impediment to the exercise of trade union rights."
- 891.** As regards the clearance of the SITTGE camp opposite Government House in San Luis Potosí on 28 July 2010, the Government indicates, in order to provide the context in which the events occurred, that a group of SITTGE demonstrators had spent five months prior to this date encamped on the public thoroughfare, obstructing pedestrian access and creating a loud noise. It should be noted that this is acknowledged by the complainant organization itself. Such acts affected the general public by hampering their freedom of movement and obstructing access to Government House, which, being a public building, is a much-frequented location. This situation is considered a breach of public safety, which is liable to be penalized under section 12(VI) of the Police and Government Code of San Luis Potosí Municipality, which states:

The following actions shall be considered breaches of public safety irrespective of whether or not they are deemed to be criminal offences:

...

VI. Disturbing people in public places or in the vicinity of their homes. Impeding or endangering the free movement of vehicles or persons through occupation of the public thoroughfare with games and diversions without official permission.

- 892.** Since public order had been disturbed, and in order to allow the free movement of persons, the municipal authority removed the demonstrators. It was necessary to detain them and bring them immediately before the magistrate, who found that the facts did not constitute a criminal offence and released the detainees a few hours later.
- 893.** As regards the allegations relating to wrongful dismissals, the Government states that on 14 September 2010 the San Luis Potosí State Government and SITTGE, through its General Secretary, Ms Francisca Reséndiz Lara, signed an agreement with a view to ending the labour dispute brought before the Court of Conciliation and Arbitration in file No. 99/2010/E-4. The agreement provides for the incorporation into the State Government of the persons listed in the agreement and for the payment of wages that were unpaid when the employment of the persons concerned was terminated. The Government attaches a copy of the agreement concerned, which includes the names of the officials who were reinstated. The agreement states that “both parties agree that as a result of this negotiation the labour dispute is ended”.
- 894.** The Government concludes by indicating that the alleged facts do not constitute any failure by the Government of Mexico to observe the principle of freedom of association as established by ILO Convention No. 87, since the law was only applied as a consequence of the conduct of the persons referred to in the present document. It therefore requests that this case be closed.

### **C. The Committee’s conclusions**

- 895.** *The Committee observes that in the present case the complainant trade union SITTGE alleges the arrest and/or prosecution of trade unionists, including the union’s General Secretary, in response to union actions seeking the reinstatement of 12 workers who were wrongfully dismissed, and also the violent clearance by law enforcement officers (resulting in injuries) of a protest camp established by the union for demanding the reinstatement of the workers. The arrests occurred on various dates and concerned various people: 24 May 2010 (the General Secretary), 1 June 2010 (the General Secretary and other demonstrators) and 28 July 2010 (various trade unionists, as part of the clearance of the union camp). The complainant union places these allegations in a context of lack of dialogue on the part of the authorities and their repeated refusal to receive union representatives with a view to dialogue concerning the reinstatement of the 12 dismissed workers and compliance with various agreements signed with the previous governor of San Luis Potosí.*
- 896.** *The Committee notes the Government’s denial that the measures referred to in the allegations were taken in response to union activities and places the alleged facts in the context of breaches of public order (refusal to leave a government office, shouting, aggression involving the throwing of objects and abuse of police) and, in the case of the clearance of the union camp, in the context of hampering pedestrian movement, obstructing access to Government House and creating a loud noise. The Committee observes that the Government emphasizes that the general secretary of the union was cautioned on one occasion by the judicial authority. However, both the complainant organization and the Government concur that, further to the police complaints, the judicial*

authority released the trade unionists who had been detained (the general secretary a second time – together with other demonstrators – and four trade unionists on another occasion, as part of the clearance of the union camp) in view of the lack of evidence to justify prosecution, with the result that there are no court proceedings pending. According to the Government, a number of police officers were injured.

**897.** While the Committee notes that the versions received from the complainant and the Government were at variance as regards the circumstances that led to the detentions, the Committee nevertheless recalls the principle that if the authorities arrest and detain trade union leaders without bringing specific criminal charges against them, this constitutes a restriction of trade union rights [see, for example, 217th Report, Case No. 1031, para. 120]. Measures of this kind can create an atmosphere prejudicial to the normal conduct of trade union activities. However, the Committee notes with interest that the San Luis Potosí State Government and the complainant union subsequently signed an agreement (attached by the Government) on 14 September 2010, whereby the dismissed workers were reinstated with the payment of outstanding wages and which stated that “both parties agree that as a result of this negotiation the labour dispute is ended”. The Committee observes that one of the main problems that gave rise to the present case, namely the refusal of the San Luis Potosí authorities to engage in dialogue with the complainant union, has been resolved.

**898.** Consequently, taking account of the fact that the collective dispute has been resolved further to the agreement mentioned above, the Committee considers that this case does not call for further examination.

### **The Committee’s recommendation**

**899.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to decide that this case does not call for further examination.*

CASE NO. 2752

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

### **Complaint against the Government of Montenegro presented by the New Trade Union of the Radio and Television of Montenegro (RTCG)**

***Allegations: The complainant organization alleges the refusal of the management of the Radio and Television of Montenegro (RTCG) to recognize the union as the representative organization of workers, as well as the dismissal of its officers and harassment of its members***

**900.** The Committee last examined this case on its merits at its March 2011 meeting, when it presented an interim report to the Governing Body [see 359th Report, approved by the Governing Body at its 309th Session (March 2011), paras 904–922].

- 901.** The New Trade Union of the Radio and Television of Montenegro (RTCG) provided additional information in communications dated 20 May 2011, 18 and 23 February 2012.
- 902.** The Government sent its observations in communications dated 12 May 2011 and 19 July 2011.
- 903.** Montenegro has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

#### **A. Previous examination of the case**

**904.** In its previous examination of the case, the Committee made the following recommendations [see 359th Report, para. 922]:

- (a) The Committee regrets that, despite the time that has elapsed since the complaint was first presented, the Government has not replied to any of the complainant's allegations. The Committee strongly urges the Government to be more cooperative in the future.
- (b) The Committee requests the complainant to provide further details in respect of the alleged anti-union dismissals and urges the Government to institute an independent investigation into these allegations and provide it with full details as to the outcome. Noting that the complainant indicates that Mr Janjic's case is still pending, the Committee requests the Government and the complainant to provide information on the final decision rendered by the courts.
- (c) The Committee expects that an independent investigation will be carried out by the Government without delay into the allegations of threats against and pressure on trade union members to withdraw from their union and requests the Government and the complainant to provide detailed information on its outcome.
- (d) The Committee notes that the issue of the recognition of the complainant organization as representative is currently pending before the court and requests the Government and the complainant to provide information on the outcome.
- (e) The Committee requests the Government to bring the parties – the management of the enterprise and the New Trade Union of the RTCG – together in order to facilitate their reaching an agreement in relation to the facilities to be provided to the representatives of the complainant, bearing in mind the principles above. It requests the Government to keep it informed in this respect.

#### **B. Additional information submitted by the complainant**

**905.** In its communications dated 20 May 2011, 18 and 23 February 2012, concerning the alleged anti-union dismissals, the complainant indicates that besides the three members of the management of the New Trade Union of the RTCG (Mr Dragan Janjic, former President of the Supervisory Committee of the Union, Ms Mirjana Popovic, member of the Executive Committee, and Mr Miodrag Boskovic, member of the Supervising Committee), Mr Randomir Pajovic, President of the New Trade Union of the RTCG, was also unlawfully dismissed.

**906.** As regards Mr Pajovic, Mr Janjic and Ms Popovic, the complainant indicates that they were not reinstated in their positions. They were re-engaged in other positions that have nothing to do with their earlier duties. More particularly, Mr Janjic, a radio journalist, was re-engaged as an administrative clerk, a demotion, with a much lower salary. The complainant further indicates that a labour dispute concerning Mr Janjic's downgrading is

now pending before the courts. As regards Mr Pajovic, the complainant adds that the RTCG elected a new director, Mr Rade Vojvodic, on 1 December 2011. Immediately after his nomination, Mr Vojvodic announced he would dismiss 250 employees of the RTCG as redundant. This was approved by the Council, despite the fact that two months earlier, it had accepted the “Strategy of Development of the State Company RTCG from 2011 to 2015”, which established that the RTCG had no redundant employees but that the organizational scheme might be inadequate. Mr Radomir Pajovic was then informed that his job was going to be made redundant and he would be dismissed. On 21 February 2012, Mr Radomir Pajovic was suspended from his position by Mr Vojvodic and a disciplinary procedure was initiated for alleged “gross violation of duties”. According to the complainant, this is aimed directly at preventing the New Trade Union of the RTCG to organize its activities and it is clearly an act of anti-union discrimination.

- 907.** Concerning the allegations of threats against and pressure on trade union members to withdraw from their union, the complainant indicates that Messrs Janjic and Boskovic resigned from the management of the union because of the systematic harassment they were suffering at the workplace and adds that the remaining two members of the Executive Committee, Messrs Zeljko Zugic and Radenko Ivanovic, also intend to withdraw from the trade union activities if this situation continues. Due to this climate of threats and pressure, the union could not elect new management during its assembly that took place on 10 February 2011 since no member wished to assume the trade union’s responsibilities and duties.
- 908.** The complainant further indicates that it initiated a labour dispute before the Municipal Court of Podgorica requesting the Court to order the management of RTCG to return the documentation concerning and belonging to the New Trade Union of the RTCG taken by the management immediately after the dismissals of the members of the union board on 28 February 2008. The complainant indicates that the labour dispute is pending before the Municipal Court of Podgorica.
- 909.** According to the complainant, the General-Director of the RTCG also sued Mr Pajovic and Ms Popovic for alleged slander/defamation and brought criminal charges against Mr Pajovic, President of the Union, for counterfeiting the signatures of new members of the New Trade Union of the RTCG. These disputes are also pending before the courts. The complainant indicates that it will keep the Committee informed about the outcome.
- 910.** In addition, the complainant indicates that the company misused the signatures of ex-union members (Messrs Velibor Rovcanin and Milan Popadic) to weaken the credibility of the New Trade Union of the RTCG.
- 911.** Concerning the withdrawal of the check-off facility previously enjoyed by the union, the complainant indicates that the management of the RTCG formally allowed a 1 per cent check-off of its members’ monthly salary for membership fee. However, the complainant indicates that it had to stop this practice in order to avoid harassment, loss of earnings for its members and their resignation from the union. According to the complainant, some members of the New Trade Union of the RTCG (for example, Mr Rovcanin, as indicated in a letter enclosed with the complaint) seem to have been deprived of bonuses for various months because of their union membership and decided to resign from the union in order to be entitled to this important part of their income. In addition, against the will of the members of the union, the employer deducted twice the trade union membership fee from their salaries, not only for the complainant but also for the other trade union at the enterprise.
- 912.** With regard to the recognition of the complainant organization as representative and the refusal to grant certain facilities to the union, the complainant indicates that the court, in

judgment P.br.1734/08 required the enterprise to provide the union with facilities to carry out its activities. However, the enterprise appealed this decision to the Higher Court, which upheld the judgment of the Municipal Court. This decision was then appealed to the Supreme Court which cancelled both abovementioned decisions. The process had to start over again before the Municipal Court of Podgorica and the first hearing took place on 11 May 2011. A subsequent hearing was supposed to take place on 14 June 2011. During the course of these proceedings, the complainant indicates that as regards its appeal of the preliminary decision of the Municipal Court of Podgorica (which did not accept the request that both trade unions at RTCG present their application forms for membership and accepted a statement of the President of the pro-government trade union on its membership at the enterprise, although it had requested the parties to submit admission forms filed by the members of the respective unions) it was rejected. The Municipal Court of Podgorica latterly rendered its decision (judgment P.br.159/11) and decided to withdraw all trade union rights previously enjoyed by the New Trade Union of the RTCG (the judge ordered that the Union's Office with its inventory be taken away and the New Trade Union of the RTCG pay to the defendant the costs of proceedings, €1,875). The complainant appealed this decision before the High Court of Podgorica and is still awaiting its decision. The complaint adds that the procedures prescribed by the Civil Code of procedures as regards appeals to the Supreme Court were apparently not respected. The complainant further indicates that it has filed a complaint requesting compensation for unpaid union dues for the period 2009–10, causing financial damages to the New Union of the RTCG (Case No. P.br.5708/10). According to the complainant, the court financial expert established that for 30 members of the New Union of the RTCG (out of 88 members in total), the membership fees were deducted from their income and wired to the Trade Union of JP RTCG instead of the New Trade Union of the RTCG. This case is still pending before the courts and the judge is apparently waiting for the outcome of Case No. 159/11 before moving forward. The complainant finally indicates that, in the meantime, the New Trade Union of the RTCG is not invited to attend the meetings of the Board of Directors of the RTCG where the employees' salaries and personnel movement are discussed, while other trade unions are attending. Similarly, the management of the RTCG ignores all requests coming from the New Trade union of the RTCG and they are neither consulted nor informed of any decision taken by the management. According to the complainant, this whole process serves the employer's interests not to provide facilities to the union.

### **C. The Government's reply**

**913.** In communications dated 12 May 2011 and 19 July 2011, the Government provides information on the steps of the labour inspection regarding the request of Messrs Boskovic and Janjic and Ms Popovic for the suspension of the execution of the decision on termination of employment. In the case of Mr Boskovic and Ms Popovic, the Government indicates that the Ministry of Health, Labour and Social Welfare denied the complaint. According to the Government, these cases of termination of employment did not occur due to the employees' trade union activities but due to their unjustified absence from work for seven business days with interruptions during a period of three months. Deciding upon the complaint of Mr Janjic, the Basic Court passed a verdict on 26 March 2010 cancelling as unlawful the termination of employment and committed the defendant to return the plaintiff to the duties and work tasks which he had performed prior to the passing of the decision or to other duties corresponding to his professional qualification, knowledge and capacities. The labour inspectorate conducted another control and ordered the employer to establish the rights arising from employment for Mr Janjic and the employer did so. The Government adds that the re-engagement of Mr Janjic was carried out in accordance with the Labour Law and the Rulebook on Systematization of Working Positions in the enterprise and was not lower than the legally prescribed minimum.

914. As concerns the denial of bonuses to members of the New Trade Union of the RTCG, the Government indicates that there were no individual or collective initiatives to the labour inspection from the employees of RTCG based on intentional reduction of their salaries because of membership in a trade union organization. There were also no reported cases by employees of RTCG that the calculation and payment of salaries was conducted with a direct intent by the employer in order to impose pressure on employees for their engagement in an organization, which would result in discrimination or deterrence of employees from active participation in such organization. The inspection's supervision determined that the variable part of the salary (bonus) is paid according to the model closely defined at the Director-General meeting. However, the labour inspector stated irregularity, i.e. lack of an act closely defining the method of determining the part of the employee's salary relating to achieved working results (variable part). In this regard, the labour inspector pointed to the obligation of the council of RTCG, as the authority competent for passing acts, to pass the Rulebook on Salaries within 60 days, in accordance with article 23 of the Collective Agreement with the employer, No. 01-1379 of 9 April 2010.
915. Concerning the withdrawal of the check-off facility previously enjoyed by the union, the Government indicates that the inspection control stated that the authorized person of the employer required from Mr Pajovic, the president of the New Trade Union of RTCG, to submit the list with names of the members so that the employer could, from April 2010, conduct deduction of trade union membership fees from the members of the New Trade Union of RTCG to the gyro account of that trade union organization, which is the duty of the employer in accordance with the General Collective Agreement. In this regard, Mr Pajovic sent a letter to the Director-General of RTCG which stated that the Executive Board of the trade union suspended the obligation of payment of the trade union membership fee, and that they had "sufficient funds for their basic activity" (this letter was provided with the Government's communication). The Government points out that deduction of the membership fee based on trade union membership is a duty of the employer under article 66 of the General Collective Agreement and the employer must present it through deductions from the net salary per type. No complaint was presented to the labour inspection concerning this issue.
916. As concerns the double deduction from the salaries of employees, so far there has been no case reported to the labour inspection concerning the employer conducting a double deduction from the salaries of employees – members of the New Trade Union of RTCG for the trade union membership fee both for the New Trade Union of RTCG and for the Trade Union of JP RTCG, the other trade union organization.
917. With regard to the refusal to grant certain facilities to the union, the Government indicates that the New Trade Union of RTCG did not raise this with the labour inspection. The Government further indicates that the inspection control stated that the New Trade Union of RTCG is not a representative trade union organization within the employer; the Trade Union of JP RTCG already has this status. Article 5 of the Law on Trade Union Representativeness (*Official Gazette* of Montenegro, No. 26/10) determines the rights of the representative trade union, and article 19 stipulates, as a special condition for determining representativeness at the workplace, that the trade union consist of a minimum of 20 per cent of the total number of the employees. Therefore, the employer is not obliged to provide the New Trade Union of RTCG, which does not have representativeness at the level of the employer, facilities for its work.

#### D. The Committee's conclusions

918. *The Committee recalls that this case concerns allegations that the management of the RTCG refused to recognize the New Trade Union of RTCG as the representative*

organization of the workers, as well as the dismissal of its officers and harassment of its members.

**919.** *As regards the alleged anti-union dismissals, the Committee notes that according to the complainant, Mr Pajovic, President of the New Trade Union of the RTCG, was also unlawfully dismissed. As regards Mr Pajovic, Mr Janjic and Ms Popovic, the Committee notes that, according to the complainant, they were not reinstated in their positions, but were rather re-engaged in other positions that have nothing to do with their earlier duties. The Committee further notes that on 21 February 2012, Radomir Pajovic was suspended from his position by the new director and a disciplinary procedure was initiated for alleged "gross violation of duties". According to the complainant, this is aimed directly at preventing the New Trade Union of the RTCG to organize its activities and it is clearly an act of anti-union discrimination. According to the Government, the termination of employment of Mr Boskovic and Ms Popovic did not occur due to their trade union activities but due to their unjustified absence from work for seven business days with interruptions during a period of three months. As regards Mr Janjic, a radio journalist, the Committee notes that he was re-engaged as an administrative clerk, a demotion according to the complainant, with a much lower salary, while the Government states that his re-engagement was carried out in accordance with the Labour Law and the Rulebook on Systematization of Working Positions in the enterprise and his wage was not lower than the legally prescribed minimum. The Committee recalls that when trade union leaders are dismissed and then reinstated a few days later, the dismissal of the trade union leaders by reasons of union membership or activities could amount to intimidation aimed at preventing the free exercise of their trade union functions. Moreover, if the post occupied by the worker has been eliminated, she or he should be reinstated in a comparable post if the dismissal constituted an act of anti-union discrimination [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 810 and 847]. In view of the recent suspension and disciplinary proceedings initiated against Mr Pajovic, President of the New Trade Union of the RTCG, who had previously been dismissed but was then re-engaged, the Committee once again urges the Government to institute an independent investigation into the allegations that these workers were dismissed or suspended for anti-union reasons, and provide full details as to the outcome. Noting that the complainant indicates that Mr Janjic's downgrading case is now pending before the courts, the Committee requests the Government and the complainant to provide the court judgement as soon as it is handed down as well as any additional information relating to this matter. In the meantime, the Committee requests the Government to ensure that Mr Janjic is maintained in his position pending the final court judgement.*

**920.** *In its previous examination of the case, the Committee noted the allegations of denial of bonuses to, and threats against, the members of the complainant organization, pressure to withdraw their union membership, as well as interference with the union's capacity to exercise its activities in the defence of the workers. The Committee considered that this was a very serious allegation which, if true, would be likely to have a grave effect on the membership of an organization and its representativity. The Committee notes that according to the complainant, this anti-union harassment continues. In particular, the complainant alleges that more recently, due to this intimidating climate: members resigned from the union, the union could not elect a new board, criminal proceedings have been taken against union members, the union was forced to stop the check-off facilities in order to avoid harassment of its members, members of the complainant's organization did not receive bonuses, the company misused ex-union members' signatures to weaken the credibility of the union, the employer carried out a double deduction from the salaries of members of the New Trade Union of RTCG for the union membership fee both for the New Trade Union of RTCG and for the Trade Union of JP RTCG, the other trade union organization in the enterprise, and the employer refuses to return the documentation*



concerning and belonging to the complainant, taken by the management immediately after the dismissals of the members of the union board of 28 February 2008. The Government indicates that no individual or collective cases were reported to the labour inspection concerning any of these issues. The Committee recalls that acts of harassment and intimidation carried out against workers by reason of trade union membership or legitimate trade union activities, while not necessarily prejudicing workers in their employment, may discourage them from joining organizations of their own choosing, thereby violating their right to organize. Since inadequate safeguards against acts of anti-union discrimination, in particular against dismissals, may lead to the actual disappearance of trade unions composed only of workers in an undertaking, additional measures should be taken to ensure fuller protection for leaders of all organizations, and delegates and members of trade unions, against any discriminatory acts. Furthermore, granting bonuses to non-union member staff – even if it is not to all non-union workers – and excluding all workers who are union members from such bonuses during a period of collective conflict constitutes an act of anti-union discrimination contrary to Convention No. 98 [see *Digest*, op. cit., paras 773, 786 and 787]. The Committee requests the complainant to provide more information concerning the allegations of threats against, and pressure on trade union members to withdraw from their union and urges the Government to carry out an independent investigation without delay into these serious allegations, it requests the Government to provide detailed information on the outcome.

921. Concerning the recognition of the complainant organization as representative and the refusal to grant certain facilities to the union, the Committee notes that the complainant indicates that the court has rendered a judgment (P.br.1734/08) where it required the enterprise to provide the union with facilities to carry out its activities. However, this decision was appealed by the enterprise to the Higher Court, which upheld the judgment of the Municipal Court. This decision was appealed to the Supreme Court which cancelled both abovementioned decisions. The process had to start over again before the Municipal Court of Podgorica. During the course of these proceedings, the complainant appealed the preliminary decision of the Municipal Court of Podgorica (which did not accept the request that both trade unions at RTCG present their application forms for membership and accepted a statement of the President of the pro-government trade union on its membership at the enterprise, although it has requested the parties to submit admission forms files by the members of the respective unions) but it was rejected. The Municipal court of Podgorica latterly rendered its decision and decided to withdraw all trade union rights previously enjoyed by the New Trade union of the RTCG. The complainant appealed this latest decision (P.br. 159/11) before the High Court of Podgorica and is still awaiting its decision. The complainant further indicates that it has filed a complaint requesting compensation for unpaid union dues for the period 2009–10 (Case No. P.br. 5708/10). This case is still pending before the courts and the judge is apparently waiting for the outcome of Case No. 159/11 before moving forward. The Committee notes that according to the Government, since the New Trade Union of RTCG is not a representative trade union within the employer, the latter should not be obliged to provide facilities for its work (articles 5 and 19 of the Law on Trade Union Representativeness). The Committee once again recalls that Convention No. 135, ratified by Montenegro, calls on ratifying member States to supply such facilities in the undertaking as may be appropriate in order to enable workers' representatives to carry out their functions promptly and efficiently, and in such a manner as not to impair the efficient operation of the undertaking concerned [see *Digest*, op. cit., para. 1098]. The Committee further recalls that, according to Article 4 of that Convention, national laws or regulations, collective agreements, arbitration awards or court decisions may determine the type or types of workers' representatives which shall be entitled to the protection and facilities provided for in this Convention. Observing that this matter would appear to also be linked to the other allegations in this case concerning anti-union discrimination and harassment and the question of trade union representativeness, the Committee requests the Government to provide information on the outcome of the

*proceedings pending before the court. In the meantime, the Committee once again requests the Government to bring the parties – the management of the enterprise and the New Trade Union of the RTCG – together in order to facilitate their reaching an agreement in relation to the facilities to be provided to the representatives of the complainant, bearing in mind the principles above. It requests the Government to keep it informed in this respect.*

## **The Committee's recommendations**

**922. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:***

- (a) In view of the recent suspension and disciplinary proceedings initiated against Mr Pajovic, President of the new Trade Union of the RTCG, who had previously been dismissed but was then re-engaged, the Committee once again urges the Government to institute an independent investigation into the allegations that these workers were dismissed or suspended for anti-union reasons and to provide full details as to the outcome. Noting that the complainant indicates that Mr Janjic's downgrading case is now pending before the courts, the Committee requests the Government and the complainant to provide the court judgment as soon as it is handed down, as well as any other additional information relating to this matter. In the meantime, the Committee requests the Government to ensure that Mr Janjic is maintained in his position pending the final court judgment.*
- (b) The Committee requests the complainant to provide more information concerning the allegations of threats against, and pressure on trade union members to withdraw from their union and urges the Government to carry out an independent investigation without delay into these serious allegations. It requests the Government to provide detailed information on its outcome.*
- (c) Concerning the issues of recognition of the complainant organization as representative and the refusal to grant certain facilities to the union, the Committee requests the Government to provide information on the outcome of the proceedings pending before the court. In the meantime, the Committee once again requests the Government to bring the parties – the management of the enterprise and the New Trade Union of the RTCG – together in order to facilitate their reaching an agreement in relation to the facilities to be provided to the representatives of the complainant, bearing in mind the principles above. It requests the Government to keep it informed in this respect.*

CASE NO. 2751

REPORT IN WHICH THE COMMITTEE REQUESTS TO BE  
KEPT INFORMED OF DEVELOPMENTS

**Complaints against the Government of Panama  
presented by**

- **the National Federation of Public Employees and Public Service Enterprise Workers (FENASEP) and**
- **the National Council of Organized Workers (CONATO)**

*Allegations: Recent legal reforms and rulings infringing upon trade unions rights; freezing of recognition of 30 trade union organizations that had requested registration; interference in the functioning of trade union organizations; refusal to allocate education insurance funds to FENASEP and dismissal of a trade union leader; threats by the authorities to institute criminal proceedings against trade union leaders*

- 923.** The Committee last examined this case at its March 2011 meeting, when it presented an interim report to the Governing Body [see 359th Report, paras 992–1052, approved by the Governing Body at its 310th Session (March 2011)]. The National Federation of Public Employees and Public Service Enterprise Workers (FENASEP) sent additional information by communication dated 31 May 2011.
- 924.** The Government sent new observations in a communication dated 31 December 2011 and responded to the FENASEP communication of 31 May 2011 in a communication dated 27 February 2012.
- 925.** Panama has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

- 926.** At its March 2011 meeting, the Committee made the following recommendations on the matters still pending [see 359th Report, para. 1052]:
- (a) As to the allegations regarding Act No. 29 of 8 June 2010, establishing a special regime for the area of Barú, which includes a provision allowing enterprises to operate for the first six years without undertaking bargaining processes concerning collective labour agreements (section 7 of the Act), the Committee urges the Government to take the necessary measures to repeal the abovementioned section 7 without delay. Furthermore, noting that the Government has not responded to the allegation made by the complainants with regards to said Act, according to which, the representatives of the workers' central CONATO and the employers' central CONEP are not represented on the Administration Committee of the Special Economic Area of Barú, the Committee recalls the importance of consultation with the most representative employers' and workers' organizations with regards labour issues, requests the Government to consider, together with those organizations, the possibility of the latter being represented on the

Administration Committee, in order that they might be consulted on issues affecting their members, and to keep it informed in this regard.

- (b) As to the allegations regarding a Manual of Procedures for the Department of Social Organizations (ministerial ruling of 15 December 2009), which according to the complainants restricts the exercise of trade union rights, the Committee notes that the text of the Manual (copy provided by the Government) does not seem to have been subject to consultations with the most representative trade union organizations. Rather, it is claimed that the Manual consists of a series of flexible procedures aimed at speeding up the administrative process and the Government is ready to consider any recommendations that might arise from its application. The Committee finds that certain terms employed in the Manual, such as the “approval” of executive committees, may give rise to problems of interpretation and requests the Government to examine said Manual with the most representative workers’ organizations in order to clear up any misunderstandings and produce a text which enjoys as much support as possible.
- (c) As to the alleged increase of the minimum number of public servants needed to establish a trade union association in the public sector (50 servants) in the light of Act No. 43, the Committee requests the Government to take measures to amend Act No. 43 in order to reduce the minimum number of public servants necessary to establish a trade union association, given that an excessively high minimum number could restrict trade union rights, in particular in certain public institutions and small municipalities. As to the allegation that, in the light of Act No. 43 of 2009, public servants dismissed unfairly and then reinstated through a ruling do not have the right to receive the lost wages for the period between the moment of separation and that of reinstatement, the Committee notes the Government’s statement that this allegation is groundless and notes that the Government backs up this claim by referring to two Supreme Court rulings obliging the State to pay the wages and other benefits. The Committee notes that the Government only sent one of the rulings, dated 17 February 2006, when, in fact, Act No. 43 was adopted in 2009. The Committee would therefore be grateful if the Government would send other rulings supporting its statement.
- (d) As to the allegations regarding the public servants’ organization FENASEP i.e. refusal by the authorities to recognize FENASEP in practice, despite the fact that FENASEP representatives have participated in the ILC as delegates on several occasions, exclusion of representatives of this organization from the Technical Committee and the Appeal and Conciliation Committee in the light of Act No. 43 of 30 July 2009, denial of education insurance funds (trade union training) previously enjoyed by FENASEP – (despite the fact that all public servants have 1.25 per cent deducted from their salaries for the education insurance, thus discriminating between trade union associations of public servants and private sector trade unions), the Committee requests the Government to initiate a constructive dialogue with FENASEP in order to find a solution to the problems which will avoid any risk of discrimination against the organization while allowing it to be recognized for all purposes in connection with its representativeness.
- (e) As to the allegation that the Ministry of Labour has frozen 30 requests for trade union registration over the past ten months, the Committee requests the Government to indicate those trade unions which have not been registered despite the fact that they have submitted applications for registration and to communicate the reasoned administrative rulings behind the non-registration of trade union organizations.
- (f) As to the dismissal of Mr Víctor C. Castillo Díaz (according to the allegations, the General Secretary of the Association of Employees of ASEMTRABS) in violation of Act No. 43 on the protection of trade union leaders (trade union immunity), the Committee request the Government to communicate the result of the appeal lodged against the dismissal of Mr Víctor C. Castillo Díaz and, given that the Government disputes his appointment as Secretary General and even the existence of his association of public employees (despite the fact that the complainant organizations have sent a public instrument drawn up by a solicitor which vouches for ASEMTRABS’ establishment and executive committee), to indicate whether said association has applied for registration and legal personality and, should that be the case, to indicate the reasons why that application was unsuccessful.

- (g) The Committee requests the Government to send it copies of any rulings or charges brought by the Public Ministry against trade union leaders for illicit diversion of public education insurance funds earmarked for trade union training.
- (h) Finally, the Committee notes that the Government has been examining the possibility of establishing a higher labour council as a consultative body in order to promote social dialogue concerning labour issues with the technical support of the ILO, and that it has formally requested ILO technical assistance in harmonizing national legislation and practice with the provisions of Conventions Nos 87 and 98 (the Government highlights that request in the part of this document regarding the allegations affecting FENASEP). The Committee expresses the firm hope that said technical assistance will be established in the very near future.

## B. The Government's reply

- 927.** In its communication dated 31 December 2011, the Government refers to the Committee's recommendation (a) contained in its 359th Report and states that Act No. 30 of 5 April 2011 repealed Act No. 29 of 8 June 2010 (including section 7, which allowed enterprises in the area of Barú to operate for the first six years without undertaking collective bargaining in order to align its legislation with ILO Convention Nos 87 and 98. The repeal is the result of the agreements of the special tripartite committee for the forum for dialogue set up by the Government.
- 928.** As regards the Committee's recommendation (b), the Government states that in 2012, the Ministry of Labour and Social Development will carry out a comprehensive review of the Manual of Procedures for trade union organizations, which will provide an opportunity for intervention and making suggestions to confederations, trade union centres, federations and other organizations; that will encourage them to participate in the process and will better assist them in their various trade union procedures.
- 929.** As regards the Committee's recommendation (c), in which it finds the minimum number of 50 public servants needed to establish a trade union association in the public sector (pursuant to Act No. 43 of 2009) to be excessive, the Government states that the objective of the reform committee for the Act governing administrative careers is to amend the relevant section to provide as follows: "there may be more than one trade union association within a public institution". This amendment will then be submitted to the executive body to be studied and given due consideration. The Government adds that the objective of the reform committee for the Act governing administrative careers is also to amend section 179 of Act No. 43 of 31 July 2009 to enable all public servants, including non-career public servants, as well as those freely appointed pursuant to the Constitution, those appointed following a selection process and those already serving to freely establish a trade union organization or association. These amendments will be submitted to the executive body for due study and consideration.
- 930.** As regards the second part of the Committee's recommendation (c) concerning the allegation according to which, by virtue of Act No. 43 of 2009, public servants dismissed and then reinstated through a ruling did not have the right to receive lost wages, the Government states that if a worker employed by a State institution is dismissed and reinstated, he or she immediately receives the salary and is paid any lost wages in keeping with the budget of each public institution. Should this prove to be insufficient, budgetary funds may be raised to pay the corresponding amount.
- 931.** As regards recommendation (d) concerning the non-recognition of the public servant organization FENASEP, the Government states that the Federation is not currently registered as such according to the records of legal personality of the Department of Social Organizations, the General Labour Department of the Ministry of Labour and Labour

Development (MITRADEL). FENASEP was established and granted legal personality by the Ministry of the Interior in 1984 but was subsequently regulated by Act No. 9 of 1994, which governs public servants in the administrative careers system. Section 2 of the Labour Code provides as follows:

Section 2. The provisions of this Code are of a public nature and are binding on all persons, whether individuals or juridical persons, corporations, farms and establishments that are located or established within the national territory. Public employees shall be governed by the norms of the administrative careers system, except in cases where it is expressly determined that the precepts of this Code shall apply thereto.

**932.** Similarly, on 27 April 1998 the High Court of Justice ruled on a previous case involving the same parties, underlining, among other things, the following:

Consequently, this High Court considers that the labour provisions contained in the Labour Code do not apply to the National Finance Corporation, given that it is a State body legally established by law and is therefore excluded from labour legislation in accordance with section 2 of the Labour Code and section 10 of Act No. 65 of 1 December 1975 [...]

**933.** The Government adds that the Third Administrative Division of the Supreme Court of Justice endorsed the aforementioned ruling by a judicial decision taken on 29 May 1998. Therefore, in view of this ruling, the MITRADEL is not acting arbitrarily by refusing to grant legal personality to a public sector federation, given that to do so would constitute an illegal act that could entail legal consequences for the administration when the highest judicial authority has already taken a decision on the matter. This is the reason why FENASEP is not recognized and not because of an arbitrary decision on the part of the Government or the Minister for Labour as alleged by the complainants. The Government must abide by the principle of legality and the decision of the Supreme Court of Justice.

**934.** As regards the refusal to allocate education insurance funds to FENASEP for training, the Government states that it is waiting for the Third Administrative Division of the Supreme Court of Justice to provide clarification on the matter.

**935.** The Government adds that it is examining the possibility of setting up a bipartite forum for dialogue between the Ministry of Labour and FENASEP representatives in order to address and resolve issues relating to the public sector.

**936.** As regards the Committee's recommendation (*e*) concerning the alleged freezing of 30 requests for trade union registration, the Government states that this allegation is entirely false, given that the denial of legal personality to trade unions in the process of being established stemmed from their failure to meet the relevant legal requirements, which was communicated via reasoned administrative decisions. Therefore, in this case, it was not a question of a failure to reply, especially when the law establishes a period of 30 working days in which to do so. The Government does not keep a full list of the trade unions to which legal personality has been denied but highlights six cases in which it observed irregularities: the Agricultural Workers Union of Tortí, the Union of Gaming Properties of Panama Inc., the Workers Union of Panama Gaming Services of Panamá S.A. and/or Cirsa Panamá S.A., the Union of Workers, Stevedores, Controllers and Operators of the Ports of Balboa and Cristóbal, the Workers Union of the Committee for Health and the Industrial Workers Union for Water Transport in Panama.

**937.** As regards recommendation (*f*) concerning the dismissal of Mr Víctor C. Castillo Díaz, as alleged by the General Secretary of the Association of Employees of the Ministry of Labour and Social Welfare (ASEMITRABS), the Government states that it is awaiting the decision of the Supreme Court of Justice on the appeal lodged by Mr Castillo Díaz who, according to the Government, appointed himself as the General Secretary of

ASEMITRABS knowing full well that this association was not functioning and that the majority of public servants were unaware of its existence, as it had not been operational since the end of 1989. The association has not been operational in practice since then and, at the time of the 1999 elections, a number of public servants close to the Government of the time decided to revive the association in order to seek refuge in the immunity enjoyed by trade union officials. Having failed to achieve the ends that had justified its revival, the aforementioned association once again ceased functioning and remained non-operational until the end of the 2009 elections when, once again, public servants close to the Government attempted to revive the association so as to avail themselves of trade union immunity. The Government reiterates that the association in question was never actually operational in practice, nor is it recognized at the institutional level or by the very public servants of the Ministry (including those who have served for more than 20 years) but has been used strategically during the periods of transition from one Government to another by a number of public servants for purely personal gain, namely to seek refuge in the immunity acquired on becoming a member of such an association. As things stand, in legal terms, this association still exists but is not operational in practice or recognized by the public servants of the institution.

- 938.** As regards the Committee's recommendation (g) requesting copies of any rulings or charges brought by the Public Prosecution Service against trade union leaders for illicit diversion of public education insurance funds earmarked for trade union training, the Government recalls that it lodged a complaint with the Attorney-General's Office against the trade union leaders for mismanagement of funds and the possible misuse of trade union training funds allocated by the Panamanian Institute for Labour Studies (IPEL) to various trade union confederations and federations. The Government adds that Prosecutorial Order No. 554 of 30 September 2010 requested the judge to call a provisional, impersonal and objective stay of proceedings on behalf of the Public Prosecution Service. Subsequently, the tenth Criminal Circuit Court of Panama granted the request for a provisional stay of proceedings made by the First Anti-corruption Prosecutor's Office. This was then followed by the Ministry of Labour lodging a complaint on 21 March 2011 requesting the resumption of proceedings, which was granted by means of Decision No. 84-11 of 18 April 2011. The legal proceedings are currently under way.
- 939.** As regards the Committee's recommendation (h), the Government states that it is examining the possibility of establishing a tripartite higher labour council but that a decision has yet to be taken since a consensus on the subject has not yet been reached. Nevertheless, the Ministry of Labour and Social Development will conclude a collaborative agreement with the Labour Foundation led by employers' and workers' organizations), which will allow the institution to become a tripartite body and an institutional forum for permanent social dialogue concerning labour issues aimed at seeking out mutually agreed ways to allay the concerns of social actors and to address major social challenges, including the handling of trade union complaints and labour disputes, in addition to mutually-agreed ways of harmonizing national legislation and practices with the relevant ILO Conventions.

### C. The Committee's conclusions

- 940.** *Recommendation (a) of the Committee's 359th Report. The Committee notes with satisfaction that, in its reply, the Government states that Act No. 30 of 5 April 2011 repealed Act No. 29 of 8 June 2010, including section 7, which allowed enterprises in the area of Barú to operate for the first six years without undertaking collective bargaining. The Committee notes that this repeal, which follows up the Committee's recommendation, was the result of a tripartite agreement. The Committee understands that, since the Act in question has been repealed, the pending matter of the non-representation of trade union*

*and employer representatives on the Administration Committee of the Special Economic Area of Barú instituted under the henceforth repealed Act has been resolved.*

- 941.** *As regards recommendation (b), the Committee notes with interest the Government's decision to carry out a comprehensive review of the Manual of Procedures for trade union organizations in 2012, thereby involving trade union organizations across the country. The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to this aspect of the case.*
- 942.** *As regards recommendation (c), in which it found the minimum number of 50 public servants needed to establish a trade union association in the public sector to be excessive, the Committee welcomes the Government's statement to the effect that the objective of the reform committee for the Act governing administrative careers is to amend the current legal norm to provide as follows: "there may be more than one association within a public institution". The Committee takes note of the will shown by the Government to align its legislation with Convention Nos 87 and 98 and, just as it did in its previous examination of the case, firmly expects that the future reform will reduce the excessive minimum number of public servants needed to establish a trade union association. Lastly, the Committee notes that this matter is subject to follow-up by the Committee of Experts on the Application of Conventions and Recommendations.*
- 943.** *As regards the second part of recommendation (c) concerning a request for information, the Committee takes note of the Government's statement reiterating that workers dismissed and then reinstated do have the right to receive lost wages. Bearing in mind that the trade union organizations do not subscribe to the Government's explanation or, at the very least, have expressed reservations, the Committee once again requests the Government to send a copy of recent rulings supporting its statement.*
- 944.** *As regards recommendation (d) requesting the recognition of the organization FENASEP, the Committee notes that in accordance with the aforementioned legislation and jurisprudence, it would be illegal to grant legal personality to a public sector federation. The Committee wishes to underline that this situation is incompatible with the right of workers to freely establish worker organizations of their own choosing (Article 2 of Convention No. 87), including the right to establish federations and confederations (Articles 5 and 6 of Convention No. 87). The Committee welcomes the fact that the Government is examining the possibility of setting up a forum for dialogue with FENASEP to address and resolve issues relating to the public sector. While it takes note of the Government's statement that FENASEP is not registered according to the records of legal personality of the Ministry of Labour (it was established and granted legal personality by the Ministry of the Interior in 1984), the Committee recalls that FENASEP has participated in various ILO Conferences and reiterates once again the importance of recognizing FENASEP for all purposes (this includes it being represented on the Technical Committee and the Appeal and Conciliation Committee in the light of Act No. 43 of 2009) in connection with its representativeness and requests the Government to keep it informed of developments and to take the necessary measures to ensure that its legislation recognizes the right to establish federations and confederations in the public sector. Furthermore, the Committee notes that, as regards the refusal to allocate education insurance funds to FENASEP for training, the Government is waiting for the Third Administrative Division of the Supreme Court of Justice to provide clarification on the matter. The Committee requests the Government to keep it informed in this respect.*
- 945.** *As regards recommendation (e) concerning the alleged freezing of 30 requests for trade union registration, the Committee takes note of the Government's explanation that it is not a question of "freezing" or of a failure to reply, given that the law establishes a period of 30 working days for the Ministry of Labour to do so, but of a refusal to grant legal*



personality owing to the relevant legal requirements not being met. The Government refers to six cases as examples in which irregularities were observed. Bearing in mind that, according to the allegations, the number of denied requests for legal personality stands at 30 organizations, the Committee requests the Government to examine the grounds for denial with the complainants so as to evaluate how the system functions in practice and the best way to resolve the issue of securing legal personality for the 30 trade union organizations in question. The Committee requests the Government to keep it informed of developments. [These matters are also examined in Case No. 2868 concerning six alleged cases of denied registration.]

- 946.** *As regards recommendation (f), the Committee notes that the Government is awaiting the decision of the Supreme Court of Justice concerning the dismissal of the leader of ASEMITRABS, Mr Víctor C. Castillo Díaz. The Government disputes his appointment as leader of the association and underlines the fact that the association in question has not been operational for years. The Committee requests the Government to keep it informed of developments in this respect.*
- 947.** *As regards recommendation (g), the Committee takes note of the information provided by the Government, and in particular the fact that the legal proceedings instituted by the Ministry of Labour against trade union leaders for mismanagement of funds (illicit diversion of public education insurance funds earmarked for trade union training) are ongoing. The Committee requests the Government to inform it of the judicial decision taken in this respect.*
- 948.** *As regards recommendation (h), the Committee notes with interest the Government's statements to the effect that a collaborative agreement is to be concluded with the Labour Foundation, which is led by employers' and workers' organizations, which will allow the institution to become a tripartite body and an institutional forum for permanent social dialogue to address all social challenges, including the handling of trade union complaints and labour disputes.*
- 949.** *Finally, the Committee notes the Government's observations dated 27 February 2012 sent in response to the information transmitted by FENASEP on 31 May 2011 concerning dismissals of trade union leaders and other matters, which will be examined at the next examination of the case.*

## **The Committee's recommendations**

- 950.** *In the light of its foregoing conclusions, the Committee welcomes the progress reported by the Government, particularly on the legislative matters, and invites the Governing Body to approve the following recommendations:*
- (a) The Committee firmly expects that the future reform of the Act governing administrative careers will reduce the minimum number of public servants needed to establish a trade union association.*
- (b) The Committee reiterates once again the importance of recognizing FENASEP for all purposes (this includes it being represented on the Technical Committee and the Appeal and Conciliation Committee in the light of Act No. 43 of 2009) in connection with its representativeness and requests the Government to keep it informed of developments and to take the necessary measures to ensure that its legislation recognizes the right to establish federations and confederations in the public sector. Furthermore, the Committee notes that, as regards the refusal to allocate education*

*insurance funds to FENASEP for training, the Government is waiting for the Third Administrative Division of the Supreme Court of Justice to provide clarification on the matter. The Committee requests the Government to keep informed in this respect.*

- (c) As regards the alleged freezing of 30 requests for trade union registration, bearing in mind the number of denied requests for legal personality, the Committee requests the Government to examine the grounds for denial with the organizations so that the functioning of the system in practice can be evaluated, including the means of resolving the issue of securing legal personality for the 30 trade union organizations in question. The Committee requests the Government to keep it informed in this respect.*
- (d) The Committee notes that the Government is awaiting the decision of the Supreme Court of Justice concerning the dismissal of the leader of ASEMTRABS, Mr Víctor C. Castillo Díaz (the Government disputes his appointment as leader of the association and underlines the fact that the association in question has not been operational for years). The Committee requests the Government to keep it informed in this respect.*
- (e) The Committee takes note of the information provided by the Government, and in particular the fact that the legal proceedings instituted by the Ministry of Labour against trade union leaders for mismanagement of funds (illicit diversion of public education insurance funds earmarked for trade union training) are ongoing. The Committee requests the Government to inform it of the judicial decision taken in this regard.*
- (f) Finally, the Committee notes the Government's observations dated 27 February 2012 sent in response to the information transmitted by FENASEPT on 31 May 2011 concerning dismissals of trade union leaders and other matters, which will be examined at the next examination of the case.*

CASE NO. 2868

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Panama  
presented by  
the Autonomous Trade Union Confederation of  
Panamanian Workers (CGTP)**

*Allegations: refusal to register or denial of legal personality to six trade unions in formation in breach of legislation and in violation of Convention No. 87; dismissal of members of two of those trade unions*

- 951.** The complaint is contained in a communication dated 6 June 2011 from the Autonomous Trade Union Confederation of Panamanian Workers (CGTP).
- 952.** The Government sent its observations in a communication dated 12 September 2011.
- 953.** Panama has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

- 954.** In its communication dated 6 June 2011, the CGTP alleges that the authorities refused to register or grant legal personality to the following trade union organizations in formation: (1) the Agricultural Workers' Union of Corregimiento de Tortí; (2) the "Gaming Properties of Panama Inc." Workers' Trade Union (SINETEGPPI); (3) a workers' trade union in "Panama Gaming and Services of Panamá SA" and/or "Cirsa Panamá SA"; (4) the Dockworkers, Checkers and Operators of Balboa and Cristóbal Ports Workers' Trade Union (SITEVOP-BALCRIS); (5) the Health Committee Workers' Trade Union; and (6) the Industrial Trade Union of Panamanian Waterway Workers and Related Industries. According to the allegations, the workers who signed the intention to form the "Gaming Properties of Panama Inc." Workers' Union and those who signed the intention to form a workers' union in "Panama Gaming and Services of Panamá SA" and/or "Cirsa Panamá SA" were dismissed.
- 955.** The complainant organization sent a copy of the administrative rulings and decisions adopted based on the appeals lodged and emphasizes that the decisions of the Ministry of Labour and Social Development have violated the provisions of the Labour Code (whose section 354, for example, stipulates that objections to the application for registration of a trade union may only be made if the intended purpose is not laid down in legislation, if it was not formed with the minimum legal number of members or if the legally-required documentation is not submitted in the correct form) and of ILO Convention No. 87.
- 956.** The complainant organization also alleges that the Ministry of Labour rejected the list of dispute grievances submitted for the purposes of collective bargaining by the Hotel, Gastronomy and Tourism Workers' Trade Union against: (1) Comidas y Bebidas Especializadas Int. SA; and (2) "Cirsa Panamá SA" and/or "Gaming and Services", even

though in both cases the companies' workers were present at the conciliation hearings convened by the Ministry.

## **B. The Government's reply**

**957.** In its communication dated 12 September 2011, the Government states that the complaint of the CGTP is completely unfounded. The Government recognizes and values the principle of freedom of association as a fundamental right of labour relations and the important role that it plays in democratic consolidation, governance and social peace. In this regard, its provisions are incorporated in national legislation and practice, through which it complies with its stipulations to ensure that freedom of association and collective bargaining are developed effectively throughout the country.

**958.** With regard to the denial of legal personality to the Agricultural Workers' Union of Corregimiento de Tortí, the Government states that, in fact, on 16 November 2009, the application for registration of legal personality was filed with the General Labour Directorate of the Department of Social Organizations of the Ministry of Employment and Labour Development (MITRADEL), by the trade union in formation in question, submitted by Mr Carlos Guerra Nieto, in his capacity as interim Secretary General. The aforementioned application was not approved because, on examining the documents, it was observed that it contained some irregularities which prevent the normal approval procedure for legal personality. The irregularities include the following:

- (1) Article 2 of the trade union in formation's constitution specifically states that the trade union is a trade organization, and it should be pointed out that agricultural activity encompasses a variety of tasks undertaken, ranging from ploughing, sowing, operating spraying and harvesting machinery to the work of agricultural engineers, hence various activities or specialist skills that are essential to the agricultural field of activity.
- (2) Furthermore, the applicants (signatories) do not give details of the specialist skills of individuals, limiting themselves merely to noting that they are self-employed, non-salaried agricultural workers, residents of Corregimiento de Tortí. This fact fails to comply with the requirements for forming social organizations, specifically section 342(1) of the Labour Code, which provides that trade unions are: "1. Trade associations, when they are composed of persons from the same profession, trade or specialist skill area; ...".

**959.** Decision No. DM 306 of 31 December 2009 ruled that the Agricultural Workers' Union of Corregimiento de Tortí should be denied legal personality, which was appealed by the complainant in an application for reconsideration.

**960.** The outcome of the appeal was Decision No. 123 of 13 April 2010, which ruled that the contested ministerial decision should be upheld in its entirety, as the characteristics of these workers are not in line with the definition contained in section 82 of the Labour Code, which reads as follows: "Workers are any natural persons who have the obligation by means of a verbal or written employment contract, individually or as part of a group, explicit or presumed, to provide a service or perform a task while subordinate to or dependent on a person."

**961.** It is clear that the petitioners sought to register a trade union composed of workers whose characteristics do not correspond to labour-management relations in accordance with the section invoked. It was therefore deemed appropriate to uphold Decision No. DM 306 of 31 December 2009.

**962.** With regard to the denial of legal personality to the SINTEGPPI, the Government states that it was rejected in Decision No. DM 78 of 5 March 2010 due to non-compliance with the minimum percentage of initial membership required pursuant to section 344 of the Labour Code. The decision in question was appealed by the legal representative in an application for reconsideration, alleging that: the MITRADEL has implemented a measure that contravenes section 352 of the Labour Code; the trade union was already formed, since the request was submitted on 18 January 2010 and Decision No. DM 78 of 2010 was handed down on 11 May 2010; the MITRADEL has violated the freedom of association, as it accepted resignation letters from some members of the aforementioned organization, and they state that this situation is a direct interference by the ministry's authorities in the exercise of freedom of association; and that the MITRADEL has ignored the fact that the workers provided a membership list of nine workers on 2 February 2010, disregarding section 386 of the Labour Code.

**963.** Concerning the arguments put forward by the complainant, the Ministry intends to settle the dispute as follows:

- (1) The plenary session of the Supreme Court of Justice, ruling on an application for constitutional review brought by Mr Sergio González, declares that the terms "fifteen calendar days" and "fifteen days" set forth in article 42 of Act No. 44 (1995) for the formation of trade unions, which replaces section 352 of the Labour Code, are unconstitutional.
- (2) Ms Eloísa Miller, interim Secretary-General of the trade in formation known as SINTEGPPI, aware of the period allowed in law for applying for legal personality, decides to go to the MITRADEL on 11 May 2010 and is notified of Decision No. DM 78 of 5 March 2010 handed down by the ministry in accordance with the time limits laid down in law.
- (3) Concerning the arguments claiming that the MITRADEL violated the freedom of association, with reference to the resignations tendered by some members of the organization in formation, the Government indicates that there are essentially two converging aspects within the principle of freedom of association: the positive singular aspect, establishing that a person is free to choose to belong to a social organization; and the negative singular aspect, referring to the power of an individual not to join a union, or to resign from an organization when he/she deems it appropriate to do so. On this basis, the MITRADEL accepted the resignations of the workers not wishing to join the organization in formation, respecting the freedom of choice; it is thus not a case of interference, as the legal representative maintained in his allegations of non-compliance.
- (4) With regard to the objection stating that the MITRADEL has ignored the fact that the workers provided a membership list of nine workers, the Government considers that such a declaration is illogical, as it was included in the file containing the application for registration of legal personality, as found on page 76 of the file. The list was provided after the request for legal personality; the persons concerned enjoyed the protection of trade union immunity, a privilege also enjoyed by the founding members, and not as the appellants state in their appeal.
- (5) However, to clarify section 352 of the Labour Code, it refers to the personal identity cards recorded in the organization's constitution, and not to the membership lists that may arrive after the application has been formalized. The personal identity cards recorded in the constitution were therefore checked against the copies of the personal identity cards provided in this application, from which it was determined that, given all the inconsistencies found during the checking process, in addition to the resignations of five of the founding members of the organization in question, only

29 of the members who had signed the constitution met the requirements stipulated in the provision on labour, a figure that contravenes section 352 of the Labour Code, which demands that “the personal identity cards recorded in the constitution shall be checked to ensure at least the minimum number of members required under section 344”.

**964.** In view of the above, the MITRADEL, in Decision No. DM 181-2010 of 15 June 2010, deemed it appropriate to uphold Decision No. DM 78 of 5 March 2010, as there are no grounds for amending it.

**965.** With regard to the rejection of the communication of intent to form a workers’ union in “Panama Gaming and Services of Panamá SA” and/or “Cirsa Panamá SA”, the Government states that, at 9.54 a.m. on 27 April 2011, the letter signed by a group of 31 workers of “Panama Gaming and Services of Panamá SA” and/or “Cirsa Panamá SA” was sent to the Department of Social Organizations of the MITRADEL’s General Labour Directorate, in which they state their wish to form an enterprise trade union, in accordance with section 385 of the Labour Code. They subsequently forwarded membership lists dated 31 April and 4 May 2011 for insertion into the first communication.

**966.** After the technical staff of the Department of Social Organizations had examined the communication, it was deemed not to have met the minimum requirements set forth in section 385 of the Labour Code, as the provision states as follows:

Section 385. Workers, or their representatives, who are forming a trade union shall, to obtain the protection of trade union immunity, notify the Regional or General Labour Directorate in writing of the group’s wish to form the trade union, along with a statement of the names and general information of each person, and the company, establishment or business where they work ...

**967.** Although trade union rules do not prescribe a particular formality to follow in forming a union, the Labour Code sets out certain minimum parameters for its submission, and these are basic guidelines that were followed when registering or accepting the feasibility of applications filed by workers.

**968.** The provision is therefore clear and needs no interpretation, as it stipulates that this notification must come with a statement of the names and general information of each person; it being understood that individuals’ general information, apart from their full name, includes personal identity card, address, telephone number, occupation, age, marital status, etc. Moreover, legislation also stipulates that the company, establishment or business where the person works must be described. It is thus clear from the documentation provided by the workers that the signatures are accompanied by the description of only some of the information required under the specific provision, i.e. that the general information (general details) of each person must be completed. The CGTP was therefore informed, in note No. DOS.2011 of 10 May 2011, addressed to Mr Abelardo Herrera, that the notification submitted to the Department of Social Organizations could not be registered, due to the aforementioned omissions.

**969.** However, another communication was issued, note No. 186 DOS.2011 of 12 May 2011, to notify Mr Eric A Batista Ríos that the documentation was being returned because it failed to meet the requirements stipulated in section 385 of the Labour Code.

**970.** It should be noted that on 12 May 2011, a meeting was convened at the request of the Secretary-General of the CGTP, Mr Mariano Mena, to discuss the issue in question. The meeting was attended by Mr Hernán García, Secretary-General, Ms Ada Romero, Director-General of Labour, Mr Rodrigo A Gómez Rodríguez, Head of the Department of Social Organizations, on behalf of the MITRADEL, and a group of workers accompanying

Mr Mena. At this meeting, the MITRADEL's position with respect to section 385 of the Labour Code was put forward, and it was explained that the issue could be resolved quickly if the information required were provided to the Ministry, so as to be able to grant the trade union the immunity mentioned in the provision. However, they did not accept the recommendations and chose to lodge an appeal for protection of constitutional rights in the Supreme Court of Justice against the administrative decision contained in note No. 186 DOS.2011 of 12 May 2011, issued by the Head of the Department of Social Organizations.

- 971.** With regard to the denial of legal personality to the SITEVOP-BALCRIS, the Government states that Messrs Ulises Colina and Manuel Arosemena, representing a group of workers of "Port Outsourcing Services SA", indicated their intention to form a trade union organization in a letter dated 14 May 2009. They subsequently submitted a formal application for registration of legal personality on 18 May 2009.
- 972.** However, the Head of the Department of Social Organizations informed them, in note No. 124 DOS.2009 of 19 May 2009, that an application for an enterprise trade union had already been filed previously; hence there were legal barriers to continuing with the process and encouraged them to make a new application as an industrial trade organization.
- 973.** As is clear from the above, it is not that this group of workers are being prevented from continuing with the process of forming a trade union but that, for the reasons already given in the aforementioned note, they are being informed that under the national legislation two enterprise trade unions cannot exist in the same company.
- 974.** Despite this communication and legal barrier, the group of workers proceeded to submit member lists to the Department of Social Organizations, which were received. Subsequently, and in accordance with the procedure laid down in the Labour Code, the General Labour Directorate issued Decision No. 44 DOS.2009 of 1 June 2009, the operative part of which provides that:

Article 1: To instruct interested parties in the application for legal personality for the Port Outsourcing Service SA Workers' Union to correct the omissions identified, primarily its name and envisaged activity, to ensure it does not conflict with the organization filing the previous request.

- 975.** On 9 June 2009, Mr Ulises Colina filed an application for reconsideration of the 1 June 2009 decision. This group of workers continued submitting member lists. However, on 8 July 2009, Messrs Ulises Colina and Manuel Arosemena, sent the letter dated 3 July 2009 to the Department of Social Organizations, addressed to Mr Gavino Omar Rodríguez, stating the following:

I enclose herewith the corrections requested in accordance with Decision No. 44 DOS.2009 regarding the formation of our trade union organization, which was intended to be called Port Outsourcing Services SA.

- 976.** As is clear in this letter dated 3 July 2009, the parties concerned corrected the documentation in line with Decision No. 44 DOS.2009 of 1 June 2009, confirming that it is not a new application, as evidenced in their extraordinary appeal for the protection of constitutional rights. The MITRADEL therefore, throughout this case, ensured the constitutional and legal rights of the workers and the due process of law called for in this type of process.
- 977.** It should be noted that these petitioners continued to pursue legal personality as an enterprise trade union, despite having been informed that it was more appropriate to seek legal personality as an industrial trade union, not least because in April 2009 a previous

application had already been made by workers of the “Port Outsourcing Services SA”. This group of workers also simultaneously instigated an application for constitutional review against the “Port Outsourcing Service SA” Workers’ Union, file No. 562-09, which halted the process pending a ruling by the plenary session of the Supreme Court.

**978.** This is corroborated in note No. 183 DOS.2010 of 18 May 2010, issued by Mr Edgar D Ángelo R, Head of the Department of Social Organizations, addressed to HE Alma L Cortés Aguilar, Minister of Employment and Labour Development. In the light of this application for constitutional review, the Department of Social Organizations halted the procedure pending the outcome or ruling of the Supreme Court of Justice.

**979.** After some time had elapsed, Mr Ulises Colina submitted the letter dated 21 March 2011, stating the following:

The purpose of this letter is to request you to comply with the provisions of section 356 of the Labour Code, given that the periods stipulated in sections 351 and 352 of the Labour Code have elapsed without comment, as required under section 353 of the Labour Code. We are therefore requesting you to kindly issue the respective certificate attesting to the existence of the Dock Workers, Checkers and Operators of Balboa and Cristóbal Ports Industrial Trade Union (SITEVOP-VALCRIS) and to record the entry and registration of that trade union on the registers of organizations.

**980.** This request, submitted on 21 March 2011, reflects the ruling of the Supreme Court of Justice dismissing the application for constitutional review filed by this group of workers of the trade union currently in formation.

**981.** Decision No. DM 75-2011 was subsequently handed down on 14 April 2011, the operative part of which rules not to allow the registration of the request for legal personality of the social organization known as the Dockworkers, Checkers and Operators of Balboa and Cristóbal Ports Industrial Trade Union (SITEVOP-VALCRIS). An application for reconsideration was filed against Decision No. DM 75-2011 of 14 April 2011, which was settled in Decision No. DM 88-2011 of 26 April 2011, upholding, in its entirety, the contested decision.

**982.** With regard to the administrative silence resulting in denial of legal personality to the Health Committee Workers’ Trade Union, the Government states that a group of workers of the Health Committee of the San Isidro Health Centre submitted a communication in writing to the MITRADEL, in a letter dated 14 June 2006, concerning the intention to form an industrial trade union, in accordance with section 385 of the Labour Code. This communication was submitted to, and received on 19 June 2006 by the Department of Social Organizations. The Director-General of Labour subsequently decided, in Decision No. 55 DOS.2006 of 18 July 2006, to return the Health Committee Workers’ Trade Union’s application for legal personality to the parties concerned to enable them to make the corrections identified within 15 days of the notification.

**983.** The Department of Social Organizations subsequently received back the corrected documentation from the aforementioned organization, which was duly examined, but it transpired that not all of the omissions identified had been corrected. Consequently, in accordance with section 355(1) of the Labour Code, on 11 August 2006 the Director-General of Labour, in Decision No. 67 DOS.2006, rejected the application for legal personality of the organization in formation.

**984.** In this regard, the operative part of the last paragraph of Decision No. 67 DOS.2006 stipulates as follows:



In accordance with the order contained in the decision in question (Decision No. 55 DOS.2006), 40 of the identity cards of the founding members of this organization were checked. However, it should be noted that, in addition to all the omissions identified not having been corrected, the petitioners at no time confirmed that they were health sector workers, which was an essential and compulsory requirement of section 342 of the Labour Code to avoid a possible challenge on the grounds of admitting members not meeting the legal requirements.

- 985.** Concerning the refusal of the MITRADEL to grant legal personality to the Industrial Trade Union of Panamanian Waterway Workers and Related Industries, the Government states that on 13 April and on 5, 8, 11, 13 and 18 May 2009, communications were submitted to the Department of Social Organizations to notify it of the wish of a group of workers of the “Panama Ports Company SA” to form a trade union in that company, which were accompanied by members’ signatures and their respective identity card numbers. Thereafter, on 25 May 2009 documentation containing the formal application and registration material were received by the Department of Social Organizations from the social organization in formation called the Industrial Trade Union of Panamanian Waterway Workers and Related Industries, whose interim Secretary-General was Mr Luis Alberto Zárate.
- 986.** After examining the documentation, the MITRADEL forwarded the file to the Ministry of the Presidency, in note No. DM 490-2009 of 12 June 2009, for its consideration and signature of the respective decision, but it failed to reach the highest authority of the Executive Body.
- 987.** Clearly, the measure was not wholly legal because the application for legal personality was not endorsed by the highest competent authority. In this regard, the MITRADEL issued Decision No. DM 256-2010 of 11 August 2010, ordering the file of the aforementioned organization to be closed. Mr Luis Alberto Zárate Salazar through his legal representative Mr Martin González, filed an application for reconsideration of the decision on the simple grounds that the decision in question was improperly notified, thus rendering it illegal.
- 988.** In response to that appeal, the MITRADEL issued Decision No. DM 296-2010 of 14 September 2010, ruling that Decision No. DM 256-2010 should be upheld in its entirety, which states:
- After several attempts to locate the Secretary-General of the aforementioned social organization, this authority duly complied with the provisions of section 888 of the Labour Code, the first paragraph of which states:
- If the proxy of an existing party in the case who had to be notified in person could not be traced for that purpose, the bearer shall note that on the file, indicating the day and time on which he/she was to hand over the personal notification.
- 989.** In this regard, the notification was handed over as per the requirement, contrary to the allegations of the appellant.
- 990.** With regard to the alleged illegality of the contested decision, Decision No. DM 296-2010 states that “the flawed administrative decision occurred because of a failure to implement the provisions of the decision in the application process for legal personality, as upheld in Decision No. DM 256-2010 of 11 August 2010”.
- 991.** Following these events, Mr Roberto Mendoza, signatory to the application for legal personality, lodged an appeal for protection of constitutional rights through his legal representative on 4 June 2010, with the Supreme Court of Justice on the grounds that those rights were not provided for in note No. 0087-2010 of 4 March 2010, issued by the Department of Social Organizations of the MITRADEL’s General Labour Directorate.

- 992.** This appeal was acknowledged in a decision of 22 July 2010, informing the General Labour Directorate and ordering it to report on action taken, as the notification in question was not the responsibility of the General Labour Directorate, but the public official mandated to take the action described above, i.e. the incumbent Head of the Department of Social Organizations, which is why it is deemed to be a violation of the due process of law.
- 993.** In this regard, article 2615 of the Judicial Code clearly stipulates as follows:
- Any person against whom an order to do or not to do is issued or enforced by any public official which violates the rights and guarantees enshrined in the Constitution shall have the right for the order to be revoked upon his/her request or that of any other person ... The appeal for protection of constitutional rights to which this article refers shall be processed by way of a summary proceeding and shall fall under the jurisdiction of the judicial courts.
- 994.** The foregoing stipulates that the responsibility for issuing a ruling on an appeal for protection of constitutional rights does not fall to the plenary session of the Supreme Court because the official respondent does not have the authority and jurisdiction throughout the Republic of Panama or in two or more provinces in accordance with article 2616(1) of the Judicial Code.
- 995.** Without distinction, the plenary session of the Supreme Court of Justice, in the operative part of the decision of 26 October 2010, granted the appeal lodged and ordered the list of new members to be accepted and the existence of the organization in question to be certified. The Department of Social Organizations complied with the order to accept the list of new members.
- 996.** However, Mr Luis Alberto Zárate Salazar, through his legal representative Mr Martin González, filed a motion of contempt against the MITRADEL on the grounds of non-compliance with the order of the decision of 26 October 2010, handed down by the Supreme Court of Justice, on certifying the existence of the aforementioned organization (case file No. 549-10, which remains unresolved in the highest judicial authority).
- 997.** In this regard, the Government states that is clearly important to draw attention to the fact that the aforementioned order is inconsistent and clearly confusing, in that the MITRADEL cannot certify the existence of the aforementioned organization (a task carried out by the Department of Social Organizations) if the existence of this organization has still not been established in law (this occurs when a trade union organization in formation has been certified (for the purpose of registering its legal personality) by the President of the Republic), which was not done in this particular case.
- 998.** The Ministry of Employment and Labour Development is therefore not in contempt, as the applicant claims in the aforementioned case, since the Ministry accepted a list of the organization's new members, as ordered by the plenary session of the Supreme Court, and in no way did the latter order that registration of legal personality should be granted to the social organization in question.
- 999.** The Government points out that the denial of legal personality to the aforementioned trade unions in formation has nothing to do with Government policy, but is due to non-compliance with the procedural requirements for obtaining legal personality.
- 1000.** Lastly, with regard to the allegation concerning the rejection of two lists of dispute grievances, submitted for the purpose of collective bargaining by the Hotel, Gastronomy and Tourism Workers' Trade Union, made against two companies, the Government states that in one case seven of the eight workers who supported the list ceased supporting it and, in the other case, the trade union in question addressed the list of dispute grievances to a slot machine company whose activity is at odds with that of the trade union.

## C. The Committee's conclusions

- 1001.** *The Committee observes that in this case the complainant alleges that the Ministry of Employment and Labour Development prevented the formation of six trade union organizations in different sectors in violation of Convention No. 87 and the Labour Code. The complainant sent a copy of the administrative decisions and the outcome of the appeals lodged and points out that section 354 of the Labour Code provides that objections to the application for registration of a trade union may only be made if the intended purpose is not laid down in legislation, if it was not formed with the minimum legal number of members or if the legally required documentation is not submitted in the correct form. The complainant also alleges that the workers who signed the intention to form two of the six trade unions in question were dismissed.*
- 1002.** *The Committee notes that the Government states that these refusals to register or grant legal personality to trade union organizations in formation are due to non-compliance with legislation or irregularities and that they are not due to any State policy, as the State recognizes and values the principle of freedom of association as a fundamental right. The Government adds that the trade unions in formation lodged legal appeals, which were processed in accordance with the law.*
- 1003.** *The Committee observes that the substantive grounds for denial of legal personality are as follows:*
- *with regard to the Agricultural Workers' Union of Corregimiento de Tortí, the main grounds for denying legal personality are that its members are self-employed, non-salaried workers, while the concept of a worker under the Labour Code refers to natural persons who have the obligation to provide a service or perform a task "while subordinate to or dependent on a person";*
  - *with regard to the SINTEGPPI, the grounds for denying legal recognition are that the trade union in formation did not meet the legal requirement for minimum membership and that workers who subsequently join do not count, and in particular, that five founding members resigned, leaving only 29 workers who were founding members of the trade union, which did not comply with the legal requirements;*
  - *with regard to the workers of "Panama Gaming and Services of Panamá SA" and/or "Cirsa Panamá SA", the grounds for rejecting the communication of intent to form a trade union were that the communication should, according to legislation, have contained the following general information: full name; personal identity card; address; telephone number; occupation; age; marital status; etc., and a description of the company or business where the person works. The Committee notes that the Ministry of Labour invited those concerned to complete this information, but they chose to lodge an appeal for protection of constitutional rights in the Supreme Court of Justice;*
  - *with regard to the denial of legal personality to the SITEVOP-BALCRIS, the grounds for denial were the existence of a previous application (by other workers) to form an enterprise trade union, as according to legislation there cannot be two enterprise trade unions in the same company (although it could form an industrial trade union);*
  - *with regard to the denial of legal personality (by way of administrative silence) to the Health Committee Workers' Trade Union, the grounds for denial are that they could not form an industrial trade union because the applicants failed to prove that they are health sector workers;*

- *with regard to the denial of legal personality to the Industrial Trade Union of Panamanian Waterway Workers and Related Industries, the grounds for denial were that the application for legal personality was not endorsed by the highest competent authority (the President of the Republic); the applicants lodged an appeal for protection of constitutional rights before the Supreme Court of Justice, an appeal that was granted, and on the basis of which the Ministry of Labour accepted the list of new members of the trade union, but it failed to certify the existence of the trade union because the Ministry of Labour cannot, according to the Government, certify the existence of the organization in question as it still has not been established in law because the registration of the organization has not been endorsed by the President of the Republic.*

**1004.** *The Committee takes note with deep concern a number of the reasons given by the Government for refusing to register or grant legal personality to the six trade union organizations in formation mentioned in the complaint.*

**1005.** *The Committee considers that the different legal requirements or their interpretation in practice in this case appear to have contravened Article 2 of Convention No. 87 under which workers without distinction whatsoever and without previous authorization have the right to establish organizations of their own choosing. Article 3 of Convention No. 87 enshrines the principle of non-interference by the authorities. In that regard, the Committee emphasizes that, although the requirement for simple formalities for the formation of trade union organizations is compatible with Convention No. 87, it is contrary to Convention No. 87 to prevent trade unions of self-employed workers who are not subordinate to, or dependent on, a person, to prevent two enterprise trade unions coexisting, to make the granting of legal personality subject to the approval of the President of the Republic, to demand information from the founders of an organization such as their telephone number, marital status or home address (this indirectly excludes from membership workers with no fixed abode or those who cannot afford to pay for a telephone), to allow unexpected resignations by member workers (in the documents attached to the complaint, the complainant implies that they had been induced) resulting in the trade union in formation failing to have the minimum legal number of members. The Committee also observes that in Case No. 2751 the complainant (including CONATO – which is the most important trade union organization in the country) alleged that 30 applications for trade union registration were “frozen” by the authorities.*

**1006.** *Therefore the Committee, on the one hand, urges the Government to adopt measures to amend legislation to bring it in line with Convention No. 87 and, as it has already done with regard to Case No. 2751, the Committee requests the Government, including the administrative authorities, to examine, with the complainants in a proactive and constructive manner, the reasons for this situation so as to assess how the system is working in practice and how to resolve the issue of registration or access to legal personality for trade union organizations whose registration has been denied. The Committee requests the Government to keep it informed in that regard.*

**1007.** *The Committee also understands that some of the cases of denial of legal personality have been submitted to the judicial authority and requests the Government to inform it of the decisions handed down.*

**1008.** *With regard to the allegations that the workers who signed the intention to form the SINTEGPPI and those who signed the intention to form a workers’ trade union in “Panama Gaming and Services of Panamá” and/or “Cirsa Panamá SA” were dismissed, the Committee regrets that the Government has not sent detailed comments on these serious allegations and, recalling that pursuant to Article 1 of Convention No. 98, it is expressly prohibited to “cause the dismissal of, or otherwise prejudice, a worker by reason*

of union membership”, the Committee urges the Government, should the allegations be verified, to take steps to reinstate the workers of both trade unions immediately and compensate them for their losses (salaries and benefits) and to keep it informed thereof.

- 1009.** *Lastly, with regard to the allegation concerning the rejection of two lists of dispute grievances, submitted for the purpose of collective bargaining by the Hotel, Gastronomy and Tourism Workers’ Trade Union made against two companies, the Committee notes that the Government states that, in one case, seven of the eight workers who supported the list ceased supporting it, and, in the other case, the trade union in question addressed the list of dispute grievances to a slot machine company whose activity does not correspond to the scope of the trade union.*

### **The Committee’s recommendations**

- 1010.** *In view of the foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee takes note with deep concern a number of the reasons given by the Government for refusing to register or grant legal personality to the six trade union organizations in formation mentioned in the complaint. The Committee considers that the different legal requirements or their interpretation in practice in this case appear to have contravened Article 2 of Convention No. 87 under which workers without distinction whatsoever and without previous authorization have the right to establish organizations of their own choosing.*
- (b) The Committee, on the one hand, urges the Government to adopt measures to amend legislation to bring it in line with Convention No. 87 and, as it has already done with regard to Case No. 2751, the Committee requests the Government, including the administrative authorities, to examine with the complainants in a proactive and constructive manner the reasons for this situation so as to assess how the system is working in practice and how to resolve the issue of registration or access to legal personality for trade union organizations whose registration has been denied. The Committee requests the Government to keep it informed in that regard.*
- (c) The Committee also understands that some of the cases of denial of legal personality have been submitted to the judicial authority and requests the Government to inform it of the decisions handed down.*
- (d) Lastly, with regard to the allegations that the workers who signed the intention to form the SINTEGPPI and those who signed the intention to form a workers’ trade union in “Panama Gaming and Services of Panamá” and/or “Cirsá Panamá SA” were dismissed, the Committee regrets that the Government has not sent detailed comments on these serious allegations and, recalling that pursuant to Article 1 of Convention No. 98 it is expressly prohibited to “cause the dismissal of, or otherwise prejudice, a worker by reason of union membership”, the Committee urges the Government, should the allegations be verified, to take steps to reinstate the workers of both trade unions immediately and compensate them for their losses (salaries and benefits) and to keep it informed thereof.*

CASE NO. 2854

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Peru  
presented by  
the National Federation of Workers of the  
National Ports Enterprise (FENTENAPU)**

*Allegations: Privatization process of the Muelle Norte de Callao port units without convening the complainant or the primary trade union; legal restrictions on the right to strike in ports; the lodging of a complaint against the Secretary-General of the federation and the violation of the principle of good faith by the National Ports Enterprise in the collective bargaining process*

- 1011.** The complaint is contained in a communication from the National Federation of Workers of the National Ports Enterprise (FENTENAPU) dated 19 April 2011. The organization sent additional information and new allegations in communications dated 27 May, 30 June, 26 July and 27 October 2011.
- 1012.** The Government sent its observations in a communication dated 23 September 2011.
- 1013.** Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

- 1014.** In its communications dated 19 April, 27 May, 30 June, 26 July and 27 October 2011, FENTENAPU claims that the state authorities have arbitrarily and unconstitutionally privatized the Muelle Norte de Callao port units, hitherto administered by the state-operated National Ports Enterprise, by granting a concession to the enterprise AMP Terminals Callao. FENTENAPU claims that this privatization process, which entails job losses and a serious deterioration in the working conditions and job security of workers, has been undertaken without the National Ports Enterprise or other authorities having convened the trade union federation or the primary trade union in spite of their high degree of representativeness. The concession holder, on the other hand, has contacted the workers directly through letters informing them that their labour relation has been modified.
- 1015.** FENTENAPU also claims that, in response to protest action and the exercise of the right to strike, the Ministry of Labour has outlawed the strikes of 22, 29 and 31 March and that of 6 April 2011 by virtue of successive directives to that effect. The conditions governing the exercise of the right to strike in the port sector are restrictive. In a letter dated 8 March 2011, FENTENAPU adds that the director of human resources of the National Ports Enterprise sent a letter to the Secretary-General of the federation, Mr Basilio Leopoldo Ortiz, in which it indicated the number of staff that would be necessary to guarantee the services provided by the National Ports Enterprise, deemed to be essential, and enclosed a

rather long list of workers which, in practice, renders the right to strike meaningless. Lastly, FENTENAPU claims that, as regards the exercise of the right to strike, the Deputy Attorney-General of the Ministry of Transport and Communications has lodged a complaint with the Criminal Prosecutor's Office of Callao against the Secretary-General of the federation for offences against public safety, transport services, the media and other public services; for an attack on collective transport services and the media; and for hindering the proper functioning of public services, on the grounds that these work stoppages are hindering and jeopardizing public transport services. This legal action is intended to curtail the legitimate exercise of the right to strike.

- 1016.** Furthermore, FENTENAPU claims that the National Ports Enterprise has seriously violated the principle of good faith in the collective bargaining process, both in negotiating the list of demands submitted by the federation for the 2011 period and at the direct negotiation stage, given that, at the meeting held on 16 March 2011, it offered "to increase the basic salary of all workers by 2.08 per cent in order to satisfy the 2011 list of demands". Even the President of the Enterprise's Executive Committee urged the federation to accept this offer. Following consultations with its members, the federation accepted the enterprise's offer on 24 March 2011. However, just as the agreement was about to be concluded, the enterprise changed its proposal, offering those workers who would have a valid labour relation with the enterprise when the collective agreement was signed an exceptional, one-off, non-remunerative payment of 1,200 nuevos soles (PEN) for the 2011 period instead.
- 1017.** The enterprise attempted to confuse the workers by sending a circular to the country's various ports, highlighting the advantages of the new proposal. This left the federation no choice but to agree.

## **B. The Government's reply**

- 1018.** In its communication dated 23 September 2011, the Government sent a copy of the comments of the National Ports Enterprise (ENAPU) concerning the complaint. The ENAPU indicates that section 118 of the Constitution provides that the powers and obligations of the President of the Republic include that of implementing the general policy of the Government, in addition to exercising their authority to regulate laws without infringing or denaturing them and, within those limits, to issue decrees and decisions. In accordance with this precept, the national policy governing the transport sector, which was approved by virtue of Ministerial Decision No. 817-2006-MTC/09, establishes that the management of the transport system must give precedence to effectively meeting the mobility needs of the population and, in particular, public transport users. Therefore, the transport infrastructure must be of an adequate standard to provide a secure, efficient and quality service. Thus, in the context of the national policy governing the transport sector, the aim of the specific strategy for the port infrastructure is to promote effective competition within the port services market. Furthermore, section 4 of Act No. 29158, the Organization of the Executive Act, sets out the exclusive powers of the Executive, such as devising and overseeing national and sectoral policies, which are in turn defined by legal norms and regulations established by the sectors in question.
- 1019.** In this connection, the ENAPU adds that the State issued Legislative Decree No. 1022, which amended section 2 of Act No. 27943, the National Port System Act, to include the following final temporary provision:

**Thirtieth.** The management, running, equipping and maintenance of the port infrastructure, which is under public ownership and meant for public use, are deemed essential public services, as are the port services provided by this infrastructure, which are guaranteed by the State. The Executive, through its constituent bodies and in coordination with the

competent national or regional port authority, as applicable, shall, in exceptional cases where the provision of those essential port services is suspended, take the measures necessary to ensure that they are permanently, continuously, securely and competitively provided.

**1020.** The ENAPU underlines that, as a juridical person governed by the judicial system currently in force, it is obliged to comply with the provisions contained in the aforementioned Legislative Decree and to take the measures prescribed by the relevant law in the case of strikes within bodies or enterprises providing essential public services.

**1021.** Moreover, the ENAPU maintains that it has recognized, respected and encouraged the free exercise of the right to organize, the right to collective bargaining and the right to strike which, in accordance with the Constitution, must be exercised in a way that is compatible with social interests and, as with all rights, these are subject to a number of exceptions and restrictions. In this connection, section 82 of the single uniform text of Decree Law No. 25593, approved by virtue of Supreme Decree No. 010-2003-TR provides that:

In the event of the strike affecting essential public services and the need to guarantee essential activities, the workers involved in the conflict must ensure that the necessary staff remain to prevent the total suspension of those services and to guarantee the continuation of services and activities, as required.

Annually and during the first trimester, enterprises providing essential services shall communicate to their workers, or to the trade union organizations representing them, and to the labour authority, the number and duties of the workers necessary to maintain those services, the working hours and schedules to which they must adhere, as well as the intervals at which each worker is to be relieved. The purpose of this communication is to enable the workers, or any trade union organization representing them, to provide the appropriate payslip when the strike is held. Those workers failing to provide their services without good reason shall be penalized in accordance with the law. Any disagreements as to the number and duties of the workers to be included in the list referred to in this section shall be settled by the labour authority.

**1022.** The ENAPU has done nothing but comply with the aforementioned legislative provision by submitting the list of workers who must remain in the enterprise in the event of a strike so as to guarantee the continuation of port services, which was not contested before the administrative labour authority at the appropriate time or in the appropriate manner.

**1023.** Without prejudice to the above, the ENAPU points out that neither FENTENAPU nor the workers who are members of the trade union organization have taken measures to ensure that the necessary staff remain to prevent the total stoppage of and to guarantee the continuation of port services. On the contrary, every time this workers' organization has called a work stoppage or a strike, it has been observed by all members, which is why, in practice and regardless of any discussion that may take place concerning the number of workers required to guarantee the continuation of these services, FENTENAPU has ignored its legal obligation to ensure that the necessary staff remain to guarantee the continuation of port activities.

**1024.** The Government also provides a copy of the comments of the Deputy Attorney-General of the Ministry of Transport and Communications (MTC) on a criminal complaint lodged against the Secretary-General for protest action taken. In this regard, the Deputy Attorney-General maintains that the actions taken to protect the Ministry, as well as its dependent bodies, constitute not only discretionary intervention but also respond to the need to involve the Public Prosecution Service, which, ultimately, is the body empowered to institute criminal proceedings. The Office of the Attorney-General of the MTC may only lodge a complaint with a view to an investigation of the actions being carried out. In accordance with section 47 of the Constitution, which establishes the precept on the defence of state interests and with Legislative Decree No. 1068, namely, the Act establishing the legal



protection system, along with other relevant norms, Attorney-Generals are authorized to take legal action, report offences and participate in any proceedings in keeping with the office they hold while informing the body's representative of such actions. It should be understood that here "any proceedings" refers to any action that is perceived as posing a potential threat to the interests of the MTC, its projects, enterprises and/or decentralized public bodies.

- 1025.** In the exercise of this power, on 30 January 2011, the Office of the Attorney-General of the MTC called for a preliminary investigation of Mr Rogdal Wilmer Estévez Morales and all others likely to be responsible before the Public Prosecution Service for alleged attacks on collective transport services and the media; and for hindering the proper functioning of public services. Furthermore, a request was made for the Puerto de Callao Dockers Union to be included as a civilly liable third party. The MTC took this action in response to a warning of an attack on transport services resulting from the work stoppages in the Puerto de Callao in so far as these would lead to ships being neglected, which could jeopardize port activities and, as a result, hinder public services transporting heavy goods, were such a work stoppage to take place without taking steps to preserve the essential nature of port activities. Moreover, if the right to strike is to be recognized, then, given that an essential public service is involved, in accordance with section 82 of the single uniform text of the Collective Labour Relations Act, it is incumbent on a group of workers to take the measures necessary to guarantee the continuation of that service so that other services and activities are not adversely affected. However, this was not the case, as the activities of the trucks attempting to enter the Puerto de Callao were restricted. The Deputy Attorney-General of the MTC concludes that there is no link between the complaint lodged and the request for an investigation. Therefore, the Secretary-General of FENTENAPU, Mr Basilio Leopoldo Ortiz Centty, has not been the subject of the complaint lodged with the Public Prosecution Service. Furthermore, it maintains that the requested investigation of Mr Rogdal Wilmer Estévez Morales and the others responsible for alleged attacks on collective transport services and the media, and for hindering the proper functioning of public services, has been conducted within the appropriate constitutional and legal framework.
- 1026.** The Government underlines that it was the duty of the trade union organizations to ensure that the necessary staff remained to allow port services to operate, which, in itself, cannot be considered as an anti-union act.
- 1027.** The Government also provides a copy of the comments of the ENAPU concerning the concession of the multi-purpose north terminal of the Puerto de Callao. The enterprise indicates that by virtue of Emergency Decree No. 039-2010, the Government added the project to modernize the multi-purpose north terminal of the Puerto de Callao to those priority projects of national necessity overseen by PROINVERSIÓN.
- 1028.** In its capacity as the governmental body competent to promote investment projects aimed at public infrastructure and public services by means of concessions, PROINVERSIÓN, by virtue of an agreement concluded by its Executive Committee, approved the plan to promote private investment in the multi-purpose north terminal of the Puerto de Callao on 16 July 2010.
- 1029.** Subsequently, on 20 July 2010, the ENAPU issued a directive approving the conditions governing the concessionary process and, with the agreement of the Executive Committee of PROINVERSIÓN, on 21 July 2010, the conditions governing the concessionary process of the aforementioned port terminal were approved, culminating in APM Terminals Callao being granted the concession.

- 1030.** On 11 May 2011, the State signed a concession contract for the multi-purpose north terminal of the Puerto de Callao with APM Terminals Callao, thereby transferring to it the rights pertaining to the design, construction, funding, conservation and running of the area of the multi-purpose north terminal, as well as the exclusive rights to port activities and services within the infrastructure for a period of 30 years.
- 1031.** In accordance with the concession contract, APM Terminals Callao was obliged to offer a contract to a number of workers of the ENAPU who worked in the Callao port terminal and who accounted for 60 per cent of the total operational staff required to run the multi-purpose north terminal. In accordance with the concession contract, the concession holder offered a contract to 436 operational workers, which was accepted by 432 workers; a situation in which the ENAPU would not have intervened, given that this was an obligation incurred by APM Terminals Callao under the concession contract it concluded with the State.
- 1032.** As regards the workers who did not accept the offer made by APM Terminals Callao, it has been communicated that they are still employed by the ENAPU and, in an effort to foster a climate of trust, a statement guaranteeing their rights, their job security and the continuation of the enterprise has been issued.
- 1033.** Moreover, the ENAPU is currently implementing a voluntary redundancy programme, which offers financial benefits to the workers of the Callao port terminal.
- 1034.** As regards the alleged violation of the principle of good faith in the negotiation of the aforementioned pay rise, the ENAPU recalls that FENTENAPU accuses it of violating the principle of good faith in the collective bargaining of the 2010 list of demands, given that, at the direct negotiation stage, it offered, at the meeting held on 16 March 2011, to increase the basic salary of all workers by 2.08 per cent, a compromise that was subsequently modified by the offer of an exceptional, one-off and non-remunerative payment of PEN 1,200 instead. The ENAPU states that it is true that, initially, the negotiating committee proposed “to increase the basic salary of all workers by 2.08 per cent” as part of the negotiations. However, at that same meeting and without consulting its members, the trade union representatives stated that “they did not agree with the proposal”. It is for this reason that the enterprise made a new proposal offering an exceptional payment instead of the aforementioned pay rise. It also adds that there is no question of interference since no document encouraging either staff from the provinces or staff from Callao to accept or reject the ENAPU’s proposal was ever issued.
- 1035.** In its capacity as the governmental body competent to promote investment projects aimed at public infrastructure and public services, by means of concessions, PROINVERSIÓN states that the plan to promote private investment in the multi-purpose north terminal was executed in a manner that was totally transparent and that respected the current legal norms applicable to the process. The Government states that the current legislation governing the concessionary process has been respected and that the complaint is being investigated by the Criminal Prosecutor’s Office. Criminal charges will be brought only if there is sufficient evidence to prove that an offence has been committed.

## **C. The Committee’s conclusions**

- 1036.** *The Committee notes that, in the present case, the complainant alleges the process of privatization of the Muelle Norte de Callao port units without convening the complainant or the primary trade union; legal restrictions on the right to strike in ports; the lodging of a complaint against the Secretary-General of the federation and the violation of the principle of good faith by the National Ports Enterprise (ENAPU) in the collective bargaining process.*

1037. *As regards the allegation that both the ENAPU and the authorities failed to convene the complainant and the primary trade union during the privatization process (the granting of a concession to a private enterprise) of the port units of the Muelle Norte de Callao, namely, the multi-purpose north terminal of the Puerto de Callao, despite the fact that this process, which was described as arbitrary and unconstitutional by the complainant, entailed job losses and a serious deterioration in the working conditions and job security of workers, the Committee notes that, in its reply, the Government does not comment on the allegation concerning the exclusion of the trade union organizations from this process but does confirm the allegation that the concession holder approached the workers directly, according to the Government's reply, which indicates that the enterprise offered a contract to 436 workers, which 432 accepted while the remainder are still employed by the ENAPU.*
1038. *In this regard, the Committee wishes to recall the principle according to which it can only examine allegations concerning economic rationalization programmes and restructuring processes, whether or not they imply redundancies or the transfer of enterprises or services from the public to the private sector, only in so far as they might have given rise to acts of discrimination or interference against trade unions. In any case, the Committee can only regret that in the rationalization and staff reduction process, the Government did not consult or try to reach an agreement with the trade union organizations [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 1079]. Given that neither the Government nor the enterprise have denied the allegation that both the ENAPU and the authorities failed to consult the federation and the primary trade union during the privatization process, the Committee regrets that no discussions or consultations were held between the authorities and the enterprises concerned on the one hand and with the trade union organizations on the other. The Committee firmly expects that, in the future, there will be timely consultations with the trade unions concerned in respect of any contemplated restructuring or privatization processes prior to their being taken. The Committee calls on the Government to initiate without delay such consultation as regards the effects of the privatization.*
1039. *As regards the allegation that the administrative authority outlawed several strikes organized in protest of the privatization process, and the ENAPU's statement, contained in the Government's reply, on the power to determine the number and duties of the workers required to maintain a minimum service in the event of a disagreement between the parties provided for in the legislation of the administrative authority, the Committee wishes to underline that the services provided by the National Ports Enterprise and ports themselves do not constitute essential services, although they are an important public service in which a minimum service could be required in case of a strike. A minimum service may be set up in the event of a strike, the extent and duration of which might be such as to result in an acute national crisis endangering the normal living conditions of the population. Such a minimum service should be confined to operations that are strictly necessary to avoid endangering the life or normal living conditions of the whole or part of the population; in addition, workers' organizations should be able to participate in defining such a service in the same way as employers and the public authorities [see **Digest**, op. cit., paras 616 and 610]. The Committee requests the Government to take measures to align its legislation with the aforementioned principles.*
1040. *As regards the way in which the strikes took place during the privatization process, the Committee takes note of the enterprise's statement to the effect that it submitted the list of workers required to maintain a minimum service but that the complainant, which, in the complaint, stated that the number of workers was so great that it rendered the right to strike meaningless, failed to do so and so, whenever a strike was called, in practice the strike was observed by all members, which means that the complainant ignored its legal obligation to ensure that the necessary staff remain to guarantee the continuation of port*

activities. The Committee also takes note of the Government's reply regarding the lodging of a complaint against the Secretary-General of the complainant organization for hindering the proper functioning of public services, and that its reply contains a copy of the comments of the Deputy Attorney-General of the Ministry of Transport and Communications (MTC), which confirms the lodging of a complaint by the Office of the Attorney-General of the MTC with the Public Prosecution Service, which is the body empowered to institute criminal proceedings and will take the final decision. According to the Deputy Attorney-General: (1) on 30 January 2011, the Office of the Attorney-General of the MTC called for a preliminary investigation of Mr Rogdal Wilmer Estévez Morales and the others responsible before the Public Prosecution Service for alleged attacks on collective transport services and the media; and for hindering the proper functioning of public services. Furthermore, a request was made for the Puerto de Callao Dockers Union to be included as a civilly liable third party; (2) the MTC took this action to prevent the work stoppages in the Puerto de Callao as this would lead to ships being neglected, which could jeopardize port activities and, as a result, hinder public services transporting heavy goods, were such a work stoppage to take place without taking steps to preserve the essential nature of port activities; (3) if the right to strike is to be recognized, then, given that an essential public service is involved, in accordance with section 82 of the single uniform text of the Collective Labour Relations Act, it is incumbent on a group of workers to take the measures necessary to guarantee the continuation of that service so that other services and activities are not adversely affected. However, this was not the case, as the activities of the trucks attempting to enter the Puerto de Callao were restricted; (4) there is no link between the complaint lodged and the request for an investigation as the Secretary-General of FENTENAPU, Mr Basilio Leopoldo Ortiz Centty, has not been the subject of the complaint lodged with the Public Prosecution Service; (5) the requested investigation of Mr Rogdal Wilmer Estévez Morales and the others responsible for alleged hindering of collective transport services and the media, and thereby the proper functioning of public services, has been conducted within the appropriate constitutional and legal framework.

- 1041.** *The Committee wishes to underline that, in the context of the allegations concerning the exercise of the right to strike, the relevant legislation, while it recognizes the right to strike in the port sector and requires a minimum service to be maintained, is unclear. Moreover, the system for defining minimum services may prove problematic in practice. As regards minimum port services, the Committee highlights that, in the event of a strike, the National Port System Act provides that the Executive will take “the measures necessary to ensure that they are permanently, continuously, securely and competitively provided”, which could be interpreted in a variety of ways. The single uniform text of Decree Law No. 25593, which is also applicable, offers a narrower range of interpretations, as it provides that the workers involved in the conflict “must ensure that the necessary staff remain to prevent the total suspension of those activities and to guarantee the continuation of services and activities, as required”, and, as has been mentioned above, that the enterprise must communicate the number of workers necessary to the trade union organization and that the trade union organization must, in turn, submit the list of these workers. Furthermore, it provides that any disagreements should be settled by the labour authority (a power that the Committee has criticized above). In this case, both the enterprise and the MTC maintain that the trade union organization representing the port workers did not comply with the minimum service requirement, and, according to their statements, the trade union organization failed to submit a minimum service proposal, leading to ships being neglected and the activity of the trucks attempting to enter the Puerto de Callao being restricted, which gave rise to the complaint against the trade unionist and the others responsible, which is awaiting a decision from the Public Prosecution Service.*

- 1042.** *While drawing attention to the fact that the legislation is unclear and that certain aspects thereof are not in line with the Committee's principles on the right to strike, as well as to the lack of consultations with trade union organizations during the privatization process, which is closely linked to the four short-lived strikes that took place, the Committee recalls that 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 [see **Digest**, op. cit., para. 672]. The Committee requests the Government to inform it of the decision of the Public Prosecution Service concerning the complaint and expects that this decision will take into account the conclusions and the abovementioned principle. The Committee also requests the Government to take measures to align the legislation on the right to strike in the port sector with the aforementioned principles.*
- 1043.** *Lastly, as regards the alleged violation of the principle of good faith by the enterprise during the negotiation of the collective agreement for the 2011 period by withdrawing its offer to increase the basic salary of all workers by 2.08 per cent, which the complainant organization had accepted, offering a non-remunerative payment of PEN1,200 for the 2011 period instead, the Committee notes that the Government presents the point of view of the enterprise, according to which, at the meeting where the 2.08 per cent increase was proposed, the trade union representatives stated that they did not agree with the proposal, which is why the enterprise subsequently proposed the exceptional payment.*
- 1044.** *In view of the contradictions existing between the allegations and the Government's reply, the Committee is not in a position to formulate conclusions on this matter.*

### **The Committee's recommendations**

- 1045.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee firmly expects that, in the future, there will be timely consultations with the trade unions concerned in respect of any contemplated restructuring or privatization processes prior to their being taken. The Committee calls on the Government to initiate without delay such consultation as regards the effects of the privatization.*
  - (b) The Committee requests the Government to take measures to align the legislation with the principles on the right to strike referred to in its conclusions.*
  - (c) In view of the circumstances of this case, the Committee believes that penal sanctions should not be imposed on the trade unionists who participated in the strikes or on trade union organizations. The Committee requests the Government to inform it of the decision of the Public Prosecution Service concerning the complaint lodged against several strikers by the Office of the Attorney-General of the Ministry of Transport and Communications and expects that this decision will take into account the conclusions and the relevant abovementioned principle.*

CASE NO. 2856

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Peru  
presented by the General Confederation of Workers  
of Peru (CGTP)**

***Allegations: Anti-union dismissals by the  
regional government of Callao***

- 1046.** The complaint is contained in a communication dated 11 April 2011 from the General Confederation of Workers of Peru (CGTP).
- 1047.** The Government sent its observations in communications dated 19 and 27 September and 5 October 2011.
- 1048.** Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

**A. The complainant's allegations**

- 1049.** In its communication of 11 April 2011, the CGTP alleges that, on 5 January 2007, the regional government of Callao illegally, arbitrarily and in violation of ILO Conventions Nos 87 and 98, declared null and void the contracts of numerous professional, technical and auxiliary workers by virtue of an administrative decision approved by the regional council of the province.
- 1050.** The CGTP adds that, after instituting legal proceedings, the dismissed workers obtained an interim measure providing for their reinstatement, followed by a judicial decision to the same effect. However, the regional government, instead of reinstating the dismissed workers in their original posts, imposed upon them service provider contracts governed by civil law. Furthermore, the regional government has appointed a number of new workers to replace those who were dismissed, instead of complying with the dozens of judicial decisions handed down.
- 1051.** Lastly, the CGTP alleges that among the dismissed workers who obtained a judicial order and subsequently a judicial decision ordering reinstatement was Ms Clara Tica, the Secretary-General of the Union of Workers of the Callao Regional Government, who was also obliged to sign a contract governed by civil law in March 2011. The CGTP underlines that this trade union official had been taking action to secure the reinstatement of the dismissed workers, in addition to other trade union activities.

**B. The Government's reply**

- 1052.** In its communications dated 19 and 27 September and 5 October 2011, the Government indicates that it approached the regional government of Callao, which states that it has in no way violated the freedom of association of the workers of the Union of Workers of the Callao Regional Government and, therefore, vehemently rejects the grounds of the complaint, which concerns legal proceedings instituted to contest the dismissal and, in that

connection, the appropriate steps are being taken to comply with the judicial reinstatement orders.

- 1053.** According to the regional government of Callao, the dismissal of these workers does not stem from an act of hostility. Moreover, a group of 19 workers were subsequently recruited to posts within the Staff Allocation Unit (CAP), which, according to the analytical budget for institutional staff, were unoccupied; thus, the aforementioned judicial order was complied with in this case. However, a group of 29 workers are employed under service provider contracts owing to a lack of vacancies within the staff allocation unit (as things stand, the regional government is not legally in a position to reinstate the dismissed workers – who are in possession of a judicial reinstatement order – to posts within the staff allocation unit, since the third transitional provision of Act No. 28411 (the General Act on the national budgetary system) allows for “the recruitment of staff only when the posts provided for in the budget are unoccupied”, thus nullifying actions that run counter to this provision without prejudice to the accountability of the public servant from the body that authorized those actions or the current holder of the post).
- 1054.** As regards the dismissal of the Secretary-General of the Union of Workers of the Regional Government of Callao, Ms Clara Tica, the regional government indicates that the judicial review of her dismissal is still pending before the Supreme Court of the Republic in the form of administrative proceedings. By virtue of an interim measure ordered by the court, the trade union official was subsequently recruited under a service provider contract, which was renewed consecutively until it was terminated by invoking the seventh clause. Ms Tica was informed of this in a communication dated 18 March 2011, which stated that “her behaviour was not in keeping with the body’s working requirements”.
- 1055.** The regional government notes that, as the different cases of dismissal have become the subject of legal proceedings, it should be recalled that article 139(2) of the 1993 Constitution and section 4 of the consolidated text of the Judiciary Organization Act provide that no authority may take over cases that are pending before a jurisdictional body or interfere in the exercise of its functions as defined by its legal responsibilities.
- 1056.** Thus, by virtue of Memorandum No. 667-2011-MTPE/4/10, the Office of the President of the High Court of Justice of Callao was requested to provide an update on the status of the legal proceedings mentioned in the complaint. This information was received and, from it, it is understood that there are legal proceedings currently awaiting review (pending a final decision that will grant them the status of *res judicata* and make them enforceable) and others that are currently at the enforcement stage, in relation to which the originating courts are empowered to take the enforcement measures necessary to safeguard the rights of the affected workers. The documentation received also reveals that a final judicial decision has been handed down by the judicial authority concerning the reinstatement of seven workers in their posts, that a final decision is about to be handed down in several sets of proceedings, that there are others at the appeal stage, and that, in one case, the statute of limitation has expired.
- 1057.** The regional government concludes that, in keeping with the jurisprudence of the Constitutional Court of Peru – the highest authority interpreting the Constitution – “redress must be sought for any detrimental, unjustified or unreasonable act that affects unionized workers or their officials and makes it impracticable for the trade union to function”, which, according to the regional government, affords full protection to freedom of association. In addition, according to this jurisprudence, the right to organize and freedom of association includes, among other aspects, the protection of workers who are attached to or members of a trade union against any acts that would serve to restrict their rights and that are motivated by their membership of a trade union or a similar organization. Thus, the mass dismissal of workers reported in the complaint will have undermined freedom of

association only if the affected workers were members of the Union of Workers of the Regional Government of Callao or, otherwise, if it was intended to restrict the normal enjoyment of the right to organize.

### **C. The Committee's conclusions**

- 1058.** *The Committee observes that the present case refers to the collective dismissal of workers in January 2007 and to the subsequent dismissal in March 2011 of the Secretary-General of the Union of Workers of the Regional Government of Callao, allegedly because of her trade union activities, in particular the action she had taken to secure the reinstatement of the dismissed workers. The trade union official was not reinstated in her post despite her having obtained an interim judicial order to this effect and she was instead obliged to accept a service provider contract governed by civil law, which was subsequently not renewed.*
- 1059.** *The Committee observes that, according to the allegations of the dismissed workers who approached the judicial authority, although they secured reinstatement in their posts, the regional government of Callao offered them only service provider contracts governed by civil law and appointed several workers to replace those who had been dismissed.*
- 1060.** *The Committee notes that the regional government denies that the dismissals have violated freedom of association or stemmed from acts of hostility, indicating that 19 workers have been reinstated in their posts, and that although 29 workers have not been reinstated in their posts (the regional government not being legally in a position to do so as, according to the budget, there are no vacancies), they have been recruited under service provider contracts, and steps are being taken to comply with the judicial reinstatement orders. The Committee notes that, according to the Government, these 29 workers instituted legal proceedings before the Supreme Court. The Committee also notes that, according to the documentation sent by the judicial authority, a judicial decision in favour of reinstating seven workers in their posts was handed down and that while in one case the statute of limitation had expired, in other cases, either a judicial decision was about to be handed down or the cases were at the appeal stage.*
- 1061.** *The Committee underlines that the alleged collective dismissals referred to in the present complaint date from 2007 and while it observes that the complaint does not provide details on the anti-union motives behind these dismissals (there is only a general reference to the violation of Conventions Nos 87 and 98), it considers that all workers and trade union members in particular are entitled to expeditious justice. Therefore, the Committee firmly expects that the dismissed workers who have yet to be reinstated in their posts (and who are currently employed by the regional government of Callao under service provider contracts) will receive a judicial decision, without delay, and requests the Government to keep it informed in this regard.*
- 1062.** *As regards the alleged dismissal of the Secretary-General of the trade union, Ms Clara Tica, who was not reinstated in her post despite her having obtained a judicial order to that effect and who was subsequently recruited under a service provider contract governed by civil law, which stopped being renewed in March 2011, the Committee takes note of the Government's statement confirming that, having obtained an interim judicial order, she was recruited under a service provider contract governed by civil law, which stopped being renewed in March 2011 because "her behaviour was not in keeping with the body's working requirements". This case has also been referred to the judicial authority.*
- 1063.** *The Committee observes that, in the case of the dismissal of this trade union official, the trade union has alleged anti-union motives and specifically her actions to secure the reinstatement of the dismissed workers who had yet to be reinstated in their posts. The*



*Committee stresses that the regional government does not cite individual, concrete actions constituting serious offences as grounds for dismissal but instead provides general statements to the effect that “her behaviour was not in keeping with the body’s working requirements”.*

**1064.** *In these circumstances, given that the regional government has failed to cite concrete actions that constitute a serious offence but has instead provided ambiguous general statements and, bearing in mind the judicial order requesting the reinstatement of the trade union official in her post, the Committee reminds the Government of the obligation of the authorities of the regional government of Callao to lead by example in ensuring respect for fundamental labour rights, including freedom of association, and requests the Government to ensure that the authorities of the regional government of Callao take steps to reinstate without delay the trade union official Ms Clara Tica in her post. The Committee requests the Government to keep it informed in this regard.*

### **The Committee’s recommendations**

**1065.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee firmly expects that the dismissed workers who have yet to be reinstated in their posts (and who are currently employed by the regional government of Callao under service provider contracts) will receive a judicial decision without delay and requests the Government to keep it informed in this regard.*
- (b) The Committee reminds the Government of the obligation of the authorities of the regional government of Callao to lead by example in ensuring respect for fundamental labour rights, including freedom of association, and requests the Government to ensure that the authorities of the regional government of Callao take steps to reinstate without delay the trade union official Ms Clara Tica in her post. The Committee requests the Government to keep it informed in this regard.*

CASE NO. 2888

DEFINITIVE REPORT

### **Complaint against the Government of Poland presented by the National Commission of the NSZZ “Solidarnosc”**

*Allegations: The complainant organization alleges that Polish legislation restricts the right of certain categories of workers to establish and join trade unions and does not effectively protect against acts of anti-union discrimination*

**1066.** The National Commission of the NSZZ “Solidarnosc” submitted its complaint in a communication dated 28 July 2011.

- 1067.** The Government submitted its observations in a communication dated 30 September 2011.
- 1068.** Poland has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

#### **A. The complainant's allegations**

- 1069.** In its communication dated 28 July 2011, the complainant alleges that the Polish version of Convention No. 87 uses the term "employees" (*pracownicy*) as a translation of the English term "workers" or the French term "travailleurs" used in the text of the Convention. The complainant considers that the term "employee" may define any person performing paid work, however, in the legal language it has a narrower meaning referring only to workers as defined by the Labour Code. This, according to the complainant, may prompt a narrower interpretation of the term than the one used in the Convention. Referring to the principles of freedom of association, the complainant emphasizes that everybody performing paid work should have the right to establish and join trade unions of their choosing and that there must be no restrictions based on the existence of labour relations, which in practice, often do not exist, as in the case of agricultural workers, self-employed or freelancers.
- 1070.** The complainant indicates that the Labour Code defines the term "employee" as a person employed on the basis of a contract of employment, appointment, election, nomination or a cooperative contract of employment. Polish legislation, in defining the scope of the right to organize as set forth in the Act on Trade Unions of 1991 grants the right to establish and join trade unions exclusively to "workers" as defined by the Labour Code, members of agricultural cooperatives, persons performing work on the basis of agency contracts, homeworkers, pensioners, unemployed, functionaries and those engaged in the non-combatant military service. The complainant therefore considers that by using a narrow definition of the term "employee" inspired by the Labour Code, the legislator denied freedom of association rights to persons employed on the basis of civil law contracts (contract for service), self-employed and other persons performing work but who are not employers. According to the complainant, the scope of the right to organize is therefore restricted only to selected categories of employees and the choice seems to be arbitrary and does not reflect the reality of the Polish labour market where persons employed on the basis of civil law contracts and self-employed constitute a significant share of the workforce.
- 1071.** According to the complainant, the problem is even more visible in the case of self-employed as according to the Polish law, such workers may not join employers' organizations as they do not employ anyone and are not "employers" in the sense of the definition provided for in section 3 of the Labour Code. Pursuant to sections 1 and 2 of the Law on Employers' Organizations of 1991, only subjects defined by the Labour Code may associate in employers' organizations.
- 1072.** The complainant indicates, however, that according to the literature on the topic, self-employed persons enjoy the right to organize as they can form other organizations and associations. The complainant nevertheless considers that working people who wish to participate actively in creation of better working and living conditions may do so only through activities of trade unions or employers' organizations. These are legitimate bodies for representing and defending rights or interests and only those organizations are granted collective rights (collective bargaining and collective labour dispute). While the Act on Association of 1989 was adopted in order to fully guarantee constitutional rights stemming from the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and to provide citizens with equal rights to fully participate in the

public life, to express diverse opinions and to follow their individual interests, the form of association covered by this Act is different from those covered by Convention No. 87.

- 1073.** The complainant also alleges that section 2 of the Act on Trade Unions is in violation of Convention No. 87 as it makes a distinction between the rights of specific categories of workers. While the right to establish and join trade unions is granted to workers, members of agricultural cooperatives, persons employed on agency contracts and in non-combatant military service, only the right to join trade unions (without the right to establish them) is granted to homeworkers, pensioners and unemployed. State officers of uniform service may associate with restrictions as defined by specific legislation.
- 1074.** The complainant also alleges that the Act on Trade Unions is also in violation of Convention No. 135 under which the term “workers’ representative” refers not only to trade union members but also to other persons in accordance with the national law. The Act on Trade Unions, however, grants special employment protection only to selected persons. In this respect, the complainant indicates that according to the Act, an employer may not, without the consent of the company trade union board: (1) terminate the employment relationship either with or without notice with a member of the board of the company trade union referred by name in the board resolution or other employee who is a member of the company trade union entitled to represent the union before the employer or the authority, or a person who performs activities in the area of the labour law on behalf of the employer; and (2) unilaterally change working or pay conditions of the employee concerned, unless other is provided for in the regulations. This norm, however, includes only workers in the understanding of the Labour Code, i.e. employees. Moreover, home-based work is regulated by a specific legislation (Decree of 31 December 1975 on Labour Rights of Home Workers) according to which, it is unlawful to terminate the employment relationship either with or without notice of a worker who is a member of a trade union board. Therefore, according to the complainant, the scope of the protection is different: while a worker who is not a member of a trade union board but is appointed by the union to represent the workers would enjoy protection against dismissal, a person performing home-based work would not.
- 1075.** The complainant also indicates that persons performing work on the basis of an agency (civil) contract, who have the right to organize pursuant to the Act on Trade Unions, if elected or nominated to a company trade union board, do not benefit from the same protection. Moreover, pursuant to the Act Implementing EU regulations on equal treatment of 3 December 2010, such persons have no right to compensation for suffered discrimination, because trade union membership is not included in the list of prohibited grounds of discrimination.

## **B. The Government’s reply**

- 1076.** In its communication dated 30 September 2011, the Government indicates that freedom of association rights are set out in article 12 of the Polish Constitution, according to which “the Republic of Poland shall ensure freedom for the creation and functioning of trade unions, socio-occupational organizations of farmers, societies, citizens’ movements, other voluntary associations and foundations”. This shall be interpreted as a guarantee of freedom of association in all aspects of social life, including employment relations. This provision does not contain a closed catalogue of forms of associations that persons may organize in: various and different kinds of organizations can be created. In the Polish legal system, trade unions are not the only organizations functioning in the field of broadly understood employment relations. Polish legislation establishes favourable conditions for the creation of different kinds of organizations. The characteristics of such organizations are regulated by specific legislation, such as the 1989 Act on Trade Unions of Individual Farmers, 1989 Law on Associations and 1984 Act on Foundations. The Government adds

that associations and foundations can apply for the status of a public benefit organization on the basis of the 2003 Act on Public Benefit and Volunteer Work. Furthermore, self-employed persons or independent professionals can establish their own organizations in order to represent their interests. The Government lists the following examples of such organizations: the Polish Journalists Association; Polish Association of Truck Drivers; Association of Taxi Drivers; Association of Polish Artists; etc.

- 1077.** The Government further indicates that trade unions have a special role in the social and economic life and enjoy collective bargaining rights and the right to strike. Thus, the legislation reflects the traditional view, according to which, trade unions are employees' organizations pursuing the aim of protecting employees' interests with regard to employers by determining remuneration and working conditions by means of bargaining with employers.
- 1078.** The Government considers that the right to associate does not literally accrue to everyone, but rather "for the protection of his or her rights" (the Universal Declaration of Human Rights), "in order to protect his or her interest" (the International Covenant on Civil and Political Rights) and "in order to protect his or her economic and social interests" (European Social Charter). In the case of trade unions, not just any interest, but only interests connected with labour are the subject of the trade unions' activities. This leads to a narrower understanding of the scope of persons who have the right to associate in trade unions. The Government refers to a decision of the European Commission on Human Rights, according to which, it is a characteristic for an occupational organization that it sustains the ethics and discipline within the profession and protects the interests of its members in non-disputatious issues; a trade union, on the other hand, represents its members in disputes with an employer and negotiates with an employer. Thus, according to the Government, there is a clear difference between trade unions and other organizations, since trade unions have the right to conclude collective agreements.
- 1079.** The Government indicates that section 1 of the Act on Trade Unions describes a trade union as an organization of people who work, therefore, not only employees as set out in section 2 of the Labour Code have the right to create trade unions and to become its members. In accordance with its sections 2 and 5, the Act on Trade Unions also applies to members of agricultural production cooperatives and persons who perform work on a basis of agency agreements if they are not employers, as well as persons delegated to companies in order to serve their military duty. As to persons who perform home-based work, they have the right to join trade unions functioning at a company with which they have concluded a contract for home-based work (section 2(2) of the Act on Trade Unions).
- 1080.** The Government further indicates that different rights regarding the possibility of creating trade unions result from different links joining individual groups of people with their place of work. In accordance with the national tradition, as well as the national legislation, the basic organizational structure of a trade union is a company trade union organization. This model clearly points both to employer–employee relations in the working process and to parties of industrial relations, solving positional conflicts resulting from opposing interests by means of collective bargaining. Such relations, according to the Government, cannot, however, be determined in the case of self-employed persons or independent professionals.

### **C. The Committee's conclusions**

- 1081.** *The Committee notes that the complainant in this case alleges that, following an inaccurate translation of the word "worker" in the Polish version of Convention No. 87, the Polish labour legislation uses the term "pracownik" ("employee"), instead of "worker" as used in Convention No. 87 and considers, in particular, that the Labour Code, by limiting its scope of application to employees and providing for a narrow*

definition of the term “pracownik” restricts the right of many categories of workers to establish and join trade union organizations. The Committee notes that under section 2 of the Labour Code, a “pracownik” is a “person employed on the basis of a contract of employment, an appointment, an election, a nomination or a cooperative contract of employment”. Such definition is, according to the complainant, much narrower than the term “worker” used in Convention No. 87. According to the complainant, the term “pracownik” used in the Act on Trade Unions is to be read in the light of the definition provided for in the Labour Code. While this Act, in addition to employees, grants the right to organize to a larger category of workers (such as members of agricultural cooperatives, persons performing work on the basis of agency contracts, homeworkers, pensioners, unemployed, functionaries and those engaged in the non-combatant military service), persons employed on the basis of civil law contracts (contract for service), self-employed and other persons performing work but who are not employers do not enjoy the right to organize in the sense of Convention No. 87.

**1082.** *The Committee further notes the complainant’s allegation that the narrow definition of the term “pracownik” provided for in the Labour Code, may result in practice in lower protection granted to trade union representatives if they are not employees in the sense of the Labour Code. In this respect, the complainant indicates that the provisions of the Act on Trade Unions dealing with the protection of trade union representatives use the term “pracownik” in the sense of the Labour Code, i.e. “employee”, and thereby exclude all other categories of workers or provide for a different scope of protection. For instance, persons performing work on the basis of an agency (civil) contract, if elected or nominated to a company trade union board, do not benefit from the same protection as those employed and working at the company.*

**1083.** *The Committee notes that the Government refers to article 12 of the Polish Constitution dealing generally with freedom of association and explains that various kinds of organizations can be freely established in Poland, including trade union organizations. According to the Government, the purpose of an organization is what qualifies a given organization. In the case of trade unions, such organizations deal with labour interests and represent employees in collective bargaining and collective labour disputes with employers. Hence, labour relationship is a key aspect. In the case of self-employed persons or independent professionals, there is no labour relation with an employer. While such persons cannot establish and join trade unions per se, they can establish their own organizations in order to represent their interests. The Committee notes that the Government lists examples of existing professional associations in Poland, which represent the interest of various categories of self-employed and independent professionals such as artists, journalists, taxi drivers, etc. The Committee also notes that in its 2010 report to the Committee of Experts on the Application of Conventions and Recommendations on the application of Convention No. 87, the Government indicated that the right to form and join trade unions is not granted for those individuals who have undertaken to provide employment on the basis of civil law contracts, since they cannot be considered employees under section 2 of the Labour Code.*

**1084.** *The Committee recalls that the term “organization” used in Convention No. 87 means any organization of workers or of employers for furthering and defending the interests of workers or of employers (Article 10), such organizations should therefore have the possibility of engaging in collective negotiations in the interest of its members. The Committee notes, however, the Government’s indication that the model of labour relations in the country does not permit self-employed or independent professionals to enter into negotiations. The Committee recalls in this regard that, by virtue of the principles of freedom of association, all workers – with the sole exception of members of the armed forces and the police – should have the right to establish and join organizations of their own choosing. The criterion for determining the persons covered by that right, therefore, is*

not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 254]. The Committee therefore, like the Committee of Experts, requests the Government to take the necessary measures, including where necessary, the amendment of the legislation in order to ensure that all workers, without distinction whatsoever, including self-employed workers and those employed on the basis of civil law contracts, enjoy the right to establish and join organizations of their own choosing within the meaning of Convention No. 87. Further, recalling that Convention No. 98 protects all workers and their representatives against acts of anti-union discrimination and that the only possible exceptions from its scope of application are the police, armed forces and public servants engaged in the administration of the State, the Committee requests the Government to ensure that all workers and their representatives enjoy adequate protection against acts of anti-union discrimination regardless of whether they fall into the definition of employees under the Labour Code or not.

- 1085.** *The Committee further notes the complainant's allegation, not disputed by the Government, that the Act on Trade Unions makes a distinction between those who can establish and join trade unions and those who can only join trade unions. With regard to the latter case, the complainant refers, in particular, to the following categories of workers: home-based workers, unemployed and retired persons. The Committee stresses that home-based workers are not excluded from the application of Convention No. 87 and should therefore be governed by the guarantees it affords and have the right to establish and join occupational organizations. The Committee therefore requests the Government to amend the Act on Trade Unions in this respect. The Committee does not however find that granting retired workers and unemployed solely the right to join a trade union and participating in its functioning subject to the rules of the organization concerned is contrary to the principles of freedom of association.*
- 1086.** *The Committee requests the Government to provide information on the measures taken or envisaged to bring its legislation and practice into conformity with the freedom of association principles to the Committee of Experts on the Application of Conventions and Recommendations to which it refers the legislative aspects of this case.*

## **The Committee's recommendations**

- 1087.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee requests the Government to take the necessary measures in order to ensure that all workers, without distinction whatsoever, including self-employed workers and those employed under civil law contracts, enjoy the right to establish and join organizations of their own choosing within the meaning of Convention No. 87.*
  - (b) Recalling that Convention No. 98 protects all workers and their representatives against acts of anti-union discrimination and that the only possible exceptions from its scope of application are the police, armed forces and public servants engaged in the administration of the State, the Committee requests the Government to ensure that all workers and their representatives enjoy adequate protection against acts of anti-union discrimination regardless of whether they fall under the definition of employee under the Labour Code or not.*

- (c) *The Committee requests the Government to amend the Act on Trade Unions so as to ensure that home-based workers can establish and join organizations of their own choosing.*
- (d) *The Committee requests the Government to provide information on the measures taken or envisaged to bring its legislation and practice into conformity with the freedom of association principles to the Committee of Experts on the Application of Conventions and Recommendations to which it refers the legislative aspects of this case.*

CASE NO. 2714

INTERIM REPORT

**Complaint against the Government of the  
Democratic Republic of the Congo  
presented by  
the Congolese Labour Confederation (CCT)**

***Allegations: Harassment and intimidation of  
trade union leaders***

- 1088.** The Committee last examined this case at its June 2011 meeting, when it presented an interim report to the Governing Body [see 360th Report, approved by the Governing Body at its 311th Session (2011), paras 1093–1102].
- 1089.** At its November 2011 meeting [see 362nd Report, para. 5], the Committee made an urgent appeal to the Government indicating that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body (1972), it could present a report on the substance of the case at its next meeting, even if the requested information or observations had not been received in time. To date, the Government has not sent any information.
- 1090.** The Democratic Republic of the Congo has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

**A. Previous examination of the case**

- 1091.** In its previous examination of the case in June 2011, deploring the fact that despite the time that had elapsed the Government had not provided any information on the allegations, the Committee made the following recommendations [see 360th Report, para. 1102]:
- (a) The Committee deeply deplores the fact that, despite the time that has elapsed since the complaint was presented in April 2009, the Government has still not replied to the allegations of the complainant organization, despite having been invited on several occasions, including by means of two urgent appeals, to present its observations on the allegations in reply to the recommendations made by the Committee in its previous examination of the case [see 356th and 359th Reports, para. 5]. The Committee notes with deep regret that the Government has still not provided any information whatsoever concerning three consecutive complaints presented since 2009, which have already been

examined in the absence of a Government reply and which relate to serious violations of freedom of association. The Committee expects the Government to be more cooperative in future.

- (b) The Committee urges the Government without delay to provide detailed information on the reasons for the disciplinary measures applied against Mr Basila Baelongandi and Mr Bushabu Kwete, CCT union leaders, in June 2008 and January 2009, indicating in particular whether they remain suspended and, if so, why. If it is found that the measures in question were motivated solely by their legitimate trade union activities, the Committee expects that the officials in question will be reinstated without delay and paid the wages arrears and other benefits owed to them, and that the Government will ensure that such acts of anti-union discrimination will not recur in future. If reinstatement is not possible for objective and compelling reasons, the Committee requests the Government to take the necessary measures to ensure that the trade union leaders are paid an adequate compensation which would represent a sufficiently dissuasive sanction for anti-union discrimination.
- (c) The Committee requests the Government to provide its observations without delay on the summons issued by the prosecution service for Mr Bushabu Kwete to attend a hearing and, in particular, the reasons for the summons in question.
- (d) The Committee, recalling that it is for trade unions to appoint their own representatives on consultative bodies, requests the Government to reply without delay in detail to the complainant's allegations concerning the appointment of a trade unionist who, according to the complainant, has no union mandate, to the Bonus Allocations Committee.
- (e) The Committee requests the Government, or the complainant, to provide information on the composition of the bodies within the DGRAD and to clarify the role of the unions in that regard.

## B. The Committee's conclusions

**1092.** *The Committee deeply deplores the fact that, despite the time that has elapsed since the presentation of the complaint in April 2009, the Government has still not replied to the complainant's allegations, even though it has been requested several times, including through three urgent appeals, to present its observations on the allegations and its reply to the recommendations made by the Committee in its previous examinations of the case [see 357th Report, para. 1120 and 360th Report, para. 1102].*

**1093.** *Hence, in accordance with the applicable procedural rules [see 127th Report, para. 17, approved by the Governing Body at its 184th Session (1972)], the Committee is obliged to present another report on the substance of the case without being able to take into account the information it had hoped to receive from the Government.*

**1094.** *The Committee once again reminds the Government that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to ensure respect for this freedom in law and in practice. The Committee is confident that, while this procedure protects governments against unreasonable accusations, they must recognize the importance of formulating, for objective examination, detailed replies concerning allegations made against them [see First Report of the Committee, para. 31].*

**1095.** *In general, the Committee notes with deep regret that the Government has still not provided any information whatsoever regarding the five consecutive complaints presented since 2009, which have already been examined in the absence of the Government's reply and which allege grave violations of freedom of association. The Committee notes with deep regret that the Government continues to fail to comply, despite assurances given to the Chairperson of the Committee at a meeting held in June 2011. The Committee expects*



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*the Government to be more cooperative concerning this case. The Committee reminds the Government of the possibility to avail itself of the technical assistance of the Office.*

**1096.** *In these circumstances, the Committee finds itself obliged to reiterate its previous recommendations and firmly expects the Government to provide information without delay.*

### **The Committee's recommendations**

**1097.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) In general, the Committee notes with deep regret that the Government has still not provided any information whatsoever regarding the five consecutive complaints presented since 2009, which have already been examined in the absence of the Government's reply and which allege grave violations of freedom of association. The Committee notes with deep regret that the Government continues to fail to comply, despite assurances given to the Chairperson of the Committee at a meeting held in June 2011, and expects the Government to be more cooperative concerning this case.*
- (b) The Committee urges the Government to provide detailed information without delay on the reasons for the disciplinary measures applied against Mr Basila Baelongandi and Mr Bushabu Kwete, CCT union leaders, in June 2008 and January 2009, indicating in particular whether they remain suspended and, if so, why. If it is found that the measures in question were motivated solely by their legitimate trade union activities, the Committee expects that the officials in question will be reinstated without delay and paid the wages arrears and other benefits owed to them, and that the Government will ensure that such acts of anti-union discrimination will not recur in future. If reinstatement is not possible for objective and compelling reasons, the Committee requests the Government to take the necessary measures to ensure that the trade union leaders are paid adequate compensation which would represent a sufficiently dissuasive sanction for anti-union discrimination.*
- (c) The Committee requests the Government to provide its observations without delay on the summons issued by the prosecution service for Mr Bushabu Kwete to attend a hearing and, in particular, the reasons for the summons.*
- (d) The Committee, recalling that it is for trade unions to appoint their own representatives on consultative bodies, requests the Government to reply without delay in detail to the complainant's allegations concerning the appointment of a trade unionist who, according to the complainant, has no union mandate, to the Bonus Allocations Committee.*
- (e) The Committee requests the Government, or the complainant, to provide information on the composition of the bodies within the General Directorate for Administrative, Judicial, Property and Share Revenues (DGRAD) and to clarify the role of the unions in that regard.*
- (f) The Committee reminds the Government of the possibility to avail itself of the technical assistance of the Office.*

CASE NO. 2789

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Turkey  
presented by  
the International Textile, Garment and Leather  
Workers' Federation (ITGLWF)**

*Allegations: The complainant alleges that two enterprises, Menders Tekstil and Desa Der Sanayi ve Ticaret AS initiated anti-union campaigns involving acts of harassment and intimidation, and dismissals to deter workers from organizing. The complainant further alleges that national legislation unduly restricts the rights to organize and collective bargaining and fails to provide adequate protection against acts of anti-union discrimination and interference*

- 1098.** The International Textile, Garment and Leather Workers' Federation (ITGLWF) submitted its complaint in communications dated 2 June 2010.
- 1099.** The Government sent its observations in a communication dated 29 September 2011.
- 1100.** Turkey has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

**A. The complainant's allegations**

- 1101.** By its communications dated 2 June 2010, the ITGLWF submitted a complaint on behalf of its two affiliates, Teksif and Deri-Is, which involves two companies as related below.

***Menderes Tekstil***

- 1102.** By way of background, the ITGLWF indicates that workers at the Menderes Tekstil plant in Denizli began to organize in mid-2008 when the company began downsizing without, allegedly, making any effort to mitigate the negative impact on workers. The complainant alleges that when Teksif began recruiting workers at the company, the latter adopted an anti-union attitude: it prevented union activists from handing out leaflets; played loud music to disturb trade union activists trying to address workers at the factory gates; insulted union organizers in front of workers; and generally tried to intimidate them. The ITGLWF further alleges that in July 2008, 12 union members were unfairly dismissed. According to the complainant organization, one worker was escorted to the notary public to sign her formal resignation from the union and to attest that she would take no action against the company. The notary's fees, amounting to nearly a week's wages, were paid by the company.

- 1103.** When the company refused to address the issue, 12 workers initiated legal proceedings. Seven workers withdrew their cases, allegedly after receiving threats from the company. On 21 October 2009, the Labour Court ruled that it had not been proven that the workers had been dismissed as a result of their union activity, given that the company was in the process of downsizing. The ITGLWF indicates that the union appealed the cases in the High Court of Appeal.
- 1104.** In July 2009, Teksif formally requested a meeting with the company's management to discuss the outstanding issues at the plant. The company responded by claiming that the European Social Charter prevented it from accepting the union as a party and that a meeting with the union would amount to "imposing" a particular union on the workforce.
- 1105.** Based on the above, the complainant alleges failure of the Government to uphold the freedom of workers to establish organizations and to allow unions to represent the interests of their members, as well as to promote collective bargaining. In particular, the ITGLWF indicates that the requirement under the legislation that trade unions must represent at least 10 per cent of workers at the sectoral level and over 50 per cent of workers at the enterprise level before they can gain recognition for the purpose of collective bargaining and elect shop stewards (whose role is to handle grievances, protect the rights and interests of workers and supervise the observance of working conditions) has made it impossible for workers at the company in question to establish a trade union. According to the complainant, the exercise of the right to organize has been further hampered by the legislative provision which requires workers to certify their union membership by the notary, which can only be done during work hours, meaning that workers need to leave work and that an employer can easily find out who is joining a union. Moreover, the complainant considers that a notary fee of about 20 euros (one fifteenth of the monthly wage) clearly hinders the free exercise of the right to organize.
- 1106.** The ITGLWF indicates that Teksif was the only union at the enterprise, yet it was prevented not only from bargaining on terms and conditions of employment but also from operating at the workplace, from engaging in discussions on good industrial relations practices or even from representing individual workers in grievances. The union was also denied the opportunity of consultation on the measures to be taken to avert or to minimize the termination and to mitigate the adverse effects of dismissals in accordance with the Termination of Employment Convention, 1982 (No. 158), ratified by Turkey.

### ***Desa Der Sanayi ve Ticaret AS***

- 1107.** The ITGLWF alleges that when its affiliate organization, Deri-Is (first trade union organization at the enterprise) began organizing workers at the plant in April 2008, the company began dismissing union members or harassing them. Over the course of the week of 28 April to 5 May, the company dismissed 38 union members. Other workers were harassed and intimidated and told they would lose their jobs if they did not resign from the union. In July 2008, the company also dismissed a worker from its Sefakoy plant. In her eight years at the factory, Ms Emine Arslan had developed a reputation of a diligent worker; yet shortly after she started organizing workers, she received three warnings on the same day and fired. The day after her dismissal, Deri-Is union representatives came to the factory and sought a meeting with the company's management, but the latter refused to deal with the union, telling Ms Arslan to come alone if she wished to talk. In December 2009, the company dismissed another five union members.
- 1108.** When the company refused to reinstate the dismissed workers, Deri-Is and the ITGLWF engaged with the company in an attempt to find a solution. The ITGLWF wrote to the company's management on 22 occasions between April 2008 and June 2009 to ask for the reinstatement of the unfairly dismissed workers and for other measures to ensure sound

industrial relations at the plant (including respect for the right to unionize, access to the workplace for trade union representatives, and beginning discussions with the union on industrial relations issues). According to the complainant, several meetings took place between the management, Deri-Is and the ITGLWF regional organization, ETUF-TCL, but every time it appeared that progress was being made the company went back on its commitments. The company repeatedly claimed it could not accept union demands for the introduction of an industrial relations management system because the demands were in breach of Turkish legislation regarding representation rights requiring a union to represent over 50 per cent of the workforce before it can be recognized.

- 1109.** The complainant indicates that in view of the company's refusal to reinstate the dismissed workers, the union initiated legal action on their behalf. It further points out that the unlawful nature of these dismissals is not in question given that the courts found that the workers had been dismissed because of their union membership. In 34 of the 43 cases submitted, the courts found that the workers had been dismissed because of their union activity and ordered the company to either reinstate them with four months' back pay or finalize the termination of their employment with the payment of 16 months' wages. Of the remaining nine cases, two were rejected because the workers concerned had been employed for less than six months; six cases were dropped after the workers concerned received inducements from the employer (three of those were subsequently reinstated, while others received money) and one case was rejected because the worker concerned had signed a letter of resignation as well as a letter saying that he was leaving the company at his own free will (the union has appealed this case in view of the fact that the letter was signed under pressure). The company appealed the Labour Court's rulings but the Supreme Court rejected the appeal. To date, 32 appeal cases have been found in favour of the workers, while two are still pending.
- 1110.** In spite of this, the company continued to refuse to reinstate all but three of the workers who were demanding reinstatement, and opted to pay compensation to 15 workers whose cases were approved by the Supreme Court. On 24 August 2009, the company and the union reached an agreement providing for the reinstatement of six workers and the recognition of Deri-Is as the single authorized union at the factory. However, the company failed to uphold the terms of the agreement, including by refusing to reinstate two of the six workers. The ITGLWF alleges that anti-union discrimination continues to this day. A union member was dismissed in May 2010, while others have been harassed, given warnings and reassigned to other sections. During a training programme in March, workers were warned not to join the union because it was a "terrorist" organization.
- 1111.** The complainant further alleges that during the course of the organizing drive at the plants, the company set up a joint Workers' Council which was used to further undermine unionists' efforts. The workers represented on the Council were appointed by the employer rather than being freely elected by the workers.
- 1112.** Based on the above, the ITGLWF considers that the Government failed to uphold the freedom of workers to establish organizations and to protect against acts of interference and anti-union discrimination, as well as to promote collective bargaining and allow unions to defend the interests of their members. In addition to the minimum legislative requirements to establish trade union organization at the enterprise level referred to above, the complainant organization considers that by creating a joint Workers' Council, the employer was conveying to workers that they had no need for a union and thus further hindered workers' freedom of association rights. Indeed, according to the ITGLWF, the Council worked to keep the union out of the workplace and the fact that workers were appointed by the employer rather than being freely elected meant the Council was neither independent nor legitimate.

## **B. The Government's reply**

- 1113.** In its communication dated 29 September 2011, by way of background, the Government refers to article 51(1) of the Constitution of the Republic of Turkey, which provides for the right of employees and employers to form labour unions and employers' associations and their higher organizations, without obtaining prior permission as well as to join and freely withdraw from such organizations, in order to safeguard and develop their economic, social and labour rights and interests. According to the same provision, no one shall be forced to become a member of a union or to withdraw from its membership. The Government also refers to section 22 of the Trade Unions Act (No. 2821), according to which, trade union membership shall be optional and no one shall be forced to join or not join a trade union. According to the same provision, membership in a workers' trade union shall be acquired by forwarding five copies of the membership registration form duly completed and signed by the worker and certified by a notary public to the trade union concerned, subject to the approval by the competent body of such an organization. According to the Government, section 25 of this Act also stipulates that no worker or employer shall be forced to maintain or withdraw his or her membership in a trade union and that any member may resign by giving a prior notice in person in the presence of a notary public.
- 1114.** As to collective bargaining agreements, the Government refers to article 53 of the Constitution, which provides that workers and employers have the right to conclude collective bargaining agreements in order to regulate their economic and social position and conditions of work and that the collective bargaining procedure shall be regulated by law, and to section 12 of the Collective Labour Agreements, Strikes and Lock-outs Act (No. 2822) which stipulates that "a trade union of workers representing at least 10 per cent of the workers engaged in a given branch of activity (excluding the branch of activity covering agriculture, forestry, hunting and fishing) and more than half of the workers employed in the establishment or each of the establishments to be covered by the collective labour agreement shall have the power to conclude a collective labour agreement covering the establishment(s) in question".
- 1115.** The Government indicates that, following the 2010 constitutional amendments, membership in more than one union became possible and more than one collective agreement can now be concluded at the same workplace. Other provisions restricting the right to strike (concerning liability for damages caused during a strike, as well as prohibition of politically motivated and solidarity strikes, go-slows and pickets) were also repealed. The Government explains that Acts Nos 2821 and 2822 will be amended in consultation with the social partners. In this respect, it indicates that a committee composed of academics was formed to re-evaluate the Bill Amending Acts Nos 2821 and 2822. This Bill is currently on the agenda of the Grand General Assembly of Turkey. The Government explains that the Draft Act on Trade Unions and Collective Labour Agreements, Strikes and Lock-outs prepared by the committee in line with the ILO norms and EU standards was reviewed by the social partners in the framework of the tripartite consultancy committee meetings.

### ***Observation on the matters raised by the Teksif Union***

- 1116.** The Government explains that the allegations of acts of anti-union discrimination at the Menderes Tekstil have been examined by labour inspectors of the Ministry of Labour and Social Security. It refers to the following findings contained in their June 2011 report:

- (i) As workers' contracts were terminated because of their refusal to comply with the employer's decision dated 21 March 2008 to close down some machines in the fibre department of the factory and to reassign affected workers to other departments, and as such workers received compensation, it cannot be considered that workers' right to organize was limited or obstructed. Downsizing of the company is an indicator of the global economic crisis.
- (ii) When workers' contracts are terminated for economic reasons, it is normal that some union members are also affected; otherwise it would constitute an infringement of the equal treatment principle embodied in the Labour Law.
- (iii) The verdict of the local courts in cases filed by some affected workers confirmed that "termination of contracts cannot be considered as an evidence of obstacle to freedom of association".
- (iv) The fact that the workers' protest only ended when a few workers whose service contracts were terminated gave up gave the impression that the employer had not put any pressure on trade union members.
- (v) According to the legislation, a trade union, whose competence to conclude a collective labour agreement is not certified, cannot represent workers against an employer. Therefore, the fact that the workers' decision not to accept the Union of Teksif as a party and not to accept its offer to take a decision should not be criticized and be considered as a ground for complaint.

**1117.** The Government explains that as the relevant judicial process regarding the allegations of termination of contracts in this case has not yet been concluded, no administrative procedure needs to be instigated.

### ***Observation on the matters raised by the Deri-Is Union***

**1118.** The Government explains that the allegations of acts of anti-union discrimination at the DESA Deri Sanayil Tic. Ltd have been examined by labour inspectors of the Ministry of Labour and Social Security. It refers to the following findings:

- (i) There have been no deductions from wages for union membership fees.
- (ii) In their confidential statements, witnesses have denied any pressure being put on them.
- (iii) No concrete evidence confirming the allegation of the creation at the factory of a joint Workers' Council in order to hinder freedom of association rights has been found.
- (iv) The allegation that the terms of the agreement reached by the company and the union on 24 August 2009 providing for reinstatement of six workers and the recognition of the Deri-Is as the single authorized union at the factory were not upheld is a matter that needs to be handled by the courts. Therefore, no administrative procedure needs to be instigated in this respect.
- (v) Thirty-seven out of 41 dismissed workers have initially filed a case against the employer, but later, six workers have withdrawn their complaints. The court ruled against three workers (one of them has filed an appeal) and in favour of 28 workers. The employer filed an appeal against the verdicts concerning four workers and these proceedings have not yet been concluded. Seventeen out of the remaining 24 workers have made an application for reinstatement: three have been reinstated and 14 have received compensation in lieu of reinstatement. The remaining seven workers have not made an application. As the judicial process has not yet been concluded, no administrative procedure needs to be instigated.

### C. The Committee's conclusions

- 1119.** *The Committee notes that the complainant organization alleges that two enterprises, Menderes Tekstil and Desa Der Sanayi ve Ticaret AS, initiated anti-union campaigns involving acts of harassment and intimidation, and dismissals to deter workers from organizing and that national legislation unduly restricts the rights to organize and collective bargaining and fails to provide adequate protection against acts of anti-union discrimination and interference. The Committee notes the information provided by the Government with respect to the findings of the labour inspection carried out at both undertakings and the national legislative framework.*
- 1120.** *With regard to the allegations concerning the first enterprise, the Committee observes that the case concerning five dismissed workers is now pending before the High Court of Appeal, following the 21 October 2009 ruling by the Labour Court, which considered that it had not been proven that the workers had been dismissed as a result of their union activity, given that the company was in the process of downsizing. The Committee notes the findings of the labour inspection carried out at the enterprise, as described by the Government, according to which workers' contracts were terminated because of their refusal to be reassigned as per the employer's decision following the downsizing of the company. According to the Government, the labour inspection report also indicates that the workers concerned have received compensation. The Committee notes from the Government's reply that relevant court cases concerning termination of employment are still pending. The Committee requests the Government to keep it informed of the outcome of these cases and to transmit a copy of the judgments once they are handed down.*
- 1121.** *The Committee notes the complainant's allegation that the enterprise in question refused to meet with the union to discuss the issue of downsizing and other labour-related matters, as well as to recognize the union for collective bargaining purposes. It further alleges that instead, the company adopted an anti-union attitude by preventing union activists from handing out leaflets, playing loud music to disturb trade union activists trying to address workers at the factory gates, insulted union organizers in front of workers and generally tried to intimidate them. The Committee notes that, according to the Government, the labour inspectors were under the impression that the employer has not put any pressure on workers. The Committee further notes the Government's indication that no administrative procedure needs to be initiated into these allegations as the case was currently under judicial review. The Committee recalls that the tactics on the employer's behalf as alleged by the complainant, if proven to be true, are tantamount to interference in trade union internal affairs and recalls in this regard that respect for the principles of freedom of association requires that employers exercise great restraint in relation to intervention in the internal affairs of trade unions. The Committee considers that in cases where staff reduction is envisaged, prior negotiations should take place between the enterprise concerned and the relevant trade union organization. Noting that only the cases concerning allegations of unlawful termination of employment are currently pending before the courts, the Committee requests the Government to institute an investigation into the allegations of the employer's refusal to meet with the union to discuss the issue of downsizing and the general allegation of anti-union discrimination. Observing that Teksif is the only union at the enterprise, it further requests the Government to take the necessary measures so that the enterprise management recognize it so as to allow both parties to work together to achieve sound labour relations at the enterprise. The Committee requests the Government to keep it informed in this respect.*
- 1122.** *As regards the allegations involving the second enterprise, the Committee notes the ITGLWF's indication that the unlawful nature of the dismissals is not in question as the courts found that in 34 out of 43 cases submitted, the workers had been dismissed because of their union membership and ordered the company to either reinstate the workers with*

*four months' back pay or pay a compensation equivalent to 16 months of salary. The complainant indicates that out of the remaining nine cases, two were rejected because the workers concerned had been employed for less than six months; six cases were dropped after the workers concerned received inducements from the employer (three of those were subsequently reinstated, while others received money) and one case was rejected because the worker concerned had signed a letter of resignation as well as a letter saying that he was leaving the company of his own free will (the union has appealed this case in view of the fact that the letter was signed under pressure). The company appealed the Labour Court's rulings but the Supreme Court rejected the appeal. To date, 32 appeal cases have found in favour of the workers, while two are still pending. The ITGLWF indicates that the company opted to pay compensation to 15 workers, reinstated five, and agreed to reinstate four others, but then failed to uphold the agreement and refused to reinstate the latter four workers. The ITGLWF alleges that anti-union discrimination continues to this day and that a union member was dismissed in May, while others have been harassed, given warnings and reassigned to other sections.*

- 1123.** *The Committee notes the information submitted by the Government on the findings of the labour inspectorate in relation to these allegations. Noting the divergence between the information provided by the Government, and the complainant's allegations as to the number of workers involved, the Committee requests both the complainant and the Government to provide further information to clarify this matter.*
- 1124.** *The Committee further notes from the information collected during the inspection that it appears that an agreement between the union and the company in August 2009 providing for the reinstatement of six workers and the recognition of the Deri-Is as the single representative union at the factory was not upheld by the employer. The inspection report considered, however, that this matter should be reviewed by the court and that, accordingly, there was no need to initiate an administrative procedure.*
- 1125.** *Recalling that no one should be penalized for carrying out or attempting to carry out legitimate trade union activity, the Committee expresses its deep concern at the apparent persistent refusal on the part of the employer to reinstate or compensate the dismissed workers despite the judicial decision in this respect. The Committee considers that such an attitude of the employer constitutes a serious violation of freedom of association rights. Further recalling that the dismissals date back to 2008, the Committee requests the Government to take the necessary measures without delay to ensure the implementation of the relevant court judgments so that all the dismissed trade union members in this case are reinstated in their posts or provided the ordered compensation and to keep it informed in this respect. It further requests the Government and the complainant to keep it informed of the status of the two dismissal cases which were appealed by the employer, the cases appealed by the union, as well as of the situation of the worker allegedly dismissed in May 2010.*
- 1126.** *With regard to the ITGLWF allegation that the enterprise management had set up a joint Workers' Council to undermine unionists' efforts and that its representatives had been appointed by the employer, the Committee notes that, according to the information provided by the Government, the labour inspection report states that "no concrete evidence confirming the allegation of the creation at the factory of a joint Workers Council in order to hinder freedom of association rights has been found". The Committee requests the Government to further clarify this information and, in particular, to indicate whether a joint Workers' Council has been established at the enterprise and whether it is currently functioning.*



- 1127.** *With regard to the allegations of pressure, the Committee notes that according to the Government, the labour inspection report states that “in their confidential statements, witnesses have denied any pressure being put on them”. The Committee requests the Government to provide further detailed information as to the workers interviewed and the specific inquiry into the allegation of harassment of workers of the enterprise through, in particular, warnings and reassignments to other sections and calling the union a “terrorist” organization.*
- 1128.** *With regard to the legislative issues raised in this case, the Committee recalls that on several occasions it had before it cases concerning Turkey raising similar matters. Likewise, the Committee of Experts on the Application of Conventions and Recommendations and the Conference Committee on the Application of Standards for a number of years have been commenting on several provisions of Act No. 2821 on trade unions and Act No. 2822 on collective labour agreements, strikes and lockouts.*
- 1129.** *More specifically, the Committee recalls that in Cases Nos 1810 and 1830 it had examined the dual criteria applied in order to determine the representative status of a union for the purposes of collective bargaining and considered, on that occasion, that Turkish legislation did not have the effect of promoting and stimulating unhindered collective bargaining at the level of the undertaking [see 303rd Report, para. 57]. It therefore requested the Government to amend section 12 of Act No. 2822, according to which, in order to be allowed to negotiate a collective agreement, a trade union must represent 10 per cent of the workers in a branch and more than half of the employees in a workplace. The Committee observes that the Committee of Experts has also requested the Government to amend the abovementioned provision so as to ensure that, where no union meets the 50 per cent membership criterion, the existing unions at the workplace or enterprise may bargain at least on behalf of their own members. The Committee further observes that the Committee of Experts had on numerous occasions requested the Government to amend the legislative provision requiring the intervention of a public notary to become a member of a trade union or to resign from it, which prevented the free exercise of the rights under Article 2 of Convention No. 87.*
- 1130.** *The Committee notes the Government’s indication of its intention to amend Acts Nos 2821 and 2822 so as to bring it in to line with Conventions Nos 87 and 98 and the newly amended Constitution. The Committee expects that, in consultation with the social partners, the Government will bring its legislation and practice into line with the principles of freedom of association, as repeatedly requested by the ILO supervisory bodies, in the very near future. The Committee suggests to the Government that it continue to avail itself of ongoing ILO technical assistance in this regard and draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.*
- 1131.** *The Committee notes that the complainant also alleges that the labour legislation does not provide for sufficient protection against acts of interference and anti-union discrimination. The Committee regrets that no specific information has been provided by the Government on the measures taken to address this point in the framework of the indicated revision of the labour legislation. The Committee therefore expresses the hope that this issue will be adequately addressed in consultation with the social partners in the very near future so that any relevant proposals may be considered within the framework of the current review of the labour legislation.*

## The Committee's recommendations

1132. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

(a) *With regard to the allegations concerning Menderes Tekstil enterprise, the Committee requests the Government:*

- *to keep it informed of the outcome of the dismissal cases pending before the High Court of Appeal and to provide a copy of the judgments once they are handed down;*
- *to institute an investigation into the allegations of the employers' refusal to meet with the union to discuss the issues of company downsizing and the general allegation of anti-union discrimination; and*
- *to take the necessary measures so that the enterprise management recognize Teksif so as to allow both parties to work together to achieve sound labour relations at the enterprise.*

(b) *With regard to the allegations concerning Desa Der Sanayi ve Ticaret AS enterprise, the Committee:*

- *noting the divergence between the information provided by the Government and the complainant's allegations as to the number of workers involved, requests both the complainant and the Government to provide further information to clarify this matter;*
- *requests the Government to take the necessary measures without delay to ensure the implementation of the relevant court judgments so that all the dismissed trade union members are reinstated in their posts or provided the compensation ordered by the court;*
- *requests the Government and the complainant to keep it informed of the status of the two dismissal cases which were appealed by the employer, the cases appealed by the union, as well as of the situation of the worker allegedly dismissed in May 2010;*
- *requests the Government to indicate whether a joint Workers' Council has been established at the enterprise and whether it is currently functioning; and*
- *requests the Government to provide further detailed information as to the workers interviewed and the specific inquiry into the allegation of harassment of workers of the enterprise through, in particular, warnings and reassignments to other sections and calling the union a "terrorist" organization.*

(c) *The Committee expects that, in consultation with the social partners, the Government will bring its legislation and practice into line with the principles of freedom of association, as repeatedly requested by the ILO*

*supervisory bodies in the very near future and requests the Government to intensify its efforts in this regard.*

- (d) The Committee requests the Government to keep it informed in this respect of the measures taken to implement the above recommendations.*
- (e) The Committee suggests to the Government that it continue to avail itself of ongoing ILO technical assistance.*
- (f) The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.*

CASE NO. 2892

INTERIM REPORT

**Complaint against the Government of Turkey  
presented by  
the Union of Judges and Public Prosecutors (YARGI-SEN)**

*Allegations: The complainant alleges that the legislation in force denies judges and public prosecutors the right to organize and that on the basis of this legislation, the Labour Court has ordered the dissolution of the complainant organization. It further alleges anti-union discrimination in the form of transfers of its leaders*

- 1133.** The complaint is contained in communications from the Union of Judges and Public Prosecutors (YARGI-SEN) dated 4 August and 6 September 2011.
- 1134.** The Government replied in communications dated 2 November 2011 and 4 January 2012.
- 1135.** Turkey has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

**A. The complainant's allegations**

- 1136.** In its communication dated 4 August 2011, YARGI-SEN explains that it is a trade union of judges and public prosecutors established on 20 January 2011 pursuant to the labour legislation of the republic of Turkey. With the view of obtaining legal personality, on 31 January 2011, the union submitted a petition for registration, together with the relevant documents, to the Governorship of Ankara. In reply, the Governorship of Ankara sent a letter to the founders of the trade union referring to the Public Servants Trade Unions Act (Act No. 4688) and requesting the union to amend its constitution so as to bring it into conformity with the legislation in force within a one-month period. The letter indicated that should the union fail to do so, a procedure for its dissolution would be initiated.

According to the complainant, in its letter dated 2 February 2011 addressed to YARGI-SEN, the Ministry of Labour and Social Security (MLSS) adopted the same attitude.

- 1137.** The complainant indicates that a court case for the dissolution of YARGI-SEN was initiated in Ankara on 11 March 2011. On 28 July 2011, the Ankara Labour Court ruled for the dissolution of YARGI-SEN. The complainant indicates its intention to appeal to the Supreme Court (Court of Appeals) against this ruling.
- 1138.** The complainant explains that the right of public servants to establish trade unions is regulated by Act No. 4688 adopted in 2001. Section 15 of the Act excludes judges and public prosecutors, as well as chairpersons and members of the supreme judicial bodies from the right to organize. Section 4 of this Act prohibits the establishment of craft unions. The complainant considers that these prohibitions are contrary to Convention No. 87 and, on the basis of article 90 of the Turkish Constitution regulating the adoption and implementation of international conventions, are null and void. The complainant refers, in particular, to paragraph 5 of article 90 of the Constitution according to which, “in the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail”. The complainant therefore considers that the judiciary is under the constitutional obligation to disregard the restrictions on the exercise of freedom of association under Act No. 4688, as the ratification of the Convention imposes on the Government an obligation to acknowledge the right of judges, among other workers, and public prosecutors to establish organizations of their own choosing without previous authorization.
- 1139.** The complainant alleges that the MLSS had declared YARGI-SEN to be non-existent even before the court’s decision. In this respect, the complainant explains that it had applied to the Accounting Department of the Office of the Ankara Public Prosecutorship for the deduction of trade union dues from the salaries of its members (check off, which is the legal right of public sector trade unions in Turkey). Upon receiving this request, the Ankara Public Prosecutorship contacted the MLSS and the Ankara Governorship. In its reply dated 29 April 2011, the MLSS Department of Labour stated that judges and public prosecutors cannot establish trade unions in Turkey and, accordingly, the YARGI-SEN’s request should be rejected. The Ankara Governorship’s reply of 25 May 2011 was to the same effect. On the basis of these replies, the Accounting Department of the Ankara Public Prosecutorship replied to YARGI-SEN on 30 May 2011 stating that deduction of trade union dues was not possible. The complainant considers that the abovementioned decisions violate basic trade union rights and reject the existence of YARGI-SEN as a legal entity.
- 1140.** Furthermore, the complainant alleges that, on 26 July 2011, the MLSS sent a letter to YARGI-SEN informing the union that the documents of the First General Congress of YARGI-SEN could not be accepted, as judges and public prosecutors cannot establish trade unions.
- 1141.** The complainant further alleges acts of anti-union discrimination against its leaders. In particular, it explains that on 18–19 June 2011, during its first ordinary congress, its three founding members (Dr Rusen Gultekin, Omer Faruk and Ahmet Tasurt) were elected to the union’s Executive Committee. On the same dates, these three trade unionists were transferred to positions in other provinces without any stated reasons. According to the complainant, this is in violation of section 18 of Act No. 4688 which stipulates that the workplace of trade union representatives and leaders cannot be changed by the employer without a just cause and clearly stated reasons. The complainant further explains that under the Turkish legislation and practice, in case of transfers, the position of the spouse of the

person is to be taken into consideration, and alleges that this principle has been violated as well.

**1142.** The complainant alleges that the transfers of three trade union leaders cannot be considered as an ordinary practice, since by being transferred from posts at the Supreme Court of Appeals to other posts in the provinces, their job security has been reduced. The complainant considers that Dr Rusen Gultekin, Omer Faruk and Ahmet Tasyurt are victims of anti-union discrimination and provides in this respect the following information:

- Omer Faruk Emingaoglu: founder and President of YARGI-SEN; served as public prosecutor at the Supreme Court of Appeals; transferred to Istanbul as judge on 18 June 2011. His wife is a public servant working in Ankara with no chance of being transferred to Istanbul.
- Dr Rusen Gultekin: founder and former Financial Secretary, current Assistant President of YARGI-SEN; served as public prosecutor at the Supreme Court of Appeals; transferred to Gaziantep as judge on 18 June 2011. His wife is a lawyer working in Ankara.
- Ahmet Tasyurt: founding member and current member of the Executive Committee of the union; served as a public prosecutor at the Supreme Court of Appeals; transferred to Sanliurfa as public prosecutor.

**1143.** The complainant further indicates that Dr Rusen Gultekin and Ahmet Tasyurt were also members of the Association of Judges and Public Prosecutors (YARSAV) and played an important role in the affiliation of YASRAV to the International Association of Judges (IAJ), European Association of Judges (EAJ) and the *Magistrats Europeens pour la Democratie et les Libertés* (MEDEL). YARGI-SEN believes that its intention to affiliate with the international trade union organizations (Public Services International (PSI) and the European Federation of Public Service Unions (EPSU) has also been the reason for the transfer of the trade union leaders.

## **B. The Government's reply**

**1144.** In its communications dated 2 November 2011 and 4 January 2012, the Government refers to article 51 of the Turkish Constitution entitled “The right to organise labour unions”, which stipulates that the formalities, conditions and procedures to be applied in exercising the right to form a union shall be prescribed by law. The Government further refers to section 4 of Act No. 4688 according to which, “trade unions are established to carry out Turkey-wide activities by public servants working in the public workplaces in a service branch, based on the principle of service branch and that profession or workplace trade unions cannot be established”. Furthermore, according to sub-paragraph (b) of section 5 of the Act, chairpersons and members of higher judicial organs (e.g. judges, prosecutors, etc.) cannot establish and join trade unions. While pursuant to section 15 of the Act all public servants enjoy trade union rights, a limited number of public servants were not granted such rights due to the nature of their duties.

**1145.** The Government considers that in determining which categories of public servants can be excluded from the scope of application of the Convention in question or the extent to which the guarantees provided for in the Convention shall apply to high-level employees whose functions are normally considered as policy-making or managerial, or employees whose duties are of a highly confidential nature, Article 1 of Convention No. 151 was taken into consideration.

1146. The Government further refers to Article 8 of Convention No. 87, according to which, in exercising the rights provided for in the Convention, workers and employers and their respective organizations, like other persons or organized collectivities, shall respect the law of the land.
1147. The Government indicates that the applications made by Omer Faruk, public prosecutor at the Supreme Court of Appeals, and 22 judges and public prosecutors for the establishment of a trade union of judges and public prosecutors to the Ankara Governorship was rejected due to the lack of documents. The application filed with the MLSS was not accepted on the grounds that the establishment of the organization was contrary to sections 4 and 15 of Act No. 4688. On this basis, on 28 July 2011, Ankara 15th Labour Court had ruled on the dissolution of YARGI-SEN.
1148. The Government concludes by reiterating that according to the legislation in force, judges, prosecutors and those considered to be members of this profession cannot be members of trade unions and cannot establish trade unions and their unions shall not acquire the status of legal entity.

### C. The Committee's conclusions

1149. *The Committee notes that the complainant in this case alleges that Act No. 4688 denies judges and public prosecutors the right to organize and that, on this basis, the Labour Court has ordered the dissolution of the complainant organization. YARGI-SEN further alleges anti-union discrimination in the form of transfers of its leaders.*
1150. *The Committee notes that in its reply, the Government confirms that Act No. 4688 denies to certain categories of civil servants, including judges and public prosecutors, the right to organize and considers that this is in conformity with Article 8 of Convention No. 87 and Article 1 of Convention No. 151, both ratified by Turkey.*
1151. *At the outset, the Committee wishes to recall with regard to Convention No. 151 referred to by the Government, that this Convention, which was intended to complement Convention No. 98 by laying down certain provisions concerning, in particular, protection against anti-union discrimination and the determination of terms and conditions of employment for the public service as a whole, does not in any way contradict or dilute the basic right of association guaranteed to all workers by virtue of Convention No. 87 [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 1061]. With regard to Article 8 of Convention No. 87, the Committee draws the Government's attention to paragraph 2 of the Article, according to which the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.*
1152. *The Committee recalls that public employees (with the sole possible exception of the armed forces and the police, by virtue of Article 9 of Convention No. 87) should, like workers in the private sector, be able to establish organizations of their own choosing to further and defend the interests of their members [see **Digest**, op. cit., para. 220]. The Committee therefore considers that section 15 of Act No. 4688 which denies the right to set up trade unions to judges and public prosecutors is contrary to Article 2 of Convention No. 87, according to which workers "without distinction whatsoever" shall have the right to establish and join organizations of their own choosing without previous authorization, as well as to Article 8, paragraph 2, of the Convention. In this respect, the Committee recalls that for a number of years, the Committee of Experts on the Application of Conventions and Recommendations has been requesting the Government of Turkey to amend section 15 of Act No. 4688 so as to guarantee the right to organize to, among other public employees, judges and prosecutors.*

- 1153.** *The Committee notes from the information provided by the Government in Case No. 2789 that it is currently engaged in labour law reform with a view to bring the relevant legislation in line with Conventions Nos 87 and 98 and the newly amended Turkish Constitution. The Committee requests the Government to intensify its efforts in this regard and expects that, in consultation with the social partners, Act No. 4688 will be amended in the near future, as repeatedly requested by the ILO supervisory bodies. The Committee invites the Government to avail itself of ongoing ILO technical assistance in this regard and draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case. The Committee urges the Government to take the necessary measures to immediately register YARGI-SEN as a trade union organization of judges and prosecutors so as to ensure that it can function, exercise its activities and enjoy the rights afforded by the Convention to further and defend the interests of these categories of public servants. The Committee requests the Government to keep it informed of the developments in this respect.*
- 1154.** *With regard to section 4 of Act No. 4688, which prohibits the establishment of trade unions on an occupational or workplace basis, the Committee notes from the information provided to the Committee of Experts by the Government that the letter intends to repeal the same prohibition imposed on workers in the private sector in the framework of ongoing legislative reform. The Committee expects that this prohibition will be also lifted in the public sector.*
- 1155.** *With regard to the alleged cases of transfers of trade union leaders, the Committee regrets that no specific information has been provided by the Government. It notes with concern that the alleged transfers of trade union leaders have taken place on the date of their election to the Executive Committee of the union. Emphasizing the importance of providing detailed replies to the allegations brought by complainant organizations so as to allow the Committee to undertake an objective examination, the Committee urges the Government to provide its observations on the alleged acts of anti-union discrimination suffered by trade union leaders Dr Rusen Gultekin, Omer Faruk and Ahmet Tasurt. The Committee stresses in this regard that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom [see **Digest**, op. cit., para. 799].*

## **The Committee's recommendations**

- 1156.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee expects that, in consultation with the social partners, Act No. 4688 will be amended in the near future so as to bring it into conformity with Convention No. 87, as repeatedly requested by the ILO supervisory bodies and requests the Government to intensify its efforts in this regard. The Committee invites the Government to avail itself of ongoing ILO technical assistance in this respect.*

- (b) *The Committee urges the Government to take the necessary measures to immediately register YARGI-SEN as a trade union organization of judges and prosecutors so as to ensure that it can function, exercise its activities and enjoy the rights afforded by the Convention to further and defend the interests of these categories of public servants. The Committee requests the Government to keep it informed of the developments in this respect.*
- (c) *The Committee urges the Government to provide its observations on the alleged acts of anti-union discrimination suffered by trade union leaders Dr Rusen Gultekin, Omer Faruk and Ahmet Tasurt.*
- (d) *The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.*

CASE NO. 2839

DEFINITIVE REPORT

**Complaint against the Government of Uruguay  
presented by  
the Association of Customs Officials (AFA)**

*Allegations: The complainant organization alleges that the National Customs Directorate does not respect a collective agreement and has modified the workers' conditions of employment unilaterally; it also objects to the decision to ask workers if they took part in a strike and alleges that their wages were docked arbitrarily for doing so*

- 1157.** The complaint is contained in a communication of February 2011 from the Association of Customs Officials (AFA) of Uruguay.
- 1158.** The Government sent its observations in a communication dated 6 October 2011.
- 1159.** Uruguay has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

- 1160.** In its communication of February 2011, the AFA states that it is the only representative trade union organization for public servants employed by the Uruguay's National Customs Directorate (DNA). It is a juridical entity recognized by the Ministry of Education and Culture and is governed by its own by-laws approved by the Ministry. The AFA adds that the DNA is a dependent body attached to the Ministry of the Economy and Finance and that its senior official is the National Customs Director.



- 1161.** The AFA is affiliated to Uruguay's Single Workers' Federation, the Workers' Inter-Union Plenary–National Workers' Convention (PIT–CNT), and, at the sectoral level, to the Confederation of Public Servants' Organizations (COFE). It is also a member of the MERCOSUR Federation of State Customs and Tax Officials (FRASUR).
- 1162.** The AFA alleges that for several years it has been the victim of various forms of discrimination by the authorities, which have cancelled or reduced benefits that the AFA has acquired over its long history (almost invariably through trade union action that often involved union-led protests against such measures).
- 1163.** The AFA states that just recently, faced with a Budget Act that substantially modifies the system of sharing out among all DNA officials of the proceeds of customs fines and seizures, the Association was obliged to take union action; this mainly consisted of work stoppages none of which affected areas that can be deemed essential services – a standard practice of the Association in the exercise of its power of self-regulation. The AFA states that it was “forced” to take such steps because the National Director did not use the collective bargaining machinery which is provided for in Uruguay's legal system for public servants (Act No. 18508 of 2009) and which was indispensable to resolve an issue as sensitive and negotiable as wages and salaries.
- 1164.** The AFA asserts that, previously, the Ministry of the Economy dealt through bodies that were nothing but a “sham” in terms of negotiations, since its representatives declared in advance as non-negotiable, immutable and irrelevant precisely those issues of salaries and income from customs fines and seizures that were of particular concern to the Association. The two or three meetings that were held at the Ministry by these bodies ended when the chairperson abruptly decided that they were over. Since the loss of these and other benefits was already included in the draft budget, the AFA's assembly decided to take the action mentioned above.
- 1165.** According to the AFA, the National Director's attitude towards the steps taken by the Association was decidedly anti-union from the start. In a press conference he publicly demonstrated a total disregard for national and international standards on freedom of association, the right to strike, collective bargaining and, specifically, the provisions of the Constitution (articles 53, 54 and 57), of the ILO's Conventions (Nos 87 and 98) and of the Protection of Freedom of Association and Trade Union Rights Act No. 17940 and the Public Service Collective Bargaining Act No. 18508, among others.
- 1166.** The first anti-union measure the Director took was to send an internal mail to the customs officials demanding that they state and sign in writing whether or not they took part in the work stoppages, ostensibly so as to dock their wages accordingly. In the view of the AFA, this constitutes interference in its internal union affairs and an attack on collective and individual freedom of association, both directly and indirectly. To begin with, the measure undermines freedom of association because it seeks to weaken the Association's action and to impose formal requirements that are not provided for in any national law; moreover, such a public and explicit declaration on the part of the workers is perceived as a threat and is therefore liable to discourage participation in the strike called by the Association for fear of reprisals. Directly, the measure inhibits the freedom of association of those who took part in the work stoppage by placing them in a moral dilemma; indirectly, it inhibits freedom of association inasmuch as non-participants in the work stoppage are likewise required to make a public and explicit declaration that they did not participate, which without any legal grounds whatsoever exposes them vis-à-vis their trade union.
- 1167.** The AFA states that it rejected the measure and lodged an administrative appeal against it, based on national and international standards on freedom of association and the right to strike and on the irrefutable grounds that it is the senior management's responsibility to

carry out the necessary verifications itself or through the intermediate management, so as to determine which officials worked and which did not and to dock wages accordingly – in strict proportion to the time not worked because of the strike. The AFA adds that, as a corollary to this discriminatory measure, an equally serious measure was taken along the same lines. When the officials received their pay for the month concerned, they discovered that the wage cuts were completely arbitrary and bore no relation to the time people actually stopped working. Even some non-participants' wages were docked and, worse still, the wages cuts were described as “fines”, whereas fines are purely and simply prohibited under the international standards that Uruguay has ratified.

- 1168.** According to the AFA, despite the administrative appeal lodged by the customs officials on the grounds mentioned above, two months later (in November 2010) the workers were informed in a similar communication from the Director that their wages were to be docked, again by amounts that were arbitrary and likewise described as “fines”, in clear proof of the Director's systematically anti-union attitude. As the Director maintained his refusal to negotiate and the labour dispute grew, and since the date for Parliament to vote the budget was approaching, the work stoppages intensified and the anti-union atmosphere increased to an unprecedented degree. The customs officials were again sent communications inviting those who were prepared to take the place of striking workers to report to the areas or posts most severely affected. For this they were paid travel allowances to facilitate their movements from one part of the country to another, and were given the necessary codes and rank that had hitherto been assigned to the strikers. At the same time pressure was brought to bear by their superiors on trainees and temporary staff, who did not have the necessary training for the job and were prohibited by law from performing certain duties because of the shortness of their contracts, their young age and their inexperience – even though in several cases they actually took over from the striking workers.
- 1169.** Contrary to normal procedure, the measures were announced by the National Director at a press conference in the presence of several of the country's leading economic figures, whom he assured that the customs services would be maintained at all costs. That constituted not just an infringement of freedom of association and the right to strike but a public and nationwide admission of his disregard for the AFA and for union action as well.
- 1170.** Finally, the complainant organization states that the dispute ended with the signing of a collective agreement on 26 November 2010 by the AFA and the Plenary of the Economy (a subsector of the State Workers' Confederation comprising the trade unions at the Ministry of the Economy), on the one hand, and the Minister of the Economy, the Director-General of the Ministry's secretariat and the National Director of Customs, on the other. The agreement contained a series of provisions that were contrary to the terms of the draft budget presented by the Executive on which the Senate was in the process of voting. At a meeting with the National Director on 30 November 2010, and to the AFA's dismay, the Director informed it that the budget was not going to be “retouched”, that no such steps to do so were going to be taken by Parliament and that later, at the drafting stage of the relevant regulations, they would see how the terms of the agreement could be reconciled with the provisions of the budget.
- 1171.** According to the AFA, it was obvious from this that the negotiations that had ended in the signing of the collective agreement had not been conducted in good faith by the authorities as required by law, inasmuch as, since the Ministry of the Economy was part of the Executive, it was only to be expected that as a co-signatory it would take all the steps at its disposal to inform the members of Parliament of the terms of the agreement, of the Government's change of heart and of the modification that this entailed of certain provisions of the earlier draft text, and that these would be submitted to them in due course so that the final text could be amended while there was still time prior to its adoption by Parliament.

**1172.** The AFA adds that, immediately after the dispute, the DNA issued instructions for the application of an Executive Decree that unilaterally modified the working conditions of customs officials that had been in operation since 1994. The Decree increased hours of work without any increase in pay and once again disregarded the requirement that the issue be the subject of collective bargaining.

## **B. The Government's reply**

**1173.** In its communication dated 6 October 2011, the Government states, at the outset, that in its view the complaint is out of all proportion to any disagreement and misunderstanding that may exist between the management of the DNA and the AFA. It further recalls that, according to the Committee on Freedom of Association itself, "customs officials are covered by Convention No. 87 and therefore have the right to organize".

**1174.** Regarding the allegation concerning the requirement that the workers indicate in a written and signed declaration whether or not they took part in the work stoppage, the Government says that it naturally agrees that a statement of participation in a work stoppage is not a formal requirement for a strike to be lawful, inasmuch as Uruguay has absolute and unfettered freedom of association. Moreover, public servants enjoy total job stability and can only be dismissed on grounds that are set out explicitly in the Constitution; in addition, the law protects them from any discrimination on grounds of trade union activities. Since the system offers such extensive guarantees, it would seem disproportionate for the AFA to take offence only because the administration seeks to identify the workers who exercised their right to strike, simply for purposes of docking their wages for time not worked.

**1175.** The DNA, in Communications Nos 52/2010 and 64/2010 from the Resources Division, called on customs officials to indicate whether or not they had participated in certain work stoppages so as to make the corresponding deductions from the wage bill. Such communications are nothing new in the customs service and had already been sent by previous national directors. Communication No. 16 of 2009 was couched in almost exactly the same words as Communication No. 52 of 2010, though it is unknown whether the AFA or any customs official lodged an appeal against the Director at the time for anti-union practices.

**1176.** The Government asserts that what the current Director did was simply to continue an established practice, which is in fact based on Executive Decree No. 401/2008 of 18 August 2008, section 1 of which requires the wages of central administration officials to be docked "in proportion to the extent to which their union action entails a reduction in the performance of their duties during normal working hours; this includes union or similar action such as working to rule, slowdowns, sit-down strikes, etc".

**1177.** Preambular paragraph VII of Decree No. 401/2008 states: "Following the adoption of these measures, the wages of participation officials are to be docked in proportion to the reduction in the work carried out. In such cases, the executive directors are to communicate to the directors-generals of the secretariat the list of names of the officials concerned and the assessment of the reduction in work." It is worth mentioning that no complaint was lodged with the ILO against this Executive Decree on anti-union grounds either. The DNA is an executive unit attached to the Ministry of Economy and Finance and, as such, is required to send the communication referred to in the previous paragraph, on pain of incurring administrative liability.

**1178.** The Government states that the docking of wages required under the aforementioned Decree – which is the latest standard on the subject – is further based on article 20 of the Consolidated Financial Accounts and Administration Act, articles 280–282 of the Consolidated Public Servants Act (TOFUP), established national doctrine and Uruguay's

case law. It suffices in this respect to refer to Ruling No. 629 of 25 October 2004, handed down by the Administrative Disputes Tribunal, which declared that “any public servants who cease to carry out their duties for whatever reason (strike, working to rule, etc.) shall be guilty of a breach of contract and therefore liable to a management decision to dock their wages in proportion to the reduction in their output”.

- 1179.** The Government adds that, in order to dock officials’ wages, the employer has to know who participated in the union action and who did not. In the event of strikes, where no one is present at the workplace, it is easy to know who the participants were. To put it more graphically, workers who clocked in did not participate in the union action, while those who did not clock in did participate and should have their wages docked accordingly. But in strikes where some workers are in fact present and in sit-down strikes, it is not so simple, because the workers clock in as if they are present, and time sheets can no longer be relied on to prove participation in a strike. And there is the added complication that the DNA’s jurisdiction, being territorial, comprises a broad geographical area with 18 administrations covering the country as a whole – central headquarters, Montevideo airport, Carrasco airport, free zones, domestic airports and river ports, which in the interior of the country are very widespread. Consequently, the ability of the administration, of the administrators, of the department heads or division directors to verify workers’ participation in a work stoppage effectively is curtailed, to say the least. Moreover, where in the past it was the head of the department who decided who took part in the work stoppage, workers sometimes lodged appeals on the ground that they were not on strike. From 2009 onwards, therefore, the previous administration introduced the system whereby the workers themselves declared whether or not they participated in a strike.
- 1180.** This was the procedure that was followed to make the relevant deductions in compliance with the regulations in force, and no other proposal has come forward either from the Parliamentary Labour Legislation Committee, with which the AFA lodged its complaint, or even from the AFA in its various communications. If one accepts that when there is a work stoppage, wages have to be docked accordingly – which even the AFA recognizes – then there has to be some way of establishing who used the right to strike in the present instance, since the regulations in force have to be applied and the corresponding wage cuts applied, just as Director-General of the Secretariat of the Ministry of Economy and Finance has to be informed of the list of participating officials and of the volume of work not carried out.
- 1181.** Far from engaging in anti-union discrimination, the National Director in fact applied the regulations in force and gave the workers the possibility, in exercise of their unrestricted right to strike under article 57 of the Constitution and under international treaties, to declare whether or not they took part in the work stoppage. Otherwise, it would have been impossible to know who was on strike and who was not, since in this kind of work stoppage the officials clock in as if they are present. However, following the complaint of union repression that the AFA lodged with the General Labour and Social Security Inspectorate of the Ministry of Labour against the DNA, the Inspectorate issued a ruling calling on the DNA to change its method of verifying officials’ participation in union action while present at their work stations, in keeping with Decree No. 401/008 and with the requirements of the DNA, and requesting that the Inspectorate be informed of the new arrangements.
- 1182.** Regarding the allegation that the deductions from wages for exercising the right to strike were arbitrary, the National Director of Customs, as the highest authority in the country’s customs service, is obliged to apply the regulations in force concerning the docking of wages. The AFA, for its part, claims that workers who did not participate in the strike had their wages docked, though without presenting any evidence – and in circumstances where there was obviously a possibility of error quite independent of any infringement of the

freedom of association of the workers who did not exercise their right to strike. The AFA further claims that the deductions were described as “fines”, and that is true. But “fines” is the term used in the computer programme for paying the salaries of the entire Uruguayan central administration – and not just the DNA – under the Integrated Financial Data System (SIIF) and derives from the Classification of Items of Expenditure used by the General Accounts Department of Uruguay (which the Government attached). But of course it is just a word, and docked wages do not in fact correspond to fines but are simply deductions for days on strike.

- 1183.** The Government stresses that the AFA does not say what exactly it considers to be arbitrary. It obviously cannot be the docking of wages from officials who were on strike; nor can the AFA be referring to the use of a term that is not the responsibility or invention of the National Director of Customs. The Government adds that, when dealing with people’s assets, there is bound to be a possibility of human error, in one direction or the other. However, if there genuinely is a documented mistake, a solution can always be found that is in keeping with the law. The Government affirms that it is perfectly willing to review any material error that the administration may have committed.
- 1184.** The Government states that the so-called communication about replacing officials on strike with officials not involved in the work stoppage, which the AFA sees as an anti-union measure, never existed. What is true is that officials not on strike did work in the National Customs Administration, as is their inalienable right and which ensured the functioning of an essential service – which is the case of foreign trade. Quite apart from customs officers’ tax collection work, one only has to think of their role in maintaining public safety and health to illustrate that it cannot come to a stop simply because a group of workers decide, as is their right, to go on strike.
- 1185.** Moreover, the Government does not at all share the complainant’s belief that striking officials were replaced by “trainees and temporary staff who did not have the necessary training for the job and were prohibited by law from performing certain duties”, since the officials concerned were for the most part workers employed on the regular budget, and of course trainees who for the most part are university and tertiary-level students who are both young and eager to get ahead with their job. For the Government, filling posts by reorganizing assignments is not discriminatory, so long as it is not a question of employing strike-breakers but simply of an administrator exercising his legal and constitutional prerogatives.
- 1186.** The Government also denies the AFA’s contention that “at a press conference in the presence of several of the country’s leading economic figures”, the National Director of Customs admitted “publicly” to anti-union measures. If there had been no union action, it would have been ridiculous for the Director to make any such admission. What he did say to the press on several occasions was that essential customs services would be maintained by officials who were not on strike.
- 1187.** Regarding the alleged non-respect of a collective agreement, the Government states, first of all, that non-respect of a collective agreement does not per se constitute anti-unionism. Moreover, it was not in fact a case of non-compliance but rather of strict compliance with the agreement. As to the AFA’s allegation of so-called “non-respect” itself, the agreement in point of fact stipulates that the Merit Fund to be provided for in the budget will be for all customs officials and will be shared out notably in recognition of their direct participation in the verification of infringements of the law and in the attainment of other personal and group targets. This undertaking was inserted in the budget at the express insistence of the National Director of Customs, and so it is hard to see how there can be any suggestion of non-compliance.

**1188.** Section 311 of National Budget Act No. 18719 reads:

The proceeds of fines for the commission of all infringements of customs regulations shall be shared out as follows: Seventy per cent for the constitution of a Merit Fund destined especially to compensate the DNA officials. In sharing out the proceeds of the Fund, account will be taken of the attainment of personal, group and institutional targets and of the participation of officials in the detection of infringements of customs regulations. The scope of this provision shall be regulated by the Executive.

It can be seen from this that the provisions of the collective agreement with the AFA coincide exactly with the provisions that were embodied in the Budget at the insistence of the National Director, and there can therefore be no question of anti-unionism. Furthermore, the Government recalls that the system for sharing out the proceeds of fines is quite separate from the remuneration of customs officials; it is a bonus accorded to all those who detect customs violations, whether or not they are custom officers. Under the proposed amendment, which is covered by the collective agreement concluded with the AFA, the fines are to be shared out among all customs officials, due allowance being made for their participation and performance.

**1189.** The Government adds that it is altogether unacceptable to claim moreover that, by not going against the wishes of a state institution such as the Parliament to ensure that the AFA's demands are inserted into a law, the National Director of Customs was somehow engaging in a form of anti-unionism. The AFA even accuses the Director of not taking "all the steps at his disposal to inform the members of Parliament of the terms of the agreement", when in fact he went so far as to publish the collective agreement on his website. It was quite clearly the Director who took the initiative in advocating the standard that was included in the agreement; in any case the AFA could just as easily have informed everybody who was interested of the terms of the agreement it had signed.

**1190.** Regarding the alleged modification of the conditions of employment by increasing the hours of work, the Government states that the working day in the DNA used to be based on two official schedules dating back to 1994, which stipulated a minimum number of hours rather than a maximum. Then, on 26 October 2010, the Executive issued Decree No. 319/2010, section 1 of which stipulates that "normal working hours shall in no case be less than six hours per day or 30 hours per week" and that "all legal provisions regarding working hours that entail more hours of work than the minimum shall remain in force". Article 23 goes on to state: "No regulation issued by the Ministry or by the senior management that conflicts with the provisions of this Decree shall be applicable." In other words, the section revoked the DNA's internal regulations providing for shorter minimum working hours. Furthermore, the Decree stressed that legal provisions entailing more hours of work than the minimum were still valid. This was precisely the situation in the DNA, for which section 247 of Act No. 15809 stipulated longer working hours: "For public officials employed under Programme 007 – Collection of Customs Duties and Comptroller of Goods in Transit – the normal working week shall be 48 hours. Any official wishing to do so may opt for this schedule within 60 days of the publication of this Act." According to the Government, all the regular budget customs officials on the DNA's payroll opted for the new schedule, except for one official who is therefore not bound by the longer working week.

**1191.** The Government points out that it is obvious that the Director simply did his duty and applied the regulations in force, without engaging in any form of anti-unionism. As far as the six-hour day being fixed by decree and without any consultation is concerned, the fact is that six hours a day is less than the official working week of 48 hours for customs officials (section 247 of Act No. 15809).

- 1192.** According to the Government, the complainant presupposes that all administrative decisions are necessarily subject to negotiation and, moreover, that all negotiations must end in an agreement that is close to the AFA's position; but that is not what national and international standards on the subject say. Section 4 of Collective Bargaining (Public Sector) Act No. 18508 does not require that there be agreement but rather establishes the reasonable principle that "the parties are obliged to negotiate, which does not mean that they are bound to reach agreement". To sum up, the complainant organization is being altogether excessive when it denounces a situation that appears to be entirely within the law, inasmuch as the administration has exercised its powers reasonably, has negotiated without reaching agreement on certain points and, finally, has simply asked the officials on strike to identify themselves so that their wages can be docked accordingly. Far from being a form of anti-unionism, this practice recognizes the legitimacy of the union's action and merely serves to draw attention to the obvious consequences from the standpoint of the employer.
- 1193.** In conclusion, the Government considers that it is clear from its reply that the so-called anti-union actions of the DNA never existed, but that what actually happened – and what remains the case – is that the DNA abided strictly by the law and demonstrated at all times its determination as effectively and efficiently as possible to maintain a service that is essential both for foreign trade and for the population as a whole. The DNA's dialogue and good relations with the AFA is a priority for the customs administration, which has been negotiating a comprehensive collective agreement with the AFA on various aspects of trade union activities that should benefit both parties.

### C. The Committee's conclusions

- 1194.** *The Committee observes that the complainant organization alleges that the Budget Act modified the system for sharing out the proceeds of customs fines and seizures among DNA officials and failed to take into account the provisions of a collective agreement concluded on 26 November 2010, and that it unilaterally modified their conditions of employment by increasing the hours of work without first engaging in collective bargaining. The Committee observes also that the complainant contests: (1) the DNA's decision to demand that officials declare whether or not they took part in a work stoppage, supposedly so that their wages could be docked; (2) the arbitrary nature of reductions in pay that had nothing to do with the work stoppages, and their description as fines; and (3) the pressure that was brought to bear on officials to take the place of workers on strike.*
- 1195.** *With regard to the allegation that the Budget Act modified the system for distributing the proceeds of customs fines and seizures among DNA officials without taking into account the provisions of a collective agreement concluded on 26 November 2010, the Committee notes that the Government states that: (1) it was not a case of non-compliance but rather of strict compliance; (2) it was at the insistence of the National Director of Customs that the undertaking concerning the sharing out of the proceeds of fines was included in the Budget Act; (3) the provisions of the collective agreement with the AFA coincide exactly with the provisions that were embodied in the Budget Act and there is therefore no question of anti-unionism; and (4) the fines are to be shared out among all customs officials, albeit with allowance for their participation and performance. Taking into account this information and the Government's assurances, the Committee will not pursue its examination of these allegations.*
- 1196.** *Regarding the allegations that, disregarding the collective bargaining requirement, the DNA modified conditions of employment unilaterally by increasing the number of working hours, the Committee notes the Government's statement that: (1) the working day in the DNA used to be governed by two instructions issued in 1994 that set a minimum rather than a maximum number of hours; (2) on 26 October 2010, the Executive issued*

*Decree No. 319/2010, section 1 of which stipulates that “normal working hours shall in no case be less than six hours per day or 30 hours per week” and that “all legal provisions regarding working hours that call for more hours of work than the minimum shall remain in force”; (3) section 23 went on to state that “no provisions issued by the Ministry or by the senior management that conflict with the provisions of this Decree shall be applicable”; (4) consequently, internal decisions of the DNA providing for shorter minimum working hours were accordingly annulled by section 23 but, as stressed in the Decree, legal requirements entailing longer working hours than the minimum remained applicable, as was the case in the DNA under section 247 of Act No. 15809 which provided for longer working hours that any official could sign up to within 60 days of the publication of the Act; and (5) all the regular budget customs officials who are currently on the DNA payroll opted for the new schedule, except for one official who is therefore not bound by the longer working week. The Committee points out in this respect that, though it must be made clear that higher-level administrative regulations take precedence over lower-level regulations, it would be desirable if the workers’ organizations could be consulted on measures such as these that entail changes in practical matters. However, mindful of the information communicated by the Government, and notably of the fact that all the officials except one opted freely for the new work schedule, the Committee will not pursue its examination of these allegations.*

- 1197.** *Regarding the AFA’s objections to the DNA’s decision to demand that customs officials state and sign in writing whether or not they took part in the work stoppage, under the pretext of having to dock their wages accordingly, the Committee notes the Government’s statement that: (1) it agrees that a declaration of participation in a work stoppage is not a formal requirement for a strike to be lawful, inasmuch as Uruguay enjoys absolute and unfettered freedom of association; (2) public servants enjoy total job stability, and it would seem out of proportion for the organization to take offence simply because the administration sought to identify the workers who exercised their right to strike, merely for purposes of docking wages for time not worked; (3) the DNA’s Resources Division, in Communications Nos 52/2010 and 64/2010, called on customs officials to indicate whether or not they had participated in certain work stoppages, so as to make the corresponding deductions from the wage bill; (4) such communications are nothing new in the customs service and have in the past been issued by previous national directors; (5) in strikes where no one is present at the workplace it is easy to know who the participants are, but in strikes where some workers are present or in sit-down strikes it is not so simple, because workers clock in as if they are present and time sheets can no longer serve to verify participation in a strike; (6) there is the added complication that the DNA’s jurisdiction, being territorial, comprises a broad geographical area, with 18 administrations covering the country as a whole; (7) far from engaging in anti-union discrimination, the National Director in fact applied the regulations in force and gave the workers the possibility, in exercise of their unrestricted right to strike, to declare whether or not they took part in the work stoppage, since otherwise it would have been impossible to know who was on strike and who was not; and (8) nonetheless, following the complaint of trade union rights violations that the AFA lodged against the DNA with the General Labour and Social Security Inspectorate of the Ministry of Labour, the Inspectorate issued a ruling calling on the DNA to change its method of verifying workers’ participation in union action while on the job, in keeping with Decree No. 401/008 and with the requirements of the DNA’s executive branch. The Committee considers in this respect that the decision to request workers to declare whether or not they took part in the strike so as to be able to dock their wages accordingly does not in itself violate the principles of freedom of association. That being so, and bearing in mind that according to the Government the General Labour Inspectorate intervened and recommended a change in the manner of verifying workers’ presence on the job but did not conclude that trade union rights had been infringed, the Committee will not pursue its examination of these allegations.*



- 1198.** *Regarding the allegation that the reductions in wages were completely arbitrary and bore no relation to the actual work stoppage, the Committee notes the Government's statement that: (1) the complainant organizations does not say what exactly it claims was arbitrary; (2) when dealing with people's assets, there is bound to be a possibility of human error, in one direction or the other, but if it is a genuine, documented mistake a solution can always be found that is in keeping with the law; and (3) it is perfectly willing to review any material error that the administration may have committed. Noting the Government's willingness to reconsider any deductions that may by error have been more or less than they should have been, the Committee invites the complainant organization, should it detect any irregularity in deductions from pay, to pass on the information to the administration so that the officials can be adequately compensated.*
- 1199.** *Regarding the allegations that deductions from pay for days on strike were described as "fines", the Committee notes the Government's statement that "fines" is the term used in the computer programme for paying the salaries of the entire Uruguayan central administration – and not just the DNA – under the SIIF and derives from the Classification of Items of Expenditure used by the General Accounts Department of Uruguay, and that docked wages do not in fact correspond to fines but are simply deductions for days on strike. Taking this information into account, the Committee will not pursue its examination of these allegations.*
- 1200.** *Finally, regarding the allegation that pressure was brought to bear on workers to replace the striking officials, the Committee notes the Government's statement that: (1) the so called communication about replacing officials on strike with officials not involved in the work stoppage never existed; (2) what is true is that officials not on strike did work in the National Customs Administration, as is their inalienable right; (3) it does not at all share the complainant's belief that striking officials were replaced by "trainees and temporary staff who did not have the necessary training for the job and were prohibited by law from performing certain duties", since the officials concerned were for the most part workers employed on the regular budget, and of course also trainees who are mainly university and tertiary-level students; and (4) filling posts by reorganizing assignments is not discriminatory, so long as it is not a question of employing strike-breakers but simply of an administrator exercising his legal and constitutional prerogatives. Bearing in mind this information, and specifically that no workers were recruited to replace those on strike, the Committee will not pursue its examination of these allegations.*

### **The Committee's recommendation**

- 1201.** *In the light of the foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:*

*With regard to the allegation that the deductions for days on strike in the National Customs Directorate were arbitrary and bore no relationship to the actual work stoppage, the Committee notes the Government's willingness to review any deductions that may by mistake have been more or less than they should have been and invites the complainant organization, should it detect any irregularity in deductions from pay, to pass on the information to the administration so that the officials can be adequately compensated.*

CASE NO. 2876

DEFINITIVE REPORT

**Complaint against the Government of Uruguay  
presented by  
the Inter-Trade Union Assembly – Workers’ National  
Convention (PIT–CNT)**

*Allegations: The complainant organization alleges that the executive branch sent a draft budget to the legislative branch in 2010 without having presented the draft, bargained or reached an agreement on state employees’ working conditions with the Confederation of Civil Service Trade Unions (COFE); the complainant organization further alleges that the executive branch promulgated Decree No. 319/2010 without taking into account the observations made by COFE in that regard*

- 1202.** The complaint is contained in a June 2011 communication from the Inter-Trade Union Assembly – Workers’ National Convention (PIT–CNT).
- 1203.** The Government sent its observations in communications dated 6 and 13 October 2011.
- 1204.** Uruguay has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

**A. The complainant’s allegations**

- 1205.** In its June 2011 communication, the Inter-Trade Union Assembly – Workers’ National Convention (PIT–CNT) states that the adoption of Act No. 18508 on collective bargaining in the public sector was a major recent milestone given the major effect it is expected to have on the public sector labour relations system. Act No. 18508 genuinely favours workers and makes corresponding demands on the public sector as an employer. Furthermore, it can be argued that the adoption of the Act has led to the recognition of an inherent right to collective bargaining through the reference made in section 1 of the Act to ILO Conventions Nos 87 and 151.
- 1206.** The Act sets forth the content or substance of collective bargaining and sections 8 to 14 of the Act define the structure of the collective bargaining system. The structure comprises three bargaining levels: a first level consisting of a senior negotiating council for the public sector made up of eight representatives of the Government and eight representatives of the trade unions that are most representative of public employees nationwide, and in which efforts will be focused on reaching agreements with the most relevant scope possible; a second level consisting of one bargaining panel for each branch or sector (central government, autonomous bodies or decentralized agencies) and also made up of eight representatives of the Government and eight representatives of the trade unions that are most representative in the sector or branch in question; and a third level comprising a

bargaining panel made up of the authorities in each department or body and the grass-roots trade union organizations.

- 1207.** A new Government took office at the beginning of 2010 and a five-year budget was adopted accordingly. An announcement that reform of the State was forthcoming added to the variety of existing complaints, aspirations and demands of trade unions of public employees. As a result, the trade unions of public employees called for collective bargaining at the various levels defined in the Act. Various bargaining sessions were convened and suspended, then eventually held in late July, August and September 2010.
- 1208.** PIT–CNT states that proceedings in those sessions did not even remotely constitute a genuine opportunity for collective bargaining as it is clearly defined in the legislation in force. In those sessions, the public employees’ representatives set out their demands but the response from the representatives of the executive branch was insufficient to generate a dynamic of proposals and counter proposals. Worse still, while the sessions were going nowhere, the executive branch was simultaneously working on its draft five-year budget, which included a large number of regulations governing the working conditions of public employees.
- 1209.** According to PIT–CNT, at each and every one of the sessions, the representatives of the workers asked the representatives of the executive branch for information on the process of drawing up the five-year budget, and for economic data that would enable a debate on wages and the wage-adjustment system. Nothing of the sort happened; the representatives of the executive branch did not respond to the requests for information on which discussion and debate should have been based. The executive branch merely expressed its determination not to renew contracts that were about to expire or to change the amount of the minimum wage on the basis of a predetermined number of working hours, and indicated that it would not provide information on the budget because it had not yet been finalized.
- 1210.** PIT–CNT considers that, in the light of the abovementioned legislative provisions, this attitude of the public sector as an employer constitutes a clear violation of the Act in so far as it has failed to meet its obligation to bargain. The obligation to bargain is not an obligation to agree. The fact that there is no such thing as an obligation to agree cannot be interpreted in such a way that bargaining is deprived of any real substance or content. Collective bargaining requires the strict compliance with various processes that give it real meaning. Some of them are substantive and others are instruments intended to expedite bargaining.
- 1211.** PIT–CNT states that, in practice, bargaining involves engaging in discussions on a number of subjects identified in the Act as being the focus of bargaining. The obligation to bargain in good faith and provide information is key to enabling the parties to interact. Whether or not an agreement is reached, there must be a unity of time and place where there is engagement between the parties, making proposals and counter proposals on the basis of information duly provided enough time in advance for it to be analysed.
- 1212.** PIT–CNT considers that worst of all is the fact that the executive branch violated section 6 on the “right to information”. Section 6 stipulates, inter alia, that the State must provide information on the progress of work on draft budgets, the economic situation of bodies and possible changes in working conditions. In the absence of such information, bargaining is absolutely impossible, because the draft five-year budget contains all of the subjects for discussion specified in section 4 of the Act, namely, working conditions, career structures, and management reform, among others. All of these subjects were comprehensively covered in the draft budget but not negotiated for the simple reason that, during bargaining, the executive branch never shared the draft with the other party, the Confederation of Civil

Service Trade Unions (COFE), before transmitting it to the legislative branch, even though the workers had persistently sought to have it shared with them. On 31 August 2010, the executive branch transmitted the draft national budget to the legislative branch. COFE became aware of the content of the draft budget when the executive branch published it on its website.

- 1213.** According to PIT–CNT, the seriousness of this situation is made even clearer by the content of the draft budget. The Government unilaterally defined all of the conditions. For example, it defined criteria for raising and adjusting wages; rules for the handling of public employees’ personal data by both Human Resources and the National Civil Service Office; criteria for the redeployment of public employees; criteria for determining employees’ leave entitlements; staff budgeting processes and criteria; and criteria for converting budgeted staff posts. It defined which posts are considered to be reserved for particularly trusted employees; established criteria for the payment of certain types of financial compensation (such as allowances for cash shortages); defined criteria for setting wage ceilings; changed the licensing system for employees; defined the procedure to be followed when employees are sick or physically unfit for work; defined criteria for admittance to the civil service; defined promotion criteria and procedures; defined the contractual modalities under which the State hires employees, namely contracts for work, artists’ contracts, temporary contracts under public law, employment contracts; and defined other categories of recruited employees, namely interns and trainees.
- 1214.** These are among the subjects covered in the “employees” chapter in part one of the draft budget. A large number of other provisions that also concern working conditions are also found in the chapters on each of the paragraphs in the budget, namely the ministries and the various agencies. PIT–CNT considers that these subjects cover the full range of working conditions, including salaries, of state employees. None of them was agreed or negotiated with COFE. On the contrary, they were drawn up and defined unilaterally by the executive branch, outside the scope of collective bargaining.
- 1215.** PIT–CNT adds that a similarly serious violation of the law occurred when the executive branch promulgated Decree No. 319/2010 on the reorganization of office hours and staff working hours in the central Government. The authorities summoned COFE to a bargaining session in the presence of the National Labour Director himself and presented the draft decree. COFE expressed its acute concerns about the fact that the Decree enabled sanctions of up to 180 days to be applied with no investigation being required, and was thus a regression with respect to due process and the system of guarantees, and further stated that the change in office hours increased the working hours of professional and technical staff without a corresponding increase in their wages and might therefore violate constitutional principles on the protection of wages. The executive branch stated that it would examine COFE’s observations then convene another meeting to deliver its response. According to PIT–CNT, absolutely nothing of the sort ever happened. The only communication received was intended to inform COFE that the Decree was going to be promulgated in the form in which it had been proposed.
- 1216.** PIT–CNT states that all of these facts constitute a violation of the spirit, logic and letter of Act No. 18508 and ILO Conventions Nos 98, 151 and 154. The Government failed to meet its obligation to bargain. It cannot even be said that it complied with the requirement to consult or inform, namely the minimum form of worker participation.

## **B. The Government’s reply**

- 1217.** In its communications dated 6 and 13 October 2011, the Government states that it regretfully cannot agree with the point of view expressed by the state workers’ organization, whose version of events is not consistent with the facts. Indeed, the

Government considers that various passages of the complaint confirm that there have been numerous opportunities to meet and reach agreements. The Government states that before the current phase of public sector collective bargaining was initiated, various social actors referred to the need to provide a regulatory framework for bargaining in this kind of activity, since a framework would create greater certainty and promote bargaining. As a result, and pursuant to Convention No. 151, the executive branch issued Decree No. 104/005 on 7 March 2005 to invite public employees' organizations to join a bipartite bargaining panel with a view to establishing a regulatory framework for collective bargaining in the public sector. Decree No. 113/005 of 15 March 2005 subsequently defined the criteria for the membership and operations of the various working groups, of which there were supposed to be three. Finally, a framework agreement on collective bargaining in the public sector was signed on 22 July 2005. The agreement formalized the context for the negotiation of labour relations with employees, and the State established a senior negotiating council for the public sector for the purpose of conducting high-level collective bargaining. Given the need for legislation on collective bargaining in the public sector, it was decided to draft a bill on collective bargaining in the state sector and define the criteria for implementing that legislation without infringing the freedom of action and powers of the State or the full exercise of trade union rights.

- 1218.** The agreement was the immediate precedent for Act No. 18508 of 26 June 2009 on the regulation of collective bargaining in the public sector. This Act, together with Act No. 18566 on collective bargaining in the private sector and Act No. 17940 on freedom of association, was a genuine novelty in national collective law, which was traditionally considered abstentionist and unregulated, and is part of the protective or rights-based model implemented in Uruguay from 2005 onwards. From March 2005 until the adoption of Act No. 18508, some 60 agreements were signed, ranging from branch framework agreements and wage agreements to specific agreements in a number of bodies.
- 1219.** Regarding the new collective bargaining system (Act No. 18508), the Government states that the system in place is governed by the principles set forth in Chapter I (participation, consultation and collaboration, right to collective bargaining, obligation to bargain in good faith, right to information and training in bargaining) of the abovementioned Act, and by internationally recognized labour rights (articles 57, 65, 72 and 332 of the Constitution). Collective bargaining in the public sector takes place in two main areas, namely a first area where there is collective bargaining in the executive branch, autonomous bodies and decentralized agencies carrying out the industrial and commercial activities of the State. The first area comprises three levels: (a) the general or highest level – the senior negotiating council for the public sector; (b) the sectoral or branch level – bargaining involving autonomous bodies or organized by particular sectors; and (c) the level of each department or body – bargaining sessions involving trade union organizations representing the grass roots and the bodies in question.
- 1220.** The second area comprises collective bargaining in the legislative branch, the judiciary, the administrative court, the electoral court, the court of auditors, autonomous bodies of the public school system and departmental governments. Bargaining in this area takes place in bargaining sessions within the framework of the parameters recognized by the Constitution of the Republic.
- 1221.** The Government states that, before dealing with the substance of the complaint, it considers itself duty-bound to make a few points of a conceptual nature. Indeed, although the complaint is presented by the PIT–CNT central workers' organization and its state and municipal employees department, the subject of the complaint almost exclusively concerns employees of the central Government (executive branch employees working in the various ministries) and certain non-commercial decentralized agencies such as the Uruguayan Institute for Children and Adolescents (INAU). These workers are members of COFE and

they are the ones affected by the contested budgetary standards. The same applies with regard to Decree No. 319/2010. In other words, the complaint in fact relates to a category of public sector workers and not to public sector workers in their entirety.

- 1222.** Consequently, the following considerations are applicable only to that bargaining unit. In any event, the Government provides information on various public sector negotiations involving other state employees such as employees of public enterprises, teaching institutions, other state bodies, audit agencies and departmental governments. Reference is also made to bargaining in various first-level departments or bodies.
- 1223.** As regards budgetary standards, the Government states that the special constitutional conditions surrounding the adoption of the National Budget Act are such that a special observation is required for the underlying problem and for the inappropriateness of the complaint to be fully understood. The national budget requires formal approval in the form of an act debated and adopted, obviously, by the national Parliament. Therefore, the national budget needs to be approved, not by the executive branch but, to the best of their ability, by legislators. This is no minor point and it is one of the special conditions affecting collective bargaining in the public sector. Adoption of the National Budget Act is not the same as that of routine legislation since the procedure to be followed is expressly and clearly defined in the Constitution of the Republic. Indeed, by way of example, initiating the budget is the prerogative of the executive branch and the time limits for its adoption are strict.
- 1224.** One thing that is abundantly clear is that the content of the National Budget Act is not confined to the bill sent by the executive branch. Numerous amendments, deletions and additions are made during the parliamentary adoption process as a result of countless negotiations forming part of a dynamic political process with constant exchanges between legislators and the executive branch as well as various social organizations.
- 1225.** The Government adds that, upon closer inspection, various passages of the complaint explicitly confirm that there have been numerous opportunities for collective bargaining in the public sector. For example, it is acknowledged that a number of public sector bargaining sessions were organized; the executive branch made proposals on the amount of the minimum wage for employees; and reference is made to COFE being summoned to discuss draft Decree No. 319/2010. Therefore, according to the Government, such a negative and critical appraisal of the Government's behaviour is not justified when the complaint itself highlights the large number of meetings and bargaining opportunities.
- 1226.** The Government adds that the first meeting of the senior negotiating council for the public sector took place on 8 June 2010, meaning that it is not true that the general sessions under Act No. 18508 did not take place until late July, as the complainant erroneously claims. On that occasion, the Government, acting mainly through the Ministry of Economic Affairs and Finance, explained the broad lines of the incipient draft bill. Meetings were then held during July 2010. The Government provided the workers with a draft document on "strategies and instruments for strengthening state institutions", previously discussed in the Council of Ministers. The document contained a range of proposals such as a streamlining of labour relations with the State, and the adoption of minimum working hours for employees. The workers, meanwhile, set out their demands and produced a written document with observations on the Government's document.
- 1227.** Following a series of meetings and numerous exchanges, a decision was taken to open bargaining in the various "activity branches", namely the central Government, public enterprises, teaching institutions and the like. Discussions in the central Government and non-commercial bodies thus began in July 2010. On 6 August 2010, COFE made its wage proposal in a note presented to representatives of the executive branch. It requested a

minimum wage for public employees of 14,427 Uruguayan pesos (UYU). In subsequent meetings, the Government stated that it was considering the introduction of a minimum wage equal to the amount paid for 40 hours of work per week for central Government workers. As can be seen, the proposal conveniently put forward by the workers and referred to above was used as the starting point and reflected in section 754 of the National Budget Act (No. 18719 of 27 December 2010) which set the abovementioned minimum wage.

- 1228.** The Government states that bargaining continued until just before the draft budget was transmitted, at a time when an agreement was about to be signed on adjustments and departures on grounds of presenteeism. There was also bargaining during the parliamentary debate on the Act. The bargaining was not fruitless to the extent that a collective agreement covering the Government's entire term was eventually signed. Regarding the definition of contract types, the aim was to simplify labour relations as previously proposed by the Government. In any event, the clear purpose of the legislation is to create greater stability and order in the hiring of public employees.
- 1229.** The Government states that the obligation to bargain is not an obligation to agree. This is acknowledged by the workers and explicitly set forth in the last paragraph in section 4 of Act No. 18508. As previously mentioned, solutions were reached jointly in some areas but not in others, as in all bargaining processes. The National Budget Act was eventually adopted as Act No. 18719 on 27 October 2010. The Act includes explicit references to collective bargaining in the public sector.
- 1230.** The Government states that bargaining sessions involving workers and the national Government were held at the time the National Budget Act was adopted and subsequently, a collective agreement with COFE was reached, and the accusations made in the present complaint are thus without foundation. A modern approach to labour relations sees them as a dynamic process, as reflected in the events of 2010 and 2011. Moreover, considering that the Government's term has only just begun, there is ample scope for dialogue with workers. Indeed, as of December 2010, the bargaining committee of the central Government attended a variety of meetings to discuss the new wage agreement and debate the new Institutional Strengthening Programme. The broad lines of the Programme were presented by the executive branch in a meeting on 8 December 2010 and include, inter alia: (1) organization design; (2) the new public service; and (3) the modernization of structures and processes. It was agreed in the meeting that once the broad outlines of the new public service had been defined, it would be submitted to a bargaining session.
- 1231.** There were further meetings on 20, 23, 27, 29 and 30 December 2010 specifically devoted to negotiating the new wage agreement. After the meetings held at the headquarters of the Ministry of Labour and Social Security and the Ministry of Economic Affairs and Finance, the wage agreement was signed on 30 December 2010. The five-year agreement sets the guidelines to be followed by the central Government in the wage-adjustment process and establishes the procedures and mechanisms guiding wage discussions between the parties. In addition to setting general wage adjustments, the agreement provides for selective salary adjustments to allow advancement within each grade of the salary scale established within the framework of the central Government's new occupational and salary system. According to the agreement, a working group will be set up on 1 and 31 May every year to consider individual cases and determine the abovementioned adjustments. The working group is to be tasked with assessing the feasibility of formalizing the incentive set forth in section 754 of the 2010–14 National Budget Act while taking into account the constraints specified in the Act.

- 1232.** After the agreement had been signed, the trade union requested a meeting to deal, *inter alia*, with the regulatory decree relating to the minimum wage in the central Government. Before the meeting, the executive branch asked the trade union to send a list of amounts that, in its opinion, should not be included in the calculation of a minimum wage. Meetings were then held on 25 February and 4 March, in which the trade union raised a number of points concerning the implementation of the new contracts provided for in the National Budget Act, and consultations were organized to consider the possibility of excluding other amounts specified in the list for the implementation of a minimum wage. The executive branch took into account the points made by the trade union, including most of the amounts identified by the trade union as being suitable for exclusion from the calculation of the minimum wage. Lastly, a fresh meeting with COFE was held on 15 May 2011.
- 1233.** The Government states that there have been numerous bargaining opportunities at all bargaining levels in the public sector. This is evidence of compliance with the duty to participate, consult and collaborate, as set forth in section 2 of Act No. 18508. All of the events organized were genuine opportunities to bargain in which representatives of each sector (workers and government) took part, making proposals and counter proposals that led to agreements being concluded in the vast majority of cases. The number of meetings held and the agreements concluded reflect the executive branch's interest and willingness to engage in collective bargaining with respect to all issues arising from working conditions in the public sector, and to refrain from imposing unilateral solutions, contrary to the complainant's allegations. There is no doubt that the obligation to engage in dialogue and exchange information has been met, in accordance with the provisions of section 3 of Act No. 18508. The State has at all times promoted and guaranteed this right by addressing the requests to bargain by public sector workers for the purpose not only of dealing with issues arising from working conditions but also of resolving conflict situations, thereby ensuring the comprehensive implementation of the existing legislation.
- 1234.** Regarding Decree No. 319/2010, the Government states that the draft decree was presented to the trade unions in the form of a document that included regulations on the minimum hours of presence of employees who did not do six hours of work per day at the time the legislation was adopted. Some months earlier, the Government had already brought this issue to the attention of the trade unions, who considered that the Government had merely compiled a new document containing provisions that were already in force, and had not made any substantial innovations. The Government states that the complainant acknowledges that the legislation was submitted for consideration before being adopted. Close analysis of the Decree shows that the provision actually reordered a range of existing legislation that concerned the relevant aspects of labour relations but was scattered across older Acts and decrees. The new legislation did not introduce any substantial novelties. The sanctions mentioned in the legislation refer only to unjustified absences by employees. Furthermore, the claim that the legislation is not rights-based is not true. Indeed, according to section 18 of the abovementioned Decree, once an instance of misconduct has been recorded, the employee is given the opportunity to make comments, and following due consideration of the comments and the employee's track record, a sanction may be adopted. There are administrative opportunities to appeal against the sanction, which can be struck down by the administrative court. Lastly, the Government states that state employees instituted *amparo* (protection of constitutional rights) proceedings against the executive branch's Decree, and the subsequent rulings went against the workers in both the court of first instance and the court of second instance.

### **C. The Committee's conclusions**

- 1235.** *The Committee observes that, in this case, the complainant organization alleges that even though the adoption of Act No. 18508 on collective bargaining in the public sector was a major milestone in the public sector labour relations system, the executive branch sent a*



*draft budget to the legislative branch in 2010 without having presented the draft, bargained or reached an agreement on state employees' working conditions with COFE, and without having reported on changes in the status of the draft five-year budget; according to the allegations, the draft was sent to the legislative branch before being presented to the abovementioned organization (the complainant does, however, acknowledge that there were some invitations and that a number of meetings took place with representatives of the executive branch). The complainant organization further alleges that the executive branch promulgated Decree No. 319/2010 on the reorganization of the working hours of staff in the central Government, and the authorization of sanctions with no prior investigation being required, without taking into account the observations made by COFE in that regard.*

- 1236.** *Regarding the allegations according to which the executive branch sent a draft budget to the legislative branch in 2010, without having bargained or reached an agreement on state employees' working conditions with COFE, and without having reported on changes in the status of the draft five-year budget – according to the allegations, the draft was sent to the legislative branch before being presented to the abovementioned organization – the Committee notes that the Government states, first of all, that: (1) the complaint almost exclusively concerns employees of the central Government (executive branch employees working in the various ministries) and certain non-commercial decentralized agencies; (2) those employees are members of COFE and they are the ones affected by the contested budgetary standards; and (3) this means that the complaint in fact relates to a category of public sector workers and not to public sector workers in their entirety (the Government has provided information on public sector bargaining with other groups of state employees such as those in public enterprises, teaching institutions and the like).*
- 1237.** *Specifically, as far as the allegations are concerned, the Committee takes note that the Government states that: (1) the national budget requires formal approval in the form of an Act passed by the national Parliament – this is no minor point and it is one of the special conditions affecting collective bargaining in the public sector; (2) adoption of the national budget is not the same as that of routine legislation since the procedure to be followed is expressly defined as being different in the Constitution of the Republic: by way of example, initiating the budget is the prerogative of the executive branch and the time limits for its adoption are strict; (3) the entire content of the Budget Act is not confined to the bill sent by the executive branch, and numerous amendments, deletions and additions are made during the parliamentary process; (4) the complainant acknowledges that a number of public sector bargaining sessions did take place; (5) the first meeting of the senior negotiating council for the public sector took place on 8 June 2010, and on that occasion, the Government, acting mainly through the Ministry of Economic Affairs and Finance, explained the broad lines of the incipient draft bill; (6) meetings were then held during July 2010, the Government provided the workers with a draft document on “strategies and instruments for strengthening state institutions”, the document contained a range of proposals such as a streamlining of labour relations with the State, and the adoption of minimum working hours for employees; (7) the workers, meanwhile, set out their demands and produced a written document with observations on the Government's document; (8) following a series of meetings and numerous exchanges, a decision was taken to open bargaining in the various “activity branches”, namely the central Government, public enterprises, teaching institutions and the like, and discussions in the central Government and non-commercial bodies thus began in July 2010; (9) on 6 August 2010, COFE made its wage proposal in a note presented to representatives of the executive branch, and requested a minimum wage for public employees of UYU14,427 (the Government proposed the same minimum wage, which was recorded in what became section 754 of National Budget Act No. 18719 of 27 December 2010); (10) bargaining continued until just before the draft budget was transmitted; (11) regarding the definition of contract types, the aim was to simplify labour relations as previously proposed by the Government; (12) as*

*acknowledged by the workers, the obligation to bargain is not an obligation to agree, but solutions were reached jointly in some areas but not in others, as in all bargaining processes; and (13) there have been numerous bargaining opportunities at all bargaining levels in the public sector and all of the events organized were genuine opportunities to bargain in which representatives of each sector (workers and government) took part, information was exchanged and proposals and counter proposals were made that led to agreements being concluded in the vast majority of cases.*

**1238.** *In this regard, while the Committee observes that the accounts given by the complainant and the Government are contradictory when it comes to the exchange of information during the bargaining process concerning the draft budget (the complainant alleges that information was very limited and that as a result it did not become aware of the draft budget until it was transmitted to the legislative branch, whereas the Government argues that information was shared as and when the situation changed and that the trade union organizations produced their own set of demands), the Committee takes note that the Government points out that there were bargaining opportunities with COFE before and after the adoption of the National Budget Act, including agreements between the parties on wages, and a number of later meetings with COFE dealt with other issues. Given the above, the Committee cannot conclude that there was no genuine bargaining, although it does consider that, in future, parties to bargaining should be informed of the regulations provided for in the draft five-year budget affecting the interests of the social partners.*

**1239.** *Regarding the allegations that Decree No. 319/2010 was promulgated without taking COFE's observations into consideration, the Committee notes that the Government states that: (1) the draft decree was presented to the trade unions in the form of a document that included regulations on the minimum hours of presence of employees who did not do six hours of work per day at the time the legislation was adopted; (2) some months earlier, the Government had already brought this issue to the attention of the trade unions, who considered that the Government had merely compiled a new document containing provisions that were already in force, and had not made any substantial innovations; (3) the complainant acknowledges that the legislation was brought to its attention before being adopted; (4) the Decree actually reordered a range of existing rules that concerned the relevant aspects of labour relations but was scattered across older Acts and decrees; (5) the sanctions provided refer only to unjustified absences by employees (the decision can be challenged by means of an administrative appeal and can be struck down by the administrative court); and (6) state employees instituted amparo proceedings against the Decree, and the subsequent rulings went against the workers in both the court of first instance and the court of second instance. In the light of this information and the ruling in question, the Committee will not pursue its examination of these allegations.*

### **The Committee's recommendation**

**1240.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to decide that this case does not call for further examination.*

CASE NO. 2254

INTERIM REPORT

**Complaint against the Government of the Bolivarian Republic of Venezuela**

presented by

- the International Organization of Employers (IOE) and
- the Venezuelan Federation of Chambers and Association of Commerce and Production (FEDECAMARAS)

*Allegations: The marginalization and exclusion of employers' associations in the decision-making process, excluding them from social dialogue, tripartism and the conduct of consultations in general (particularly in relation to very important legislation that directly affects employers), thereby not complying with the recommendations of the Committee on Freedom of Association; acts of violence, discrimination and intimidation against employers' leaders and their organizations; legislation at odds with civil liberties and the rights of employers' organizations and their members; violent assault on the FEDECAMARAS headquarters by pro-Government mobs, who caused and threatened employers; bomb attack on the FEDECAMARAS headquarters; authorities' favouritism towards non-independent employers' organizations*

- 1241.** The Committee last examined this case at its March 2011 meeting, when it presented an interim report to the Governing Body [see 359th Report, paras 1177–1292, approved by the Governing Body at its 310th Session (March 2011)].
- 1242.** Subsequently, the International Organisation of Employers (IOE) sent new allegations and additional information in communications dated 10 February and 30 June 2011 and 20 February 2012. The Government sent new observations in communications dated 25 February and 18 October 2011.
- 1243.** The Bolivarian Republic of Venezuela has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

- 1244.** In its previous examination of the case in March 2010, the Committee made the following recommendations on the matters still pending [see 359th Report, para. 1292]:

With regard to the abduction and maltreatment of the FEDECAMARAS leaders, Messrs Noel Álvarez, Luis Villegas, Ernesto Villamil and Ms Albis Muñoz (Employer member of the Governing Body of the ILO), the latter being wounded by three bullets, the Committee deplores the offences that were committed, emphasizes their seriousness and requests the Government to take all the steps within its power to arrest the other three persons involved in the abductions and wounding, and to keep it informed of developments in the investigations. The Committee expresses the hope that the persons guilty of these crimes will soon be convicted and sentenced in proportion to the seriousness of the offences in order that such incidents will not be repeated and requests the Government to keep it informed in this respect.

As regards the allegations concerning the attacks on FEDECAMARAS headquarters in 2007, the Committee notes that the Government states that there is no complaint pending with the Public Prosecutor's Office and the representatives of FEDECAMARAS have not filed any complaint. The Committee deplores, whether or not there had been a complaint by representatives of FEDECAMARAS within the country, that the Government has ignored its recommendation to step up the investigations into these attacks on FEDECAMARAS headquarters in May and November 2007. The Committee requests FEDECAMARAS to file an official complaint concerning the alleged facts of the attacks on its headquarters in 2007 with the Public Prosecutor's Office and hopes that the authorities will collaborate with the organization's representatives to clarify the facts, identify and convict the guilty persons.

As regards the allegation concerning the bomb attack on FEDECAMARAS headquarters on 24 February 2008, the Committee firmly hopes that the authors of the bomb attack at FEDECAMARAS headquarters will soon be convicted and sentenced in proportion to the seriousness of the offences. The Committee requests the Government to keep it informed of developments.

The Committee deplores the lack of observations on the alleged abduction of 25 agricultural and livestock farmers and the death of one farmer (Mr Franklin Brito) as a result of going on a succession of hunger strikes in protest against the Government for the unjust invasion and expropriation of his land. The Committee emphasizes the seriousness of these allegations, requests the Government to reply to them without delay, and to make every effort to secure the release of the 25 abducted agricultural and livestock farmers and should order investigations to be carried out to punish the guilty persons. The Committee requests the Government to keep it informed of developments.

In general, taking into account the series of allegations examined in this section, the Committee draws the attention of the Government to the principle that the rights of workers' and employers' organizations can only be exercised in a climate free of violence, intimidation and fear, as such situations of insecurity are incompatible with the requirements of Convention No. 87.

With respect to the allegations of intimidation and harassment of FEDECAMARAS and its leaders, including the invasion and expropriation of farms or companies (in many cases without payment of due compensation) to the detriment of leaders or members of FEDECAMARAS, criminal prosecutions of employers' leaders and verbal attacks by the authorities against FEDECAMARAS and its leaders, the Committee deplores that the Government has not replied to these allegations and requests it to send detailed observations without delay. The Committee reiterates the principle expressed in the previous paragraph and expresses the firm hope that in the future the authorities will refrain from adopting such an aggressive tone in their statements concerning FEDECAMARAS and its leaders and members, and that these allegations of unjust invasions, expropriations and prosecutions should be investigated.

The Committee deplores that the Government has not explained in detail the circumstances of the specific events which resulted in the criminal charge and trial of employers' leader, Mr Eduardo Gómez Sigala, and requests it to do so and to keep it informed of developments in the trial. The Committee once again requests the Government to return the "La Bureche" farm property to the employers' leader Mr Eduardo Gómez Sigala without delay and to compensate him fully for all losses sustained as a result of the intervention by the authorities in seizing his farm.

...

The Committee reiterates its previous recommendations concerning social dialogue:

- deeply deploring that the Government has ignored its recommendations, the Committee urges the Government to establish a high-level joint national committee in the country with the assistance of the ILO, to examine each and every one of the allegations and issues in this case so that the problems can be solved through direct dialogue. The Committee trusts that the Government will not postpone the adoption of the necessary measures any further and urges the Government to keep it informed in this regard;
- the Committee expects that a forum for social dialogue will be established in accordance with the principles of the ILO, having a tripartite composition which duly respects the representativeness of workers' and employers' organizations. The Committee requests the Government to keep it informed in this regard and invites it to request technical assistance from the ILO. The Committee also requests it once again to convene the tripartite commission on minimum wages provided for in the Organic Labour Act;
- observing that there are still no structured bodies for tripartite social dialogue, the Committee emphasizes once more the importance that should be attached to full and frank consultation taking place on any questions or proposed legislation affecting trade union rights and that it is essential that the introduction of draft legislation affecting collective bargaining or conditions of employment should be preceded by detailed consultations with the most representative independent workers' and employers' organizations. The Committee once again requests the Government to ensure that any legislation concerning labour, social and economic issues adopted in the context of the Enabling Act be first subject to genuine, in-depth consultations with the most representative independent employers' and workers' organizations, while endeavouring to find shared solutions wherever possible;
- the Committee requests the Government to keep it informed with regard to social dialogue and any bipartite or tripartite consultations in sectors other than food and agriculture, and also with regard to social dialogue with FEDECAMARAS and its regional structures in connection with the various sectors of activity, the formulation of economic and social policy and the drafting of laws which affect the interests of the employers and their organizations;
- the Committee requests the Government to ensure that as part of its policy of inclusive dialogue (including within the Legislative Assembly), FEDECAMARAS is duly consulted in the course of any legislative debate that may affect employer interests, in a manner commensurate with its level of representativeness.

The Committee requests the Government to indicate the means of recourse available to employers who feel that they are victims of discrimination involving refusal to issue a labour solvency certificate or official foreign exchange authorizations, to initiate a dialogue with FEDECAMARAS on these questions and to inform the Committee of developments.

The Committee observes with regret that the Government has not replied to the allegations of discrimination against FEDECAMARAS and its members concerning parallel bodies and organizations close to the Government. The Committee requests the Government to send without delay its observations on these allegations and wishes to emphasize that by favouring or disadvantaging certain organizations compared with the rest, governments can influence the attitude of workers or employers when they choose which organization they wish to join, which is incompatible with the principle contained in Convention No. 87 whereby public authorities must refrain from any interference which would restrict the rights enshrined in the Convention. The Committee therefore requests the Government to ensure equal treatment for all employers' organizations in the matter of financing of activities and not to discriminate against members of FEDECAMARAS.

With regard to the examination of the international cooperation bill, the Committee hopes that it will provide for rapid recourse in the cases of discrimination and that it will avoid interference by the authorities in access to foreign funds by workers' and employers' organizations.

The Committee notes the comments of the complainant organization concerning the Organic Act establishing the Central Planning Commission. In this respect, while the legislation establishes strong state intervention in the economy and national economic

structure under the aegis of central planning in order to construct the Venezuelan socialist model, the Committee requests the complainant organizations to provide information on the relationship between the allegations and the violation of Conventions Nos 87 and 98.

The Committee notes the additional information sent by the IOE on 10 February 2011 concerning the cases of confiscation of property of employers' leaders, the alleged physical attacks against employers' leaders, the lack of social dialogue, as well as other questions, and the Government's communication, dated 25 February 2011, received two days before the Committee's meeting. The Committee will review these communications when it will next examine this case.

The Committee draws the special attention of the Governing Body to this case because of the extreme seriousness and urgency of the matters dealt with therein.

## B. New allegations of the International Organisation of Employers

**1245.** In its communication dated 10 February 2011, the IOE alleges that, despite the fact that the Committee on Freedom of Association has drawn the Governing Body's attention to the "*extreme seriousness and urgency*" of this case, the Government continues to ignore the recommendations made by the Committee at its March 2010 meeting, as well as subsequent recommendations.

### ***Constant serious harassment of the private sector and of FEDECAMARAS***

#### Confiscations

**1246.** The IOE alleges that, as it reported in its previous complaint, representatives of employers' organizations, and the private sector in general, are constantly harassed and threatened because of their efforts to defend their members. The IOE provides the following concrete examples of the confiscation of farms belonging to employer leaders of FEDENAGA and the Venezuelan Federation of Chambers and Association of Commerce and Production (FEDECAMARAS) by the government authorities, in violation of the Constitution and of ILO Convention No. 87:

Employers' leader	Egildo Luján, Director of FEDECAMARAS, Livestock Sector, Vice-President of FEDENAGA
Farm	La Escondida, State of Barinas
Number of hectares	1.400 (minus 260 hectares that are not farmed) (second occupation, land declared to be unproductive and uncultivated), 500 hectares are a forestry reserve and the remainder totally productive
Number of workers	Eight (around 24 workers are recruited to clear pasture land for 90 days a year (three periods of 30 days)
Production	Cattle, breeding
Date of occupation	June 2010
Current situation	Active
Status	Has not been paid
Action taken	Through the National Land Institute (INTI), attempts have been made to demonstrate that the land is unproductive, whereas the Government's own experts stated in their reports that the farm is productive
Employers' leader	Eduardo Gómez Sigala, former President of CONINDUSTRIA
Farm	La Bureche (this is his home in the Lara), State of Lara

Number of hectares	29 hectares, six of which are pasture land, and two of which are living quarters for family members, employees and a few animals
Number of workers	There were previously 12 employees working on the farm, who were paid by Mr Gómez Sigala up to September 2010 when they were forced by INTI and the armed forces to leave
Production	Sugar cane, pasture (18 hectares of sugar cane due for harvesting two months later were destroyed)
Date of occupation	21 September 2009 (still occupied by the armed forces) Currently being used as a military training centre
Current situation	Occupied by the national armed forces
Status	He has not been paid
Action taken	Complaint lodged with Supervisory Court No. 8, Criminal Assizes of the State of Lara
Employers' leader	AGROBUCARE, whose President and legal representative is Vicente Brito, former President of FEDECAMARAS
Farm	Hacienda Las Misiones Caripe, State of Monagas
Number of hectares	800 hectares
Number of workers	Varies with the coffee sowing and harvesting season
Production	Coffee and pasture land for cattle raising
Date of occupation	Notice was published in <i>La Prensa de Monagas</i> on 11 September 2009 declaring the farm to be idle, after which it was occupied by the INTI and used for cooperatives
Current situation	Occupied
Status	He has not been paid
Action taken	Appeal against the occupation lodged with the Fifth Higher Agrarian and Civil (Assets) Court of the Judicial Constituency of the State of Managas. The appeal was denied
Employers' leader	Rafael Marcial Garmendia, former President of FEDECAMARAS, owner of Hacienda Bucarito
Farm	Bucarito, State of Estado Lara
Number of hectares	5.058 hectares (2.767 hectares have been occupied, 2.291 hectares are productive)
Number of workers	18 permanent and 60 temporary (varies with the harvest season)
Production	Cattle rearing, raising and fattening for consumption, maize, sorghum, soya, fish farming, beekeeping
Date of occupation	January 2007
Current situation	Productive. The land taken over by Government cooperatives is idle.
Status	He has not been paid
Action taken	Two requests have been lodged: <ol style="list-style-type: none"> <li>1. The first request resulted in the land being declared idle by the Higher Agrarian Court of the State of Lara.</li> <li>2. Regarding the second request lodged by Mr Garmendia to have the farm declared private property, with submission of proof of ownership since 1926 prior to its becoming the property of the Garmendia family, the judge ruled that the documents submitted by the former owner showed that the farm was private land.</li> </ol>
Employers' leader	Genaro Méndez, former President of FEDENAGA
Farm	San Isidro Cattle-Raising Centre, State of Táchira

Number of hectares	650 hectares
Number of workers	Five employees
Production	Milk and reproduction
Date of occupation	April 2008, by INTI public officials
Current situation	The land was earmarked for “rescue” without even being inspected, but an inspection report by five INTI experts found in favour of the owner and the INTI officials’ claim was dismissed
Status	After Mr Genaro Méndez left his position of President of FEDENAGA in September 2009 the harassment ceased
Action taken	INTI administrative channels
Employers’ leader	Manuel Cipriano Heredia, President of FEDENAGA
Farm	Vieja Elena
Number of hectares	531 hectares
Number of workers	Five permanent employees
Production	Cattle raising, maize, sorghum, pasture, watermelons, fruit, milk, cheese. Also, research into animal health, recognized by national and international laboratories (vaccines against foot and mouth disease, brucellosis and tuberculosis)
Date of occupation	April 2008
Current situation	Productive
Status	Threatened occupation
Action taken	Mr Heredia, a producer of dual-purpose cattle and of cattle with high genetic value, showed the officials a certificate from INTI declaring that the farm is productive

**1247.** The IOE further states that, according to Roberto Orta Martínez, President of the Association of Urban Building Owners, the Government, in pursuit of its anti-private property policy, has expropriated a total of 280 urban buildings, for which it has paid compensation in only 5 per cent of the cases.

#### Further attacks against the President of FEDECAMARAS

**1248.** The IOE alleges that, in addition to the attacks mentioned in the information it presented on 3 November 2010, the Public Prosecutor’s Office embarked on a new criminal investigation on 23 December 2010 to ascertain whether, in his statement of 22 December 2010, the President of FEDECAMARAS, Noel Álvarez, committed a crime by calling on the Bolivarian National Armed Forces (FANB) to respect the Constitution and not to accept any orders that they judged might violate the Constitution or any other law.

**1249.** In his statement the President of FEDECAMARAS asked the members of the FANB to read article 25 of the Constitution: “Any act on the part of the public authority that violates or encroaches upon the rights guaranteed by this Constitution and by law is null and void, and public employees ordering or implementing such an act shall incur criminal, civil and administrative liability, as applicable, without the excuse of having followed the orders of a superior” and declared: “I appeal to them to exercise their freedom of conscience by refusing to carry out any order which they deem to be a violation of the Constitution.” He made this recommendation on the occasion of the military occupation of 47 productive private properties in the Sur del Lago region in the State of Zulia.



- 1250.** President Chávez declared on 24 December 2010 that the FEDECAMARAS President's appeal to military personnel to respect the Constitution and the law was a "call to war" and expressed the view that it was a "statement that bordered on the criminal".
- 1251.** Despite these threats, Mr Noel Álvarez said that he would remain in the country to face all the accusations against him and insisted that he was not guilty of any crime since he had at no time called on anyone not to respect the Constitution but rather to respect it.

#### Physical aggression against the leaders of FEDECAMARAS

- 1252.** The IOE refers to its allegations concerning events on the night of 27 October 2010, when in Caracas a group of armed and masked men machine-gunned, kidnapped and maltreated the President of FEDECAMARAS, Mr Noel Álvarez, the former President, Ms Albis Muñoz, the Executive Director, Mr Luis Villegas, and the Treasurer, Mr Ernesto Villamil. The kidnappers also injured Ms Albis Muñoz, Employer member of the Governing Body of the ILO, shooting her three times.
- 1253.** According to the Venezuelan authorities, two suspects in the kidnapping were arrested in November 2011. The Director of the Scientific, Penal and Criminal Investigations Body declared that the motive behind the aggression was vehicle theft, but he was unable to explain why the victims had been held for about two hours or why Ms Albis Muñoz, a former President of FEDECAMARAS and Employer member of the Governing Body of the ILO, had been shot three times. Ms Albis Muñoz stated that neither of the suspects had been the instigators of the aggression.
- 1254.** Furthermore, although the names of the people and institutions behind the numerous attacks on FEDECAMARAS are known and despite the Government's public assurances before the Conference and Governing Body of the ILO, as well as the numerous recommendations made by the ILO's supervisory bodies, so far none of the attacks have led to the arrest and punishment of the guilty parties.

#### ***Lack of social dialogue and tripartite consultation***

##### Adoption of laws without tripartite consultation

- 1255.** In his statements on 22 December 2010, the President of FEDECAMARAS criticized the attitude of the National Assembly at the end of 2010 when in barely two weeks it adopted more laws than during the rest of the year, just before the government party on 5 January 2011 lost the possibility of adopting organic laws with its votes alone.
- 1256.** The President of FEDECAMARAS said that he rejected the legislative haste with which the National Assembly had within the previous few weeks adopted a series of laws that affected essential trade union rights of Venezuelan citizens and modified fundamental aspects of the country's economic system, without due consultation of the people as required by the Constitution.
- 1257.** For its part the non-governmental organization *Human Rights Watch* described as "a legislative hold-up" the series of laws adopted by the Venezuelan Parliament in the last days of December 2010, which in its opinion was an attack on freedom of expression and on human rights defence groups, especially the law regulating the content of the Internet and giving the State greater control over telecommunications and the law preventing the international financing of NGOs. The executive body of *Human Rights Watch* said that the Government would now be able to block Internet sites and penalize radio and television stations for encouraging people to join start a peaceful civil disobedience movement or merely for broadcasting news that made people "anxious".

**Adoption of the Defence of Political Sovereignty and National Self-Determination Act without tripartite consultation**

- 1258.** On 3 December the Inter-American Commission on Human Rights expressed its concern at the Venezuelan Government's proposal, in the Defence of Political Sovereignty and National Self-Determination Bill, to control the financing of NGOs by international cooperation and to prevent the international financing of political parties. In the Commission's opinion, the ambiguous wording of certain clauses of the Bill and the broad discretion it conferred on the authorities carried a risk that it might be interpreted restrictively so as to limit the exercise of freedom of association, freedom of expression, political participation and equality.
- 1259.** Despite the views expressed by the Inter-American Commission and by several civil society institutions, and at the solemn request of President Chávez, the National Assembly urgently examined a new draft of the Bill in December 2010. On the night of 20 December 2010, at its second reading, the National Assembly approved the Defence of Political Sovereignty and National Self-Determination Act, which contains ten articles and, inter alia, prevents Venezuelan employers' and workers' organizations from receiving any kind of international financial assistance without prior authorization.
- 1260.** Article 4 of the Act stipulates that the assets and other income of politically motivated or political rights defence organizations must derive exclusively from "national assets and resources". The Government of Venezuela considers that employers' and workers' organizations come under this head and has accused them of receiving "thousands of dollars from North American imperialism, not just to defend human rights but to promote conspiracies and coups d'état".

**Adoption of the Communal Economic System Organic Act without tripartite consultation**

- 1261.** On 13 December 2010 the National Assembly approved at its second reading the Communal Economic System Organic Act, which introduces a communal currency unsupported by the Central Bank of Venezuela as an alternative legal tender. The Act provides that socio-productive organizations other than private sector organizations may benefit directly or indirectly from various financial and non-financial resources. Similarly, the Act provides that the Executive must encourage the use of goods and services created nationally and internationally under the Communal Economic System. Article 78 stipulates that "natural or juridical persons that together or separately engage in propaganda or subliminal, false or deceitful publicity regarding the goods, services and know-how of the Communal Economic System and its means of production, trade, distribution, marketing and supply shall be liable to imprisonment for two to four years". Once again, attention is drawn to the fact that the vagueness of the terms used give reason to fear a broad interpretation that could result in the violation of freedom of expression or of any right of opinion voiced by the private sector.

***New Enabling Act***

- 1262.** The new Enabling Act adopted by the National Assembly at the end of December 2010 constitutes yet another concession of powers to President Chávez so that he can govern by decree with the status, weight and force of law in nine additional areas: tending to vital needs resulting from the rains, infrastructure, transport and public services, housing and environment, land-use management and the integrated development and use of urban and rural land, finance and taxation, public safety and legal security, integrated security and defence, and international cooperation and the economic system. The Inter-American Commission on Human Rights has consequently voiced its concern that the Act gravely

undermines the principles of separation of powers and freedom of expression. It should be borne in mind that President Chávez has already benefited from three special Enabling Acts in 1999, 2001 and 2007 under which he passed more than 100 laws.

- 1263.** On 29 January 2011 the Land and Housing Emergency Act was promulgated under this new Enabling Act, i.e. without tripartite consultation. The Act authorizes “urban land and non-residential buildings (storehouses, warehouses, industrial plants) that are idle, abandoned or improperly employed to be declared of public utility and expropriated”, and empowers President Chávez to decree emergency areas and vital housing and residential areas. The new Act provides for fast-track expropriation machinery that offers owners no guarantees since there is no provision for compensation. As was stressed by the President of the Real Estate Chamber of Venezuela, Mr Aquiles Martini, the “discretion” left to the Executive to determine that land is idle or improperly employed raises questions as to the criteria used.
- 1264.** The IOE and FEDECAMARAS regret to have to refer once again to the lack of social dialogue and bipartite and tripartite consultation, despite the fact that the Committee on Freedom of Association has repeatedly emphasized “the importance that should be attached to full and frank consultation taking place on any questions or proposed legislation”. Despite the Committee’s recommendations requesting the Government “to ensure that any legislation concerning labour, social and economic issues adopted in the context of the Enabling Act be first subject to genuine, in-depth consultations with the most representative independent employers’ and workers’ organizations”, there has been no change in the Government’s attitude and it continues to adopt reforms and laws affecting the private sector without any prior consultation or dialogue with the social partners.
- 1265.** The IOE concludes by stating that the Government’s totalitarian project based on intimidation restricts the exercise of civil liberties in defence of the individual and collective rights of employers. The constant harassment suffered by Venezuela’s employers is endangering the very existence of independent employers’ organizations, notably FEDECAMARAS and, of course, many of the country’s economic sectors.
- 1266.** In its communication dated 30 June 2011, the IOE recalls that for eight years it has complained to the Committee on Freedom of Association about the Venezuelan Government’s constant harassment of the private sector and of FEDECAMARAS, its most representative organization. It adds that, along with its complaint, the IOE recently expressed its grave concern regarding information that it has sent the Committee, which clearly proves the lack of independence of, and government interference in, the affairs of parallel employer’ organizations it has set up, towards which it has showed favouritism and which for the past five years it has systematically designated as the employers’ delegation to the International Labour Conference. The IOE has decided to forward the that information so that it can be placed before the Committee on Freedom of Association and before the High-level Mission that is scheduled to visit Caracas to examine the complaints of the Venezuelan Government’s non-compliance with Convention No. 87. The information is as follows:
- On 14 May 2010 the Director of International Relations of the Ministry of Popular Power for Labour sent an email to the EMPREVEN, Confagan, Fedeindustrias and Coboien organizations containing models of letters for them to send the ILO and IOE in defence of its case at the 2010 Session of the Conference and to establish closer relations with the IOE itself.

- On 15 May 2010 a representative of the Venezuelan Government to the ILO and labour attaché of its Permanent Mission in Geneva wrote to the aforementioned Director of International Relations with instructions and suggestions regarding EMPREVEN, Confagan, Fedeindustrias and Coboien's communications to the IOE and the ILO's Conference Credential Committee, as follows:

The IOE points out that the details contained in the email and the justification given for sending it are clear proof of the Government's interference in these organizations and of their utter subjection to the Venezuelan authorities.

Note: I suggest that each of the employers' organizations send a letter individually, along the following lines:

1. Wait until all the Conference Committees have been set up on the first day of the 99th Session and then, after having endeavoured to establish their credentials as employers' representatives on the committees, specify clearly in a letter the names of the committees on which they have been prevented from establishing their credentials by the FEDECAMARAS representatives, and have the letter registered;
2. Introduce the document in broad and general terms as drafted, and then present a more detailed additional text themselves describing the action taken in each of the committees at the 99th Session of the Conference.

Both methods are valid, and I believe they will oblige the Credentials Committee to recognize the situation and issue a reply.

I suggest deleting the passages highlighted in red.

Regarding the suggestions, I would emphasize that we must avoid describing the written document as a complaint since, from the legal standpoint under article 26 of the Rules for the Conference, it might not strictly speaking fit any of the hypotheses contemplated or may otherwise be deemed irreceivable at the outset by the Credentials Committee by virtue of clause (c) of said article 26.

**1267.** Finally, the IOE has sent a copy of one of the letters that it received from EMPREVEN, containing word for word the Ministry of Labour's draft text, along with all the recommendations by the Venezuelan Government's official representative to the ILO. The IOE encloses copies of the emails cited in its allegations and considers that this information proves formally the total dependency of the Government organizations concerned and their lack of credibility within the ILO.

### C. The Government's reply

**1268.** In its communication dated 25 February 2011, the Government refers to the communications sent by the IOE on 3 November 2010 and 10 February 2011, containing details of the amplification of their complaint against the Government.

#### Background

**1269.** The Government respectfully requests the Committee on Freedom of Association to carry out a detailed examination of the so-called extension of the IOE's complaint, bearing in mind that an "amplification" presupposes the presentation of new allegations, of new facts, whereas the communications sent by the IOE contain the same allegations set out previously in the complaint and already answered in detail by the present representatives of the Government. Moreover, the communication dated 10 February 2011 contains virtually the same arguments as that of 3 November 2010.

- 1270.** This situation merely distracts the Government's attention, and the Committee's too, from the matter at hand, and the Government therefore insists that the Committee confine its considerations strictly to its request for the Government's observations on new allegations or new information, since it has repeatedly answered in ample detail all the allegations in this case, irrespective of the fact that the Committee has expressed little satisfaction in that regard.
- 1271.** The Government also wishes to draw attention to the powers and attributes assumed by the Committee on Freedom of Association in its examination of this case. Before the Committee examines the case further in March, the Government would like to refer to an ILO publication, *The Committee on Freedom of Association: Its impact over 50 years* by Eric Gravel, Isabelle Duplessis and Bernard Gernigon, which states with regard to the examination of complaints that are of a political nature: "Even though cases may be political in origin or present certain political aspects, they should be examined by the Committee if they raise questions concerning the exercise of trade union rights. It is for the Committee to rule on this issue after examining all the available information, in the same way as it rules on the question of whether the issues raised in a complaint concern penal law or the exercise of trade union rights."
- 1272.** Many of the allegations in this case are beyond the purview of freedom of association and collective bargaining and concern political or purely economic issues. Elsewhere, they are beyond the purview of freedom of association and collective bargaining and have to do with penal law, specifically in the case of Mr Carlos Fernández. Before the Committee considers some of the allegations in this case and expresses its opinions and recommendations, it should determine whether they have anything to do with trade union rights, in other words whether or not the Committee is competent to examine them. The Government also wonders whether the recommendations made by the Committee, such as those advocating the impunity of certain workers' and employers' union leaders who have committed serious crimes against the people of Venezuela, are actually within its powers, come within its mandate or concern its very *raison d'être*.
- 1273.** Finally, regarding practically all the allegations presented by the complainants, the Government is dismayed and concerned at the Committee's failure to lend any credit to the arguments, replies and evidence it has advanced, and at the Committee's readiness to believe the allegations and asseverations of the complainants, even though most of them are baseless. Nevertheless, as a token of its good will towards this international body and in the renewed hope that its reply will be treated with the objectivity that any Member of the ILO expects, the Government hereby responds to some of the points raised by the IOE.

Regarding the alleged harassment of the private sector and  
FEDECAMARAS by attacking property and occupying farms

- 1274.** The Government wishes to point out once again that the land rescue project being carried out by the National Land Institute (INTI) is not about confiscating, occupying or raiding the property of union representatives or private employers. On the contrary, the process involves land that is lying idle, unproductive or being used illegally, in accordance with the Constitution and the Land and Agrarian Development Act.
- 1275.** To start with, reference must be made to the land rescue process as it is laid down in Chapter VII of the said Act.
- 1276.** Article 86 of the Act states that INTI is empowered to reclaim ownership of land that is illegally or unlawfully occupied, in which case, acting on its own initiative or following a complaint, it embarks upon the appropriate reclamation procedure subject to the guarantees provided for in articles 17, 18 and 20 of the Act.

- 1277.** Article 88 stipulates that land rescue does not apply to agricultural land that is fully productive and in full compliance with the plans and guidelines laid down by the Executive.
- 1278.** Consequently, once the process is engaged, INTI can take over reclaimable land designated as idle or uncultivated in accordance with the provisions of the Act.
- 1279.** The Bolivarian Republic of Venezuela, like many countries throughout the world, is using the agrarian sector to strengthen and extend the values of social development embodied in the Constitution. In this way it hopes to bring about a just and equitable distribution of wealth along with the strategic, democratic and participative planning of land ownership and the development of the agrarian sector as a whole.
- 1280.** The Government notes that it has provided the necessary means and machinery to do away entirely with the *latifundista* system (under which vast tracts of land are privately owned) as being contrary to justice, equity, equality, the public interest and social peace. Specifically, one of the fundamental principles underlying the adoption of the Land and Agrarian Development Act is to ensure the security and sovereignty of the country's agro-food sector for the benefit of the entire population.
- 1281.** It is important to refer here to the following pronouncements of this worthy Organization on the subject of agrarian reform, affirmations which we trust are still valid today:
- The ILO's Tenants and Share-croppers Recommendation, 1968 (No. 132) of the ILO states that, "in conformity with the general principle that agricultural workers of all categories should have access to land, measures should be taken, where appropriate to economic and social development, to facilitate the access of tenants, share-croppers and similar categories of agricultural workers to land."
  - Similarly, the Rural Workers' Organisations Recommendation, 1975 (No. 149) recognizes that "land reform is in many developing countries an essential factor in the improvement of the conditions of work and life of rural workers and that organizations of such workers should accordingly cooperate and participate actively in the implementation of such reform".
  - An ILO press release along the same line issued on 8 December 1997 (OIT/97/32) on boosting agricultural productivity stated: "Most SSA countries are primarily rural and the agricultural economy requires a number of basic changes. The first major requirement is to abandon the age-old system whereby governments impose artificially low prices for staples such as bread and rice, a practice which feeds urban dwellers but keeps farmers in poverty. A second requirement is to diversify production away from large-scale commodity production to areas of greater export potential, such as cut flowers, tropical fruits and vegetables. A third major requirement is land reform. Land is the primary resource in rural SSA and access to land is highly restricted. Ownership is often concentrated in the hands of large proprietors, who often make very poor use of their holdings, either leaving them idle or holding them for speculative purposes, whereas it is well documented that small land holders absorb more labour per acre and are more productive."
- 1282.** In the case of the Bolivarian Republic of Venezuela, agrarian productivity has become a juridical concept that serves as a means of measuring the compatibility of privately-owned land with its social function. Thus, there are three levels of productivity: idle or uncultivated farmland, farmland where there is room for improvement, and productive farmland. The first level corresponds to land that does not meet minimum production requirements and is therefore subject to occupation or expropriation. The second is land which, while not

productive, can be made so in a relatively short period of time and where the owner is encouraged to adapt accordingly and is offered financial assistance. The third level refers to land that is properly managed and productive.

- 1283.** In most cases where land has been reclaimed by the State for the public good, the existing occupants were unable to prove ownership, as they only had dubious deeds or no deeds at all; in many cases the land did not meet production requirements or was simply unproductive or idle. Nevertheless, the Government, through the appropriate channels, complied with established legal procedures and, in those cases, duly compensated the owners for any improvements they may have made. This shows that Venezuela's policy of complying with the requirements of social justice embodied in the Constitution and in international declarations has in its procedures and execution respected all relevant guarantees, rights and advantages.

#### Regarding Mr Ángel Eduardo Gómez Sigala

- 1284.** The Committee has already been informed that the law has duly empowered INTI, which is attached to the Ministry of Popular Power for Agriculture and Land, to proceed with the procedure for reclaiming the piece of land known as "Hacienda La Bureche", Cabudare Parish, Palavecino Municipality, in the State of Lara, essentially to promote the agricultural use of the Río Turbio valley by the immediate revitalization of this otherwise idle piece of land. The entire procedure complied with the relevant provisions of the Constitution, the Land and Agrarian Development Act and Decree No. 2743 of 10 December 2003 (see *Official Gazette* No. 331541, 30 December 2003).
- 1285.** The inspection of the farm that was carried out showed clearly that it was underutilized, as it was being used for crops that were not suited to the type of soil and therefore engendering a process of deterioration. The system of management, too, was inappropriate and was thus having a negative impact on the environment that resulted in a total of 83 hectares being left idle on a farm measuring 97.626 hectares in all (not 29 hectares as the IOE states in its communication of 10 February 2011).
- 1286.** Furthermore, regard the situation of Mr Ángel Eduardo Gómez Sigala, he was caught *in flagrante delicto* and charged by the Public Prosecutor with resisting the authorities and causing light personal injuries (articles 216 and 418 of the Penal Code, respectively), following his assault on a military officer who among other things suffered a dislocated arm. At the time the officer and others with him were carrying out their duties accompanying INTI officials and maintaining public order.
- 1287.** On 26 September 2009 the Criminal Assizes of the State of Lara issued a restraining order, pursuant to article 256.9 of the Criminal Code of Procedure. Mr Gómez Sigala has since been released from custody and all his constitutional rights and guarantees have been respected. He has in fact been elected as a member of the National Assembly for the State of Lara, where he represents the COPEI political party and is currently serving as a Member of Parliament.
- 1288.** The legal proceedings against Mr Gómez Sigala were surrounded by all the procedural guarantees laid down in national and international rules and regulations, and it is therefore unlikely that the courts would withdraw the charges brought against him or that the investigation into the matter be dropped, since the security and judicial bodies involved were merely carrying out their business in strict compliance with Venezuela's juridical rules and regulations.

Regarding the incidents at FEDECAMARAS headquarters

- 1289.** With regard to the events of 24 February 2008, the IOE states in its communication of November 2008 that, although a complaint was lodged on 26 February 2008 with the Public Prosecutor's Office requesting "the most comprehensive and exhaustive investigation into the events and the identification of those responsible", to date no result has been achieved.
- 1290.** Since the IOE claims that on to date no result has been achieved, the Government reiterates what it has already told the Committee about this incident, namely, that the investigation was carried out by the appropriate bodies, that criminal charges were brought against Mr Juan Crisóstomo Montoya González and Ms Ivonne Gioconda Márquez Burgos, and that their arrest was ordered by the courts in 2008, whereupon they were declared fugitives from justice.
- 1291.** The Government also stated before that the suspects, Juan Crisóstomo Montoya González and Ivonne Gioconda Márquez Burgos, were arrested on 6 and 10 May 2010 for their alleged involvement in the incidents that occurred at FEDECAMARAS headquarters and are currently being held at the detention centre in the metropolitan area of Caracas.
- 1292.** That being so, it can hardly be claimed that no result has been achieved, since on the contrary the State, through the appropriate bodies, has undertaken all the relevant investigations and made every effort to catch the suspects as quickly as possible, in full compliance with the law and in the interests of the principles and values of the State.

Regarding the alleged abduction of agricultural and livestock farmers

- 1293.** With regard to the abduction of 25 agricultural and livestock farmers alleged by the IOE in its communication of November 2010, in which it refers to the Government's irresponsible attitude in not doing anything to have them released, the Government, given the limited and inadequate information and evidence presented, asks the Committee to request that the complainants supply the necessary information so as to establish exactly what incidents and which persons the IOE is referring to.

Regarding the alleged support given to parallel institutions close to the Government

- 1294.** Here again it is clear that Venezuela enjoys complete freedom of association and the right to establish organizations in conformity with the Constitution, other laws and ILO Conventions on the subject. Both employers' and workers' organizations are free to form associations without any interference whatsoever. Under no circumstances does the Government encourage or become involved in the establishment or activities of such organizations, let alone show any favouritism or exercise any influence vis-à-vis one or the other.

Regarding the labour solvency procedure and the Foreign Currency Administration Commission (CADIVI)

- 1295.** The juridical basis for the Foreign Currency Administration Commission (CADIVI) can be found in Decree No. 4248, published in *Official Gazette* No. 38371 on Thursday 2 February 2005. Article 2 of the Decree states that labour solvency refers to an administrative document issued by the Ministry of Popular Power for Labour and Social Security (MINPPTRASS) certifying that employers respect in full the labour and trade union rights of their workers, which is an essential requirement for concluding contracts,



agreements and conventions with the State. The document can be obtained rapidly and automatically through the Ministry's web site at <http://www.mintra.gob.ve>, where users have access to requirements and other information concerning their request. Employers must register with the National Registry of Enterprises and Establishments on the corresponding web page, for which purpose they are required to submit a number of documents concerning the enterprise. Once the request has been submitted and the requisite formalities have been completed, a mere five working days are needed for the Ministry to handle the request, through the appropriate channels. Employers may then collect the solvency certificate from the Labour Inspectorate. As to the procedure, article 4 of Decree No. 4248 stipulates that the Labour Inspectorate must refuse to issue or must revoke a solvency certificate if the employer concerned fails to comply with any MINPPTRASS resolution, refuses to comply properly with an administrative ruling, disobeys any injunction by a competent official, fails to meet the requirements of the Venezuelan Social Security Institute (IVSS) and the National Occupational Prevention, Safety and Health Institute (INPSASEL), fails to comply with a decision of the labour tribunals or infringes workers' freedom of association, the right to voluntary collective bargaining and the right to strike.

- 1296.** As to resources, should an employer's application for labour solvency be denied, article 17 of Decree No. 4524 stipulates as follows: "If proof of labour solvency is denied or revoked, the employer concerned may lodge an appeal as provided for in the Administrative Proceedings Act". As can be seen from the above, the labour solvency procedure provides ample and sufficient guarantees of legality and impartiality for all applicants and entails formalities that are increasingly straightforward and rapid. In other words, the labour solvency procedure is designed not to hamper the economic development or commercial viability of enterprises in any way, let alone to restrict the production and marketing of goods and services. Its purpose is to guarantee the human and labour rights of workers which were all too often violated in the past.
- 1297.** With regard to the procedure for obtaining foreign currency, the Government informs the Committee that the procedure is the same for all enterprises. It is a computerized process to which access may be had through the Government website <http://www.cadtvtgob.ve>, which contains all the necessary information and requirements for obtaining foreign currency without any discrimination whatsoever. Thanks to this method of administering foreign currency, it has been possible to cope with the fragility and volatility of currency markets and tackle the repercussions of the global crisis, without causing any negative impact on the level of employment or on workers' wages. Through this procedure CADIVI facilitates the obtention of foreign currency for basic consumer goods (medical supplies and food products) and essential imports. In other words, the State has opted to give priority to requests for foreign currency for the marketing of food products and medical supplies and, in general, for such goods as are considered vital for the wellbeing of the Venezuelan people under the system of centralized planning based on the prior determination of the needs of the population. Consequently, any enterprise that imports vital products or inputs that are necessary but not available in the country have priority for the issue of foreign currency. Similarly, Decree No. 6168 of 17 June 2008, published in *Official Gazette* No. 38958 of 23 June 2008, introduced another system for speeding up the acquisition of foreign currency for the importation of capital goods, inputs and raw materials for the country's production and processing sectors. This measure is specifically designed to dispense enterprises from certain CADIVI requirements if their request is for US\$50,000 or less in foreign currency and destined for the importation of capital goods, machinery, spare parts or production inputs. These administrative measures, which facilitate the acquisition of foreign currency as approved by the Government, help to boost the country's production system. (The Government enclosed CADIVI instructions Nos 090, 104 and 106 and Decree No. 6168).

**1298.** In its communication dated 18 October 2011, the Government confirms its earlier replies, inasmuch as it has already dealt with many aspects of the new allegations presented by the IOE.

#### Preliminary observations

**1299.** The Government respectfully requests the Committee to review very carefully the additional material admitted as part of the complaint lodged by the IOE and FEDECAMARAS since, as already noted, they contain allegations to which the Government has already responded in sufficient detail.

**1300.** The Government again observes that the allegations set out by the complainants go beyond the terms of reference of the Committee on Freedom of Association and in many respects concern political and economic affairs and Venezuela's legal system. The Government therefore wishes once again to express its dismay on reviewing the Committee's recommendations, which explicitly request the Government "to revoke the warrant for the arrest of former FEDECAMARAS President Mr Carlos Fernández, so that he may return to the country without risk of reprisals". The Government wishes to remind the Committee that Mr Carlos Fernández was involved in events that led to the breakdown of constitutional order in the country as a result of the coup d'état that originated in the work stoppage by the employers and the petroleum strike of 2002–03, events that severely disrupted the State of law, severely damaged the Venezuela's social fabric and caused the county serious economic hardship. It was for these reasons that Mr Carlos Fernández was charged by the Public Prosecutor's Office, in accordance with the laws and regulations of the country's Penal Code.

**1301.** The Government draws attention most forcefully to the wording used by the Committee, urging compliance with the law in some instances and in others requesting explicitly that legal process be denied. The Government therefore respectfully requests the Committee to reconsider the peremptory tone in which it expresses its recommendations, especially where they run counter to the country's laws and regulations.

**1302.** The Government likewise wishes to stress the principles enshrined in Venezuela's laws and regulations and recognized internationally, such as the presumption of good faith, the right to conduct one's defence and the impossibility for a party to know whether the Committee is at all concerned about a case that it is examining. For instance, the Committee refers to "the death of one farmer (Mr Franklin Brito) as a result of going on a succession of hunger strikes in protest against the Government for the unjust invasion and expropriation of his land", where the allegations regarding Mr Franklin Brito are hard to reconcile with the arguments and wording employed by the Committee.

**1303.** In addition, the Government wishes to make known its displeasure at the way the amplifications adduced by the complainants were considered and given credence in assessing the evidence presented by the Government. The point has been made again and again that employers' and workers' organizations have full freedom of association under Venezuela's legislation and that the Government does not become involved in their establishment or in their activities. Government policy towards these sectors is in no way discriminatory or left to the discretion of the authorities. On social and labour affairs the Government holds regular consultations, meetings and discussions with the employers' and workers' organizations, including FEDECAMARAS, and it cannot be held accountable for the decision of a party not to take part in them.

Regarding the aggression denounced by FEDECAMARAS leaders, Mr Noel Álvarez, Ms Albis Muñoz, Mr Luis Villegas and Mr Ernesto Villamil

**1304.** To begin with, the Government again denies the allegation that it attacked the former President of FEDECAMARAS, Mr Noel Álvarez. The allegations presented by the IOE in its communication of 10 February 2011 state explicitly that it was part of a penal investigation by the Public Prosecutor's Office, which is in conformity with the law and mandate of the Judiciary and not of the Executive. At the 308th Session of the Governing Body in June 2010, the Government representatives of Venezuela already rejected these unfounded claims presented by the Workers' group, as the minutes of the meeting show. Moreover, following that 308th Session and at the Office's request, the Government sent a detailed reply in communication No. 291/2010 of 4 November 2010, which was registered by the ILO's International Labour Standards Department on 8 November 2010. In that communication the Government duly informed the ILO of the action taken, the investigations conducted and the proceedings engaged by Venezuela's State bodies in connection with the events involving Ms Albis Muñoz, Mr Noel Álvarez, Mr Ernesto Villamil and Mr Luis Villegas, former President and executive officers of FEDECAMARAS. On 23 December 2010 the Public Prosecutor's Office accordingly charged Mr Antonio José Silva Moyega and Jason Manjares with the temporary abduction and attempted aggravated robbery of Ms Albis Muñoz Maldonado. A preliminary hearing was set for 10 February 2011 by the appropriate Supervisory Tribunal, which confirmed the charges and ordered that the accused stand trial on 20 October 2011. As soon as a final ruling on the case has been handed down, the Committee will be duly informed.

Regarding the incidents at FEDECAMARAS headquarters in 2008

**1305.** The Government states that on 20 June 2010 formal criminal charges were brought of public intimidation and unlawful use of identity papers. The competent State bodies conducted the appropriate investigation, which resulted in charges being brought against Mr Juan Crisóstomo Montoya González and Ms Ivonne Gioconda Márquez Burgos and a warrant being issued for their arrest. A preliminary public hearing was held on 4 November 2011. As soon as a final ruling on the case has been handed down, the Committee will be duly informed.

**1306.** In both cases the appropriate State bodies immediately carried out all the relevant investigations and made every effort to catch the accused as quickly as possible, in full compliance with the law and with the principles and values of the State.

Regarding the alleged abduction of 25 agricultural and livestock farmers and the death of a farmer (Mr Franklin Brito) in August 2010

**1307.** With regard to the alleged abduction of 25 agricultural and livestock farmers, the Government repeats the substance of communication No. 028/2011 of 25 February 2011, in which it requested details of the persons and events referred to in the complaint so that, if confirmed, it might order the appropriate investigations. It is still waiting for the complainant to submit that information, failing which the Government explicitly requests the Committee declare that, if the information is not forthcoming by its next meeting, it will not pursue its examination of the allegations and will therefore close the case. It is making this request so to ensure that the Committee's considerations are uniform, coherent and transparent in all the cases it is examining, just as it ruled on the absence of information from the Government in cases Nos 2674 (paras 1160 and 1165) and 2727 (paras 1179 and 1190) in its 360th report (document GB.311/4/1) adopted at the 311th Session of the Governing Body in June 2011.

**1308.** With regard to Mr Franklin Brito, the State of Venezuela, through its institutions, guaranteed him the right to health as a fundamental social right and as a legal entitlement closely allied with the right to life, in full compliance with articles 43 and 83 of the Constitution and with the Constitution of the WHO, where it states: “Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity” and “The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.”

**1309.** Faced with the Mr Franklin Brito’s entirely personal decision not to take any food, and although the petition on which he based his decision was not contemplated by the legislation in force and there was no evidence or legal grounds to support his claims, the State guaranteed that his demands would be dealt with through administrative and jurisdictional channels. The following is a brief account of what happened:

1. On 2005 a Mr Franklin Brito engaged in an act of protest, sewing his mouth closed and declaring that he was on a hunger strike until he received a reply from various State bodies regarding an alleged failure to pay monies owing to him for work done and unjust decisions concerning land belonging to him. The Office of the Public Ombudsman reported that, having looked into the matter fully, it had found no written record of any complaint on the subject. Nevertheless, in order to protect Mr Franklin Brito’s life, the Office, after carrying out all the relevant investigation, established that Mr Brito had not cashed the cheque in payment for his work and had said that he wanted a fixed-term appointment. Following the action taken by the Ombudsman, the Legal Advisory Division of the Ministry of Education and Sport reported that Mr Brito had given up his job as a supply teacher and that it could not keep the post open indefinitely, since by their very nature such posts were to meet a temporary shortage of staff and, when the appointee ceased to fill the post, it was automatically terminated.

It should be borne in mind that under national law access to fixed-term appointments in the public service is possible only by a process of public examinations and interviews, as stipulated in article 19 of the Public Service Statutes Act.

2. As part of the land ownership and land use regularization process, Mr Franklin Brito was granted title to 290.20 hectares comprising the Yguaraya farm in the La Tigera sector of the Municipality of Sucre in the State of Bolívar, by decision of the INTI board of directors (Session 15.99, point 2.123) on 11 May 1999. In 2003 Mr Rafael Gregorio D’Amico Baquero and Ms Concepción de Jesús Antoimas Fajardo were granted farming rights and title to pieces of land adjoining the Yguaraya farm, where they had been living since the end of 1990.

Mr Franklin Brito thereupon lodged a complaint against his neighbours for encroaching on part of his land. In 2005 and 2006, following Mr Brito’s complaint, the boundaries in question were verified by the State of Bolívar branch of INTI, which established that there was no such encroachment and recommended that fences be built to delimit the property clearly. It also pointed out that Mr Brito must farm the land, as it was apparent from information obtained that the only productive use he made of it was to rent it out. INTI thus confirmed that Mr Brito owned the land that he had been granted in 1999 and recorded the fact once again in the agrarian register.

In 2006 Mr Brito applied to the Second Court of First Instance for Commerce, Agriculture and Rights of Passage, which confirmed that there was no encroachment and declared his complaint irreceivable. The same day Mr Brito lodged another complaint with the Fifth Higher Agrarian Tribunal of the State of Monagas, which was likewise declared irreceivable on the grounds that there was no encroachment. In 2007 Mr Brito appealed against the decision to the Constitutional Court of the Supreme Court of Justice, which ruled that his allegations of encroachment and trespassing were unfounded. When his appeal was denied, Mr Brito went back on hunger strike.

For humanitarian reasons, even though it was fully aware of the absence of any encroachment as claimed by Mr Brito, the Government decided to award him compensation in the form of repairs, a tractor and the deforestation of 40 hectares of his

land so that he could begin farming it. In spite of this, in 2009 Mr Brito requested a large sum of money in compensation, which he was refused. Once again, Mr Brito resorted to a hunger strike to bring pressure to bear on the Government, this time in front of the headquarters of the Organization of American States (OAS).

Representatives of a number of international bodies, such as the Resident Coordinator of the United Nations in Venezuela (Alfredo Missair), the OAS, the International Red Cross (Mr Hernán Bongioanni), the International Red Crescent, the Pan American Health Organization and the World Health Organization acknowledged the Venezuelan Government's willingness to engage in a transparent dialogue in an effort to save Mr Brito's life and protect his health, although certain national and international media clearly attempted to present a biased view of the situation and use him for anti-Government political purposes.

What is quite certain is that the Government did what it could to keep Mr Brito alive until his death from voluntary starvation, which was at no time directed against the Government.

It is important to emphasize that the Government did everything it could to protect Mr Brito's physical integrity, to the extent that while he was still alive it obliged him to receive medical attention strictly to protect his health and life as a fundamental human right.

The foregoing account contradicts the allegation of the IOE and FEDECAMARAS that the late Mr Brito's hunger strikes were "in protest against the Government for the unjust invasion and expropriation of his land", which is totally false and just one of the tissue of lies concocted by the employers' organization to sully the good name and action of the Venezuelan Government.

Regarding the alleged harassment and intimidation of the private sector, FEDECAMARAS and its leaders by attacking property and occupying and expropriating farms

- 1310.** The Government states that it has repeatedly denied all the allegations presented by FEDECAMARAS and the IOE, all of which are quite baseless. The Government has always acted and continues to act in accordance with the Constitution and laws of the Bolivarian Republic of Venezuela. It emphasizes once again that the land rescue process embarked upon by the Government through INTI does not condone any confiscations, occupations or attacks on private property belonging to representatives of employers' organization or to private employers. On the contrary, the Ministry of Popular Power for Agriculture and Land, in the exercise of its mandate, has embarked upon the rescue and reclamation land suitable for growing vegetables and other strategic produce in order to maximize the soil's potential from the agrological standpoint. It has thus fostered the cultivation of broccoli, spring onions, leeks, coriander, parsley, lettuce, beetroot, tomatoes, chilli peppers and courgettes, which are considered to be strategic products of social interest, as a means of ensuring Venezuela's autonomy in agricultural foodstuffs, in order to prevent land from being left idle or unproductive or used unlawfully, in accordance with the Constitution and the Land and Agrarian Development Act. The ultimate objective is for the country to conform to the model of endogenous growth and social economy, based on the Simón Bolívar National Project 2007–13, whereby the Government is pursuing social justice through the gradual inclusion of the least privileged segment of the population in the country's priority social and economic activities, as stipulated in the Constitution, while focussing on the needs of each sector, encouraging the gradual establishment of organized groups and respecting the right to work.
- 1311.** Currently, the Government continues, the land available for agricultural and livestock production and for forestry has considerably diminished as the urban areas have grown and developed over during the past two decades, and this has rendered it necessary to encourage and maintain a minimum area of agricultural land to meet sectoral needs in the most vulnerable part of the country as part of a process of sustainable development. It is

the duty of the State to foster conditions necessary for the development of a sustainable agriculture as the strategic basis of the country's integrated rural development, not just through legislation but by taking appropriate action to create employment and guarantee the rural population and small and medium-size producers an adequate standard of living, thanks to their participation in the production process through all kinds of community labour associations and collective ownership.

- 1312.** The Government's action in respect of the cases listed below is based on the provisions of articles 127, 128, 305, 306 and 307 of the Venezuelan Constitution, articles 13.2 and 48.6 to 48.8 of the Environment Act, article 6 of the Land-Use Management Act and articles 2, 68, 82–96 and 115 of the Land and Agrarian Development Act:

Case (identification of the farm concerned)	Legal and technical grounds for State action, by farm	Social situation of farm employees at the time of the administrative action
La Escondida, 904.14 hectares, State of Barinas, Rojas Municipality, San Hipólito sector	Rescue procedure scheduled under articles 82–96 of the Land and Agrarian Development Act and implemented by the National Land Institute (INTI) in 2010. The soil is type II and III, excellent for vegetable growing; however, the land has in the past been used for livestock production, which is unsuited to this type of soil, which is classified worldwide as particularly fertile and ideal for agriculture. Consequently, in line with the political and strategic guidelines for self-sufficiency in agricultural foodstuffs, the land is currently destined for the development of primary production units and the production of strategic goods.	Employees registered with the Venezuelan Social Security Institute (IVSS) and the Compulsory Savings Fund for Housing (FAOV) under employer no. 030928592. The farm does not conform to any kind of industrial safety standards. Wages comply with laws and regulations. No pay for national holidays, overtime or food (of any kind) and no payment in kind.
Hacienda La Bureche, 97.61 hectares, State of Lara Municipality, Palavecino, El Carabalí sector	Rescue procedure scheduled under articles 8296 of the Land and Agrarian Development Act and implemented by INTI in 2009 as part of the strategic agro-ecological rescue plan of the Turbio valley. The valley includes the aquifers that supply part of the drinking water for the population of Barquisimeto and Cabudare. The Government declared the area a special agricultural exploitation zone under Decree No. 2734 of 30 December 2003. Previously, Decree No. 782 of 1980 established a land-use management scheme for the area with a view to the agricultural development of the Río Turbio valley. The land showed no sign of productive activity, i.e. it is idle and unproductive. The soil is type I and IV, suitable for planting and ideal for agriculture, and is currently being developed by the Venezuelan Food Corporation (CVAL) for the production of strategic agricultural goods.	There has always been a proper labour relationship, with holidays and end-of-year bonuses but the workers are not registered with the IVSS. At the time the administrative rescue action was engaged, they had not signed any contract for the current year.
Hacienda Las Misiones de Caripe, 536.3 hectares, State of Monagas, Caripe Municipality, Las Misiones sector	Rescue procedure scheduled under articles 82–96 of the Land and Agrarian Development Act and implemented by INTI in 2009. The land showed no sign of productive activity and was entirely idle. The soil is type IV suitable for planting,	No sign of any employees

Case (identification of the farm concerned)	Legal and technical grounds for State action, by farm	Social situation of farm employees at the time of the administrative action
Hacienda Bucarito, .377.60 hectares, State of Lara, Simón Planas Municipality, La Tronadora sector	notably fruit trees, root crops and tubers. The land has been scheduled for the establishment of a primary production unit that will supply Caripe's fruit-processing plant with raw materials.  Rescue procedure scheduled under articles 82–96 of the Land and Agrarian Development Act and implemented by INTI in 2010. The land is unproductive. The soil is type IV suitable for agriculture and is being improperly used, in violation of article 115 of the Act and contrary to the agro-food self-sufficiency policy.	No sign of any employees at the time of the inspection.
Finca Vieja Elena, 531.00 hectares, State of Barinas, Barinas Municipality, Las Matas sector	Rescue procedure scheduled under articles 82–96 of the Land and Agrarian Development Act and implemented by INTI in 2010. Action was taken because the land was being used for livestock production and therefore underutilized. The soil is type I and IV suitable for the agriculture (vegetables and tubers) and is being improperly used, in violation of article 115 of the Act and contrary to the agro-food self-sufficiency policy.	At the time of the implementation of the administrative rescue plan, employees received none of the social benefits provided for by law, except for three meals a day for which they were charged 140 bolivars. Staff responsible for milking and pasture-land had only three days' leave per month and received only half pay for national holidays.
Finca Centro de Recría San Isidro, 904.14 hectares, Libertador Municipality, Caño Lindo sector	No State-decreed administrative procedure has been engaged,	

Regarding the cases concerning Owens – Illinois, the Turbio steel plant and Agroisleña, SA

**1313.** The Government states that these cases have nothing whatsoever to do with the allegations contained in the complaint or with the complainants themselves, and it therefore invites the Committee once again to review very carefully the validity and receivability of allegations for inclusion in Case No. 2254. Furthermore, the expropriation procedure provided for in national legislation is quite unrelated to the attacks and harassment aimed at the private sector, FEDECAMARAS and its leaders that they accuse the Government of. The Government repeats that the appropriation procedure is based on article 236.2 and 11 and article 115 of the Constitution, in accordance with article 5 of the Public or Social Utility Expropriation Act and article 6 of the Access to Goods and Services Defence Act. The Government is perfectly willing to provide the legal reasons for the said procedures, but the Committee would be in no position to discuss or oppose its decisions on the matter of public utility, let alone to query the Government's economic policy in taking such action.

With respect to Owens – Illinois

**1314.** In strict compliance with the Constitution, the Government decreed the expropriation of the United States glass processing plant located in Venezuela, after establishing that the company had taken over 64 per cent of production in the sector and was therefore operating under an illegal monopoly that constituted a violation of the state of law and justice in the country, inasmuch as it ran counter to the principle of free competition provided for in the Constitution. In addition to combating a monopoly, the decision served

to protect the environment, since the company had for over 50 years been damaging the mountain region of Los Guayos y Valera by extracting unlimited quantities of sand, carbonate and limestone for the manufacture of glass. At the same time, the Government guaranteed the labour rights of the employees, set up works' committees and respected fully the collective agreements covering the great majority of workers in the plants located in Valencia, State of Carabobo and in Valera, State of Trujillo. Moreover, the Government's decision strengthens the country's industrial sector thanks to the production of glass containers for food, drinks and medicines, etc., that are necessary for the development of the country and for the wellbeing of the people. The Government wishes to place on the record that in strict compliance with Venezuelan legislation, a legal process is to be initiated following publication of the decree on expropriation which will entail numerous meetings with the company's executives in a spirit of mutual respect and tranquillity and will result in the payment of a fair price.

#### With respect to the Turbio steel plant

**1315.** The Government has decreed the expropriation of the Turbio steel plant (Sidetur) located in the Punta Cuchillo sector of Ciudad Guayana, State of Bolívar, in strict compliance with constitutional principles. The company controlled 40 per cent of the steel bars consumed in the country in construction, metal carpentry and structural reinforcement implements such as steel plates, billets, square or round bars for industrial hardware, etc. The decision will enable the State to guarantee the supply of steel bars, which are a major item in the construction of housing, especially given the strategic and priority needs of thousands of Venezuelan victims of the natural disaster caused by the heavy rains of December 2011. It will also serve to combat the company's speculative marketing policy and thereby promote the development of the construction sector in line with the needs of the people and the development of the country. Moreover, the measure complies with the State's decision to take control of all strategic activities linked to the processing of iron in the Guayana region, in order to integrate all the aluminium, iron and steel production processes and, thereby ensure that the country's means of production serve the interests of all Venezuelan citizens. In this the workers of Venezuela play a fundamental role, in keeping with the status, value and force of the Organic Act governing Enterprises engaged in Activities in the Steel Sector in the Guayana region.

#### With respect to Agroisleña, SA

**1316.** The Government has decreed the expropriation of the transnational company Agroisleña, SA, which held the position of a speculative oligopoly engaged in unfair competition by creating unfavourable conditions for others producer for 50 years, in violation of the state of law and justice in Venezuela. The company had imposed an exponential increase in prices for inputs that were up to 250 per cent higher than market prices. That then led to an increase in the price of finished products, the exploitation of rural producers and the generation of a speculative spiral. In addition, it encouraged the use of a series of toxic agro-chemicals, including some whose sale is regulated or banned worldwide. The monopoly under which Agroisleña, SA, operated extended to the agricultural production chain, where it earned high fees for technical assistance, harvesting services and storage of agricultural products, thereby ensuring the financial and technological dependency of small producers on a technology involving a high concentration of insecticides. The company opened up a credit line with the Bank of Venezuela at 8 per cent interest which it passed on to producers at 13 to 15 per cent, without the requisite authorization to operate as a sort of pseudo-bank. Article 3 of the Food Security and Self-Sufficiency Act stipulates the following: "Any assets that ensure the availability and opportune supply of quality foodstuffs in sufficient quantity for the people of Venezuela, together with the necessary infrastructure for them to operate, shall be deemed of public utility and social interest. In cases where the security of agricultural foodstuffs is at stake, the Executive may decree the



compulsory acquisition of the assets concerned, subject to fair compensation and opportune payment of all or part of one or more assets needed to execute works or develop activities relating to the production, commerce, distribution and storage of foodstuffs.” The Government has reduced the production costs of agricultural inputs by 30 to 40 per cent, thereby further encouraging the development of the agricultural sector, guaranteeing self-sufficiency in agricultural foodstuffs and promoting the distribution chain of agricultural inputs by means of the industrialization, processing, transport, storage and sale of products and by-products derived from agricultural and livestock production. The Government repeats that, once the decree on expropriation has been published and in strict compliance with relevant legislation, a judicial process will result in the payment of a fair price based on a joint review by the company’s board of directors and the Government of each and every operation engaged in by Agroisleña, SA In addition, all the company’s employees have been guaranteed that their labour and social rights will be respected.

#### Regarding Mr Eduardo Gómez Sigala

- 1317.** Commenting on the legal proceedings brought against Mr Gómez Sigala, now a deputy of the National Assembly, the Government states that from the start he enjoyed all the guarantees provided for under the national and international laws and regulations. Following the interim measures taken by the Public Prosecutor’s Office, the Government repeats that the investigation indicated that there were no grounds for conviction and the Fifth Public Prosecutor’s Office for the State of Lara decided on 26 August 2010 to dismiss the case. It is thus clear that there was absolutely no question of “personal harassment”, as claimed by the complainant, and that on the contrary the proper legal proceeding were fully adhered to.

#### Regarding the labour solvency appeals procedure and the Foreign Currency Administration Commission (CADIVI)

- 1318.** The Government states once again that labour solvency refers to an administrative document issued by the body responsible for labour policy, which certifies that employer respect workers’ social, labour and union rights, which have for years been denied in violation of the Constitution, specific laws on the subject and article 2 of Decree No. 4248, published in *Official Gazette* No. 38371 on 2 February 2008. Standard procedures require that complainants be guaranteed due legal process and impartiality.

#### Regarding the labour solvency procedure

- 1319.** A labour solvency certificate can be obtained quickly and automatically from the website of the Ministry of Popular Power for Labour and Social Security, <http://www.mintra.dov.ve/>, where users can access the necessary requirements and information. Employers must first register with the National Registry of Enterprises and Establishments on the web page and present a number of documents concerning the enterprise. Five days later, the Ministry transmits the certificate through the appropriate channels and the employer can collect it from the Labour Inspectorate where he or she is officially domiciled.
- 1320.** In accordance with article 2 of the Decree No. 4248, the labour inspector must refuse to issue or revoke a certificate if the employer has not complied with established legal requirements. Article 17 of Resolution No. 4524 of 21 March 2006, published in *Official Gazette* No. 38402 of the same date, provides that, if labour solvency is denied or revoked, the employer may appeal against the decision in accordance with articles 49 and 94 of the Administrative Procedures Act. It is clear from the above that the procedure is transparent, non-discriminatory and legal, and that the national laws and regulations provide for the possibility to appeal.

Regarding the procedure laid down by the Foreign Currency Administration Commission (CADIVI)

- 1321.** Concerning the procedure for acquiring foreign currency, the Government repeats that it is the same for all employers and that a computerized application system exists through CADIVI's webpage <http://www.cadivi.gob.ve>, which has all the necessary information and requirements. It is important to note that, in order to handle requests for foreign currency for basic consumer goods (medical supplies and food) and for the importation of capital goods, inputs and raw materials, CADIVI has introduced administrative measures to facilitate the Government's foreign currency system and thus strengthen the country's production sector and the wellbeing of its citizens.
- 1322.** The Standards and Procedures Manual for registering the documents required by CADIVI sets out the appeals procedure provided for in articles 49 and 94 of the Administrative Procedures Act. The procedure showing the requirements for initiating the computerized appeals process in all transparency is also available on CADIVI's website.

Regarding the alleged lack of independence of employers' organizations owing to Government interference Government in their affairs

- 1323.** The Government has emphasizes and reiterates its earlier statement that there is no lack of independence whatsoever among Venezuela's employers' organizations, nor is there any discrimination vis-à-vis organizations in the employer sector, where they are all treated equally. It repeats that Government cannot under any principle be held accountable for the decision of some employers to exclude themselves. Furthermore, it wishes to register its dismay at and repudiation of the additional information presented by the IOE in its communication dated 30 June 2011 as a supplement to its complaint in Case No. 2254 presented to the ILO on 4 July. The Government rejects and denies the accusations most categorically and finds it very difficult to express an opinion on the substance of the matter as presented, as it is without foundation. It refutes every word of the additional information, which does not compromise the Government's position in any way.
- 1324.** The Government categorically refuses to accept the accusation once again that it that it interferes in the affairs of employers' organizations, especially as it is based on documents that did not emanate from the Government or its representatives and which it therefore considers of doubtful origin and authorship and completely invalid. The fact that the persons alleged by the IOE to have issued the said documents deny all knowledge of them has to be taken up with other bodies and is outside the Government's sphere of responsibility. In stating its position the Government cannot be expected to discuss so-called electronic mail of which it is unaware and which does not in any way compromise or challenge its action, which has always abided by the law. The Government trusts that the Committee will dismiss these unfounded claims in strictest compliance with its principles.

#### **D. The Committee's conclusions**

- 1325.** *The Committee first of all notes the Government's statements under the heading "Preliminary observations" where it refers to: (1) the Committee's alleged failure to lend any credit to the arguments, replies and evidence it has advanced and its readiness to believe the allegations of the complainants, even though most of them are baseless; (2) allegations to which the Government has already replied in detail; (3) its claim that many of the complainants' allegations are beyond the purview of freedom of association and have to do with the Venezuela's political, economic, criminal or juridical affairs; and (4) the Committee's peremptory tone regarding compliance with the law and its request that the legal procedure not be respected, in the form of recommendations that conflict*

with Venezuela's laws and regulations. The Committee wishes to point out in this respect that the present case has been included in the category of extremely serious and urgent cases and that the gravity of the situation faced by FEDECAMARAS, Venezuela's principal employers' organization, is confirmed by the nature and evidence of alleged incidents such as the temporary abduction of four employers' leaders (one of them, an employers' representative on the Governing Body of the ILO, having sustained three bullet wounds), two attacks on FEDECAMARAS headquarters, highly aggressive declarations by the authorities against this organization that are liable to create a climate of intimidation, and serious shortcomings in terms of social dialogue with the organization. To compound the situation the Government has failed to respond to the Committee's principal recommendations; the Committee regrets, for example that instead of trying to resolve the problems raised through direct dialogue with FEDECAMARAS as requested, the Government states that it "cannot be held accountable" for an organization's decision to exclude itself. If the Committee sometimes expresses itself forcefully and energetically – as it does in its dealings with other countries – it is because of the seriousness of the problems raised and/or because of the Government's refusal to comply with the Committee's recommendations and, ultimately, with the objective of its procedure which is to promote respect for the rights of employers' and workers' organizations under Conventions Nos 87 and 98 which Venezuela, moreover, has ratified, by means of a tripartite process offering every guarantee of impartiality.

**1326.** *Regarding the alleged acts of violence against employers' leaders and members of FEDECAMARAS and against its headquarters, the Committee wishes to refer to the conclusions it reached in March 2011 [see 359th Report, paras 1264–1266]:*

- *The Committee notes with deep concern the allegations of the IOE according to which: (1) on the night of 27 October 2010, in Caracas, a group of five armed and hooded men machine-gunned, kidnapped and maltreated the President of FEDECAMARAS, Mr Noel Alvarez, its former President, Ms Albis Muñoz, the executive director, Mr Luis Villegas and its treasurer, Mr Ernesto Villamil. The kidnappers fired three shots into the body of Ms Albis Muñoz, employer member of the ILO Governing Body. After she had lost a lot of blood, the attackers dragged her from the vehicle in which she was travelling and dumped her near the Pérez Carreño Hospital, where she was taken some time later by a passing police patrol. The other three abducted persons were released two hours later, after the abductors had faked an abduction, expressed their intention to demand a ransom of 300 million bolivars, and stolen their belongings. According to the IOE, the manner of the attack suggests that its purpose was to decapitate the business leadership of the Bolivarian Republic of Venezuela, although it was afterwards disguised as an abduction.*
- *The Committee notes the statements according to which: (1) the Government condemns and investigates any act of violence against persons living in the country. It therefore deplores and condemns what happened on 27 October 2010 to Ms Albis Muñoz and the FEDECAMARAS leaders, Messrs Noel Álvarez, Luis Villegas and Ernesto Villamil; (2) as soon as the facts were known, the competent authorities of the Venezuelan State immediately launched an investigation in order to clarify what had happened, identify those responsible and bring them to trial, in accordance with national legislation; (3) given that the investigation into the incident is in progress, until the results are known, any speculative suggestion such as that expressed by the Secretary-General of the IOE, is unjustified and not serious, when he indicates that "... purpose of the attack was to decapitate Venezuela's business leadership, although it was afterwards disguised as an abduction". In this regard, no representative of FEDECAMARAS made a similar official complaint in the Bolivarian Republic of Venezuela; the Government categorically rejects the irresponsible, unfounded and false allegations with which, with impunity, they seek to link public institutions, even up to the highest representatives of the State, with acts of violence against Venezuelan business leaders; (4) on 10 November 2010, as a result of the investigations carried out by the competent authorities, two people, Mr Antonio José Silva Moyega and Mr Jaron Manjares, were arrested for their direct participation in the incident which occurred on 27 October. In addition a warrant*

was issued for the arrest of Mr Cristian Leonardo Castro Rojas, who is currently a fugitive from justice; and (5) a further two persons are suspected of being involved, but they have not yet been identified with certainty and all of these people are members of a criminal gang engaged in and abduction. The arrested persons are being tried in Caracas Metropolitan District Court 35.

- The Committee deplores the offences that were committed, emphasizes their seriousness and requests the Government to take all the steps within its power to arrest the other three persons involved in the abductions and wounding, and to keep it informed of developments in the investigations. The Committee expresses the hope that the persons guilty of these crimes will soon be convicted and sentenced in proportion to the seriousness of the offences in order that such incidents will not be repeated and requests the Government to keep it informed in this respect.

**1327.** The Committee notes with concern the IOE's statement in its additional information that Ms Albis Muñoz, employers' leader and one of the victims of aggression, has asserted that neither of the suspects arrested (Mr Antonio José Silva Moyega and Mr Jason Manjares) were the instigators of the aggression, that the four abducted officials were held for about two hours and that Ms Albis Muñoz sustained three bullet wounds, which does not bear out the contention that the motive for the crime was car theft as indicated by the Director of the Scientific, Penal and Criminal Investigations Unit. The Committee notes the Government's statement refuting the idea of a supposed attack by the Government and confirming that the criminal investigation is in the hands of the Public Prosecutor. The Government states that on 23 December 2010 the Public Prosecutor's Office brought charges against Mr Antonio José Silva Moyega and Jason Manjares, accusing them of temporary abduction, that a preliminary hearing was held on 10 February 2011 by the appropriate Supervisory Tribunal, which confirmed the charges and ordered that the accused stand trial on 20 October 2011, and that as soon as a final ruling on the case has been handed down, the Committee will be duly informed.

**1328.** The Committee wishes to express its grave concern that according to the allegations the suspects have not been identified by Ms Albis Muñoz as being responsible for the crime and that the charges do not include attempted homicide and the wounding of the employers' leader. The Committee also observes with concern that the Government provides no information on whether Mr Christian Leonardo Castro Rojas (a fugitive from justice) and the two other suspects in the case have been arrested. Consequently, the Committee has no alternative but to reiterate its earlier recommendation as follows:

*The Committee deplores the offences that were committed, emphasizes their seriousness and requests the Government to take all the steps within its power to arrest the other three persons involved in the abductions and wounding, and to keep it informed of developments in the investigations. The Committee expresses the hope that the persons guilty of these crimes will soon be convicted and sentenced in proportion to the seriousness of the offences in order that such incidents will not be repeated and requests the Government to keep it informed in this respect.*

**1329.** Regarding the allegation that the Public Prosecutor's Office initiated a criminal investigation on 23 December 2010 to ascertain whether, in his statement of 22 December 2010, the President of FEDECAMARAS, Noel Álvarez, committed a crime by calling on the FANB to respect the Constitution and not to accept orders that they judged might violate the Constitution or any other law (according to the Government the President of FEDECAMARAS asked the members of the FANB to read article 25 of the Constitution, which states: "Any act on the part of the public authority that violates or encroaches upon the rights guaranteed by this Constitution and by law is null and void, and public employees ordering or implementing such an act shall incur criminal, civil and administrative liability, as applicable, without the fact of having followed the orders of a superior serving as an excuse," and declared: "I wish to appeal to them to exercise their freedom of conscience by refusing to carry out any order which they deem to be a violation

of the Constitution”). The IOE states that President Chávez declared on 24 December 2010 that the FEDECAMARAS President’s appeal to military personnel to respect the Constitution and the law was a “call to war” and expressed the opinion that it was a “statement that bordered on the criminal”. The IOE concludes that Mr Noel Álvarez is not guilty of any crime since he had at no time called on any one not to respect the Constitution but rather to respect it.

- 1330.** *The Committee regrets that the Government has not sent any observations on this allegation. In the absence of a reply, the Committee wishes to state that, given the context, the declarations of the President of FEDECAMARAS do not in its opinion appear to contain any criminal content and, if they were as reported by the IOE should not normally have given rise to a criminal investigation. However, so that it can reach its conclusions in full possession of the facts, the Committee requests the Government to send its observations on the allegation.*
- 1331.** *Regarding the alleged attacks on FEDECAMARAS headquarters in 2007, the Committee requested FEDECAMARAS to file an official complaint on the subject with the Public Prosecutor’s Office. The Committee reiterates that recommendation and states that if the organization has not done so by the Committee’s next meeting, it will not pursue its examination of this allegation any further; noting however that an environment of harassment and lack of confidence in the public authorities is not conducive to the proposed lodging of official complaints.*
- 1332.** *Regarding the alleged bomb attack on FEDECAMARAS headquarters on 24 February 2008, the Committee notes the Government’s statement that the persons charged, Mr Juan Crisóstomo Montoya González and Mrs Ivonne Gioconda Márquez Burgos, have confessed in full to the crimes of public intimidation and unlawful use of identity papers, that a preliminary public hearing was set for 4 November 2011 and that, as soon as a final ruling on the case was handed down, the Committee would be duly informed. The Committee emphasizes the importance that the guilty parties should be punished in proportion to the seriousness of the crimes committed and the employer organization compensated for the loss and damage on account of these illegal acts. The Committee is waiting to be informed of the sentence handed down.*
- 1333.** *Observing the various acts of violence committed against FEDECAMARAS or its officials, the Committee again draws the attention of the Government to the fundamental principle that the rights of workers’ and employers’ organizations can only be exercised in a climate free of violence, intimidation and fear, as such situations of insecurity are incompatible with the requirements of Convention No. 87.*
- 1334.** *Regarding the alleged criminal charges brought against Mr Eduardo Gómez Sigala and his subsequent trial, the Committee notes with interest the Government’s statement regarding the dismissal of the case by the Fifth Public Prosecutor’s Office on 26 August 2010 when the investigation showed that there was no evidence against him and that he is now at liberty. Moreover, according to the government, Mr Gómez Sigala has been elected to the National Assembly where he is currently exercising his functions.*
- 1335.** *Regarding the Committee’s recommendation that the Government restore the La Bureche farm to Mr Eduardo Gómez Sigala and compensate him fully for all the damage caused by the authorities in occupying the farm, the Committee notes the Government’s declaration that: (1) the farm measures 97.626 hectares and not 29 hectares as the IOE stated in its complaint; (2) the land rescue procedure involved was carried out in accordance with the law and in view of the fact that 83 hectares of the land was underutilized and being used for crops that were not suited to the type of soil, thereby engendering a process of deterioration and having a negative environmental impact. The Committee notes that there*

is a contradiction between the allegations and the Government judgment that the expropriated farm of employers' leader Mr Eduardo Gómez Sigala was idle. Be that as it may, the Committee observes that the Government does not deny the IOE's allegation that the farm is currently a military training centre (contrary to the Government's statement that the purpose of the land rescue procedure is to encourage the agricultural use of the Valle del Río) or the allegation that Mr Eduardo Gómez Sigala has not received any compensation. The Committee therefore requests the Government to respond fully to the allegations and in the meantime cannot but maintain its earlier recommendation. The Committee therefore once again calls on the Government to return the "La Bureche" farm property to the employers' leader Mr Eduardo Gómez Sigala without delay and to compensate him fully for all losses sustained as a result of the intervention by the authorities in seizing his farm.

**1336.** Regarding the alleged abduction of 25 agricultural and livestock farmers, the Committee notes that the Government needs detailed information on the events and persons referred to by the complainant organizations if it is to make any observations. The Committee therefore requests the IPE and FEDECAMARAS to provide that information and indicates that if the organizations have not done so by the Committee's next meeting, it will not pursue its examination of these allegations any further.

**1337.** Regarding the alleged death of a livestock farmer (Mr Franklin Brito) as a result of going on a succession of hunger strikes in protest against the Government for the unjust invasion and expropriation of his land, the Committee notes the extensive information supplied by the Government, and notably its assertion that it did everything it could to protect Mr Brito's physical integrity, even to the extent of obliging him to receive medical attention. The Committee observes that, according to the Government, Mr Brito's hunger strike was not directed against the Government or against the occupation and expropriation of his farm but that was apparently linked to the non-payment of some of his earnings (in fact, the Government states, he did not cash the cheque in payment because he wanted a fixed-term appointment as he had given up his job as a supply teacher) and to a border dispute between neighbouring farmers after the land-use and regulation process had been completed and had awarded him title to 290.20 hectares. The Committee duly notes this information and invites the complainants to provide their observations thereon.

**1338.** In their earlier allegations the IOE and FEDECAMARAS stated the following [see paras 1204–1208]:

*The IOE and FEDECAMARAS highlight that in the last few months, the Government has multiplied attacks against the private sector, issuing numerous expropriation orders against companies without the slightest legal justification and without any financial compensation. In this regard, on 2 June 2010, President Chávez declared – economic war on the business sector and its representatives, especially FEDECAMARAS. He added – I declare myself in a state of economic war. Let's see who comes out on top, you bourgeois trash or those who love their country.*

*It should be emphasized that recently, on 3 October 2010, the company Agroisleña SA, which is crucial to the agriculture and livestock industry of the Bolivarian Republic of Venezuela and the chief distributor of farming products with 82 sales outlets and eight silos across the country, was nationalized. The order for the expropriation of Agroisleña was widely rejected by producers and company workers. In Barinas, the state police used teargas to disperse a protest by 150 producers. After this action, one producer was arrested and injured.*

*On 25 October 2010, an order was approved for the expropriation for the Venezuelan subsidiary of the United States company, Owen Illinois, the world leader in the manufacture of glass containers for drinks, food, medicines and cosmetics.*

*On 30 October 2010, President Chávez ordered the expropriation of the Siderúrgica del Turbio (Sidetur), a subsidiary of the private Venezuelan steel group SIVENSA, and six urban complexes were paralysed and a further eight were temporarily occupied*

*The announcement concerning Owen Illinois brought the number of expropriated companies in 2010 to 200, most of them without any compensation. In 2009, 139 companies were expropriated, not including companies in the agricultural sector. As highlighted by the firm Eco-analítica and the Venezuelan American Chamber of Commerce and Industry (VenAmCham), nationalizations and state takeovers worth \$23,315 million have been ordered since 2007, but only \$8,600 million have been paid in compensation, representing one third of the expropriations. The pace of takeovers of private companies by the Government without compensation has been accelerating in recent months. In the last three years, the Venezuelan Government nationalized 371 companies in strategic sectors such as electricity, banking, cement, steel, oil and food. Of this total, half were taken over between January and August 2010. The exponential number and headlong rush of expropriations without compensation by the Government of the Bolivarian Republic of Venezuela is seriously endangering the viability, development and national output in key sectors of the economy, which as well as causing heavy economic losses also generates unemployment and poverty across large swathes of the population.*

- 1339.** *The Committee notes the Government's assertion that these cases have nothing whatsoever to do with the allegations contained in the complaint or with the complainants themselves and that it invites the Committee once again to review very carefully the validity and receivability of the allegations it includes in Case No. 2254. The Committee emphasizes, however, that the complainant organization's allegations occur in a general climate of hostility on the part of the Government and of discrimination vis-à-vis FEDECAMARAS and its members.*
- 1340.** *The Committee also notes that, according to the Government, the expropriation procedure provided for in the national legislation has nothing in common with the attacks and harassment aimed at the private sector, FEDECAMARAS and its leaders that they accuse it of, that the appropriation procedure is governed by article 236.2 and 11 and article 115 of the Constitution, pursuant to article 5 of the Public or Social Utility Expropriation Act and article 6 of the Access to Goods and Services Defence Act, and that, although the Government is perfectly willing to provide the legal reasons for the said procedures, the Committee would be in no position to discuss or oppose its decisions on the matter of public utility, let alone to query the Government's economic policy in taking such action. The Committee notes that, more to the point, the Government states, concerning the Owens-Illinois case that, in strict compliance with the Constitution, the Government decreed the expropriation of the United States glass processing plant located in Venezuela, having established that the company had taken over 64 per cent of production in the sector and was therefore operating under an illegal monopoly that constituted a violation of the state of law and justice in the country, inasmuch as it ran counter to the free competition provided for in the Constitution. In addition to combating a monopoly, the decision served to protect the environment, since the company had for over 50 years been damaging the mountain region of Los Guayos y Valera by extracting unlimited quantities of sand, carbonate and limestone for the manufacture of glass. At the same time, the Government guaranteed the labour rights of the employees, set up works' committees and respected fully the collective agreements covering the great majority of workers in the plants located in Valencia, State of Carabobo and in Valera, State of Trujillo. Moreover, the Government states that its decision strengthens the country's industrial sector thanks to the production of glass containers for food, drinks and medicines, etc., that are necessary for the development of the country and for the proper wellbeing of the people. The Government places on the record that in strict compliance with Venezuelan legislation, a legal process is to be initiated following publication of the decree on expropriation, which will entail numerous meetings with the company's executives in a spirit of mutual respect and tranquillity and will result in the payment of a fair price. The Committee regrets that it has not been informed of the action taken or the outcome.*

- 1341.** *Regarding the expropriation of the Turbio steel plant, the Committee notes the Government's statement that it has decreed the expropriation of the Turbio steel plant (Sidetur) located in the Punta Cuchillo sector of Ciudad Guayana, State of Bolívar, in strict compliance with constitutional principles. The company controlled 40 per cent of the steel bars consumed in the country in construction, metal carpentry and structural reinforcement implements such as steel plates, billets, square or round bars for industrial hardware, etc. The decision will enable the State to guarantee the supply of steel bars, which are a major item in the construction of housing, especially given the strategic and priority needs of thousands of Venezuelan victims of the natural disaster caused by the heavy rains of December 2011. It will also serve to combat the company's speculative marketing policy and thereby promote the development of the construction sector in line with the needs of the people and the development of the country. Moreover, the measure complies with the State's decision to control all strategic activities linked to the processing of iron in the Guayana region in order to integrate all the aluminium, iron and steel production processes, thereby ensuring that the country's means of production serve the interests of all Venezuelan citizens. In this the workers of Venezuela play a fundamental role, in keeping with the status, value and force Organic Act governing Enterprises engaged in Activities in the Steel Sector in the region of Guayana.*
- 1342.** *Regarding the expropriation of Agroisleña, SA, the Committee notes that the Government has decreed the expropriation of the transnational company Agroisleña, SA, which held the position of a speculative oligopoly engaged in unfair competition by creating unfavourable conditions for others producer for the past 50 years, in violation of the state of law and justice in Venezuela. The company had imposed an exponential increase in prices for inputs that were up to 250 per cent higher than market prices. This then led to an increase in the price of finished products, the exploitation of rural producer and the generation of a speculative spiral. In addition, it encouraged the use of a series of toxic agro-chemicals, including some whose sale is regulated or banned worldwide. The monopoly under which Agroisleña, SA, operated extended to the agricultural production chain, where it earned high fees for technical assistance, harvesting services and storage of agricultural products, thereby ensuring the financial and technological dependency of small producers on a technology involving a high concentration of insecticides. The company opened up a credit line with the Bank of Venezuela at 8 per cent interest which it passed on to producers at 13 to 15 per cent, without the requisite authorization to operate as a sort of pseudo-bank. Article 3 of the Food Security and Self-Sufficiency Act stipulates the following: "Any assets that ensure the availability and opportune supply of quality foodstuffs in sufficient quantity for the people of Venezuela, together with the necessary infrastructure for them to operate, shall be deemed of public utility and social interest. In cases where the security of agricultural foodstuffs is at stake, the Executive may decree the compulsory acquisition of the assets concerned, subject to fait compensation and opportune payment of all or part of one or more assets required for the execution of works or the development of activities relating to the production, commerce, distribution and storage of foodstuffs." The Government has reduced the production costs of agricultural inputs by 30 to 40 per cent, thereby further promoting the development of the agricultural sector and guaranteeing self-sufficiency in agricultural foodstuffs as well as the distribution chain of agricultural inputs by means of the industrialization, processing, transport, storage and sale of products and by-products derived from agricultural and livestock production. The Government repeats that, in strict compliance with the relevant legislation, following the publication of the decree on expropriation a judicial process is to ensure that will result in the payment of a fair price based on a joint review by the company's board of directors and the Government of each and every operation engaged in by Agroisleña, SA In addition, all the company's employees have been guaranteed that their labour and social rights will be respected.*



- 1343.** *The Committee requests the complainant organizations to provide their comments on the above information and requests the Government to examine the allegations with FEDECAMARAS and to assess the situation.*
- 1344.** *Regarding the alleged harassment and intimidation of officials and members of FEDECAMARAS, which according to the allegations include the occupation and expropriation of farms and enterprises (in many cases without due compensation), the Committee reached the following conclusions at its March 2011 meeting [see 359th report, para. 1272]:*

*The Committee notes that, according to the IOE, as a consequence of their work to defend their members, representatives of employers' organizations, and the private sector in general, are constantly harassed and threatened. The IOE complains of attacks against the property of the former Presidents of FEDECAMARAS, Messrs Vicente Brito, Rafael Marcial Garmendia and Carlos Sequera Yépez, as well as against Mr Manuel Cipriano Heredia, the current President of FEDENAGA (the leading agricultural sector body affiliated to FEDECAMARAS) and its former President, Mr Genaro Méndez, and also Mr Eduardo Gómez Sigala, former President of CONINDUSTRIA (the leading industrial sector body affiliated to FEDECAMARAS). Also, according to the IOE, the National Land Institute (INTI) together with the National Guard constantly occupy productive farms under the so-called "Land Recovery Plan". The INTI could only reclaim those lands which it owned, and that is not the case of the properties of the expropriated business leader.*

*The Committee also notes the new allegations presented by the IOE which has sent extensive details concerning the alleged confiscation of the La Escondida farm in the State of Barinas owned by Mr Egildo Luján, Director of the livestock section of FEDECAMARAS and vice-president of FEDENAGA; of the Las Misiones Caripe farm in the State of Monagas owned by the AGROBUCARE company, whose President is the former President of FEDECAMARAS, Mr Vicente Brito; and of the Bucarito farm owned by the former President of FEDECAMARAS, Mr Rafael Marcial Garmendia. According to the allegations, none of these farm owners have been compensated for the occupation of their premises. The Committee notes that the IOE also refers to a threatened occupation (Vieja Elena farm owned by the President of FEDENAGA, Mr Manuel Cipriano Heredia; in its reply the Government mentions that a land rescue procedure is scheduled) and of a failed attempt at confiscation (the Cattle Raising Centre in San Isidro, State of Táchira, owned by the former President of FEDENAGAS, Mr Genaro Méndez; since the Government in its reply states that no administrative procedure has been initiated in connection with the Centre, the Committee will not pursue its examination of this point any further unless the complainants provide new information). The Committee also notes that, according to the IOE, the Government has over the past few years expropriated 280 urban buildings for which it has paid compensation in only 5 per cent of the cases.*

- 1345.** *The Committee notes the Government's extensive information on the legal basis for the "land rescue" process and on the objectives set (self-sufficiency in agricultural foodstuffs, development of the indigenous populations and social economy, gradual social insertion of the least privileged segments of society, development of sustainable agriculture, total elimination of the "latifundista" regime). The Committee notes the Government's statement that the land rescue procedure conducted by the National Land Institute does not involve the confiscation or occupation of, or attacks on, buildings, but that the Institute can intervene in cases where land is idle or uncultivated and where it is unproductive or being used illegally. The Committee notes the detailed information provided by the Government – which differs widely from that presented by the IOE – on the allegations concerning the owners and why the rescue procedures were initiated (idle or unproductive land, or, in certain cases, land being used for raising cattle when its high fertility is particularly suitable for growing crops) but recalls that its function is not to determine whether or not the authorities' actions comply with the law. The Committee wishes to emphasize that it is*

*not within its mandate to speak to matters of agrarian reform except in so far as the steps taken constitute discrimination against employers or where they concern enterprises where workers are employed and where breaches of Conventions Nos 87 or 98 are alleged. On this point the Committee cannot but observe that the persons affected by the land rescue procedures include at least five important officials or former officials of FEDECAMARAS or of affiliated associations, and that it is impossible to discount the possibility of discrimination. In its previous allegations the IOE did, moreover, emphasize that four employers' leaders had not been paid the compensation provided for in the legislation and since they cannot now carry out their productive activities, the Committee requests the Government to ensure that they are granted fair compensation without delay. Moreover, in view of the divergencies between the allegations and the Government's reply concerning the alleged instances of confiscation/rescue (cited in the previous paragraph) and their legal justification, as well as the significant number of officials and former officials of FEDECAMARAS and its affiliates that are concerned, the Committee requests the Government to initiate a frank dialogue with those affected and with FEDECAMARAS on the confiscations/rescues referred to and to keep it informed of developments. The Committee also requests the Government to send its observations on the attacks on the buildings owned by Mr Carlos Sequera Yépez, former President of FEDECAMARAS.*

**1346.** *Regarding the alleged lack of bipartite and tripartite social dialogue with FEDECAMARAS, the Committee notes with concern the IOE's new allegations concerning the approval without any tripartite consultation of laws that affect the interests of employers and their organizations. In addition to the Defence of Political Sovereignty and National Self-Determination Act (which will be examined below and which restricts the international operations of NGOs), the IOE refers to laws that allegedly restrict the freedom of association, regulate the content of the Internet, give the State greater control over telecommunications and the possibility of punishing radio and television stations, and the Communal Economic System Act which, in its opinion, is so vague as to leave it open to broad interpretation that would be prejudicial to freedom of expression. The IOE further alleges that at the end of December 2010 a new Act once again confers powers on the President that allow him to govern by decree for the following 18 months. This Act covers numerous fields affecting employers' organizations and the Inter-American Commission on Human Rights has expressed its concern that the Act constitutes a serious threat to the principle of the separation of powers and to freedom of association. This is the fourth enabling Act under which over 100 laws have been passed, and the IOE adds that under the latest enabling Act the Land and Housing Emergency Act was promulgated without any tripartite consultation despite the fact that it governs the expropriation of urban land and buildings. The Committee notes that the Government refers back to statements made in earlier examinations of this case, adding that it regularly holds consultations, meetings and discussions with employers' and workers' organizations, including FEDECAMARAS, that that it cannot be held accountable for an organization's decision to exclude itself. The Committee regrets that the Government has not responded specifically to these allegations of the IOE or to the Committee's recommendations of March 2011 and urges it to do so without delay. Moreover, observing that the serious shortcomings in social dialogue continue to exist, the Committee reiterates its earlier recommendation, as follows:*

- *deeply deploring that the Government has ignored its recommendations, the Committee urges the Government to establish a high-level joint national committee in the country with the assistance of the ILO, to examine each and every one of the allegations and issues in this case so that the problems can be solved through direct dialogue. The Committee trusts that the Government will not postpone the adoption of the necessary measures any further and urges the Government to keep it informed in this regard;*
- *the Committee expects that a forum for social dialogue will be established in accordance with the principles of the ILO, having a tripartite composition which duly respects the representativeness of workers' and employers' organizations. The Committee requests*

the Government to keep it informed in this regard and invites it to request technical assistance from the ILO. The Committee also requests it once again to convene the tripartite commission on minimum wages provided for in the Organic Labour Act;

- observing that there are still no structured bodies for tripartite social dialogue, the Committee emphasizes once more the importance that should be attached to full and frank consultation taking place on any questions or proposed legislation affecting trade union rights and that it is essential that the introduction of draft legislation affecting collective bargaining or conditions of employment should be preceded by detailed consultations with the most representative independent workers' and employers' organizations. The Committee once again requests the Government to ensure that any legislation concerning labour, social and economic issues adopted in the context of the Enabling Act be first subject to genuine, in-depth consultations with the most representative independent employers' and workers' organizations, while endeavouring to find shared solutions wherever possible;
- the Committee requests the Government to keep it informed with regard to social dialogue and any bipartite or tripartite consultations in sectors other than food and agriculture, and also with regard to social dialogue with FEDECAMARAS and its regional structures in connection with the various sectors of activity, the formulation of economic and social policy and the drafting of laws which affect the interests of the employers and their organizations;
- the Committee requests the Government to ensure that as part of its policy of inclusive dialogue (including within the Legislative Assembly), FEDECAMARAS is duly consulted in the course of any legislative debate that may affect employer interests, in a manner commensurate with its level of representativeness.

**1347.** *The Committee deeply deplores that the Government has once again ignored these recommendation despite the fact that the Committee has been insisting on them for years.*

**1348.** *Regarding the alleged discrimination by the authorities against FEDECAMARAS and the allegations of favouritism vis-à-vis parallel organizations close to the Government, the Committee reproduces here its earlier conclusions on the subject [see 359th report, paras 1288–1289]:*

*The Committee notes that the IOE alleges that the finances parallel organizations to FEDECAMARAS with official subsidies. It attaches, in this regard, an extract from the financial report of the Economic and Social Development Bank (BANDES) of 30 June 2007. This report indicates that Entrepreneurs for Venezuela (EMPREVEN) was granted an allocation of 2,267,846 bolivars and a further allocation of 438,378 bolivars. Furthermore, national financial institutions give priority to cases processed by EMPREVEN (the organization backed by President Chávez) to the detriment of those which are not affiliated to it. The Foreign Exchange Commission (CADIVI) allocated dollars for imports in 91 per cent of the cases processed by EMPREVEN. The Government's support to official companies was also expressed by the investment of three billion bolivars in the Bicentenary Fund which finances "social production companies" which participate in export and import substitution plans, but not to private enterprises represented by FEDECAMARAS. According to the IOE, the intention to replace private companies, which are being strangled by legal constraints and requirements, with socialist enterprises which obtain preferential credits, is a fact. The consequence of this situation is that since the President of the Republic came to power, the number of companies in the country fell from 11,000 to 7,000.*

*The Committee observes with regret that the Government has not replied to these allegations of discrimination against FEDECAMARAS and its members concerning parallel bodies and organizations close to the Government. The Committee requests the Government to send without delay its observations on these allegations and wishes to emphasize that by favouring or disadvantaging certain organizations compared with the rest, governments can influence the attitude of workers or employers when they choose which organization they wish to join, which is incompatible with the principle contained in Convention No. 87, whereby public authorities must refrain from any interference which would restrict the rights enshrined in the Convention.*

- 1349.** *The Committee regrets that the Government once again has not responded specifically to these allegations and confines itself to asserting that it does not encourage or become involved in the establishment or activities of employers' organizations, to denying across the board that there is no favouritism, discrimination or lack of independence with respect to any Venezuelan employers' organization and affirming that the Government cannot by any principle be held responsible for the self-exclusion of certain members of the employers' sector. The Committee therefore reiterates its earlier conclusions, recommendations and principles.*
- 1350.** *Furthermore, the Committee notes the IOE's new allegations denouncing the lack of independence of, and the Government's interference in, parallel employers' organizations that it has been supporting for the past five years as part of the employers' delegation to the International Labour Conference. The Committee observes in this respect that the IOE is referring to correspondence (electronic mail which it attaches) from a senior official of the Ministry of Popular Power for Agriculture to an official representative diplomat of the Venezuelan Government in Geneva and to the EMPREVEN, Confagan, Fedeindustrias and Coboien organizations – which it describes as being under Government influence – which includes instructions and suggestions for these organizations in their dealings with the IOE and with the Conference Credentials Committee.*
- 1351.** *The Committee notes the Government's statements concerning these allegations, according to which: (1) there is no lack of independence among Venezuela's employers' organizations nor any discrimination vis-à-vis organizations affiliated to the employers' sector but that all such organizations are treated on an equal footing, and that the Government cannot by any principle be held accountable for some members of the sector deciding to exclude themselves; (2) the Government expresses its dismay at and repudiation of the additional information presented by the IOE; it repudiates and rejects categorically any such accusation and finds it very difficult to express an opinion on the substance of the matter as presented, as it is without foundation; it refutes every word of the additional information which does not compromise the Government's position in any way; (3) the Government also categorically refuses to accept the accusation once again that it interferes in the affairs of employers' organizations, especially as they are based on documents that were not issued by the Government or its representatives and which it therefore considers of doubtful origin and authorship and completely invalid; (4) the fact that the persons alleged by the IOE to have issued the said documents deny all knowledge of them has to be taken up with other bodies and is outside the Government's sphere of responsibility; (5) in stating its official position the Government cannot be expected to entertain so-called electronic mail of which it is unaware and which does not in any way compromise or challenge Government action that has always abided by the law; (6) the Government trusts that the Committee will dismiss these unfounded claims in strictest compliance with its principles.*
- 1352.** *In this respect, and noting that the complainants' allegations also concern alleged denial of rights before the ILO, the Committee calls on the Government to verify without delay with the senior officials concerned whether or not they or their representatives sent the electronic mail attached to the IOE's deposition.*
- 1353.** *Regarding the Committee's question as to the means of recourse available to employers who feel that they are victims of discrimination involving refusal to issue a labour solvency certificate (a document issued by the Ministry of Popular Power for Labour certifying that employers respect in full the labour and trade union rights of their workers which is an essential requirement for concluding contracts with the State) or official foreign exchange authorizations, the Committee duly notes the Government's statement concerning the functioning of the system and, in particular, the existence of means of recourse for anyone who feels victimized.*

1354. Regarding the Bill on international cooperation (Defence of Political Sovereignty and National Self-Determination Bill), the Committee had hoped in its earlier recommendation that the Bill would provide for some form or rapid appeal in cases of discrimination (among organizations) to avoid interference by the authorities in the access of workers' and employers' organizations to external funds. In this respect, the Committee notes that in its new allegations, the IOE states that the National Assembly approved at its second reading the Defence of Political Sovereignty and National Self-Determination Act, which prevents Venezuelan employers' and workers' organizations from receiving any kind of international assistance, inasmuch as article 4 of the Act stipulates that the assets and other income of politically motivated or political rights defence organizations must derive exclusively from national assets and resources. According to the IOE, the Government considers that employers' and workers' organization are included in this category. The IOE emphasizes that the Act was approved at its second reading despite the objection voiced by the Inter-American Commission of Human Rights to the ambiguity of the wording of certain clauses of the Bill and the broad discretion it left the authorities responsible for implementing the Act. In this respect, the Committee regrets that the Government has not responded to these allegations and that the IOE has sent the Committee the text of the Bill approved at its second reading but that it appears that the Act itself has not yet been adopted.
1355. Under these circumstances, the Committee wishes to draw attention to the principle whereby all national organizations of workers and employers should have the right to receive financial assistance from international organizations of workers and employers respectively, whether or not they are affiliated to the latter [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 744]. However, the Committee is unable to determine whether the Bill applies to employers' and workers' organizations and calls on the Government to ensure respect for the above principle and, if the Bill does indeed apply to them, to take the necessary measures without delay to amend the Bill (or the Act) so as to guarantee explicitly the rights of employers' and workers' organizations to receive international financial assistance without prior authorization from the authorities for activities related to the promotion and defence of the interests of their members.
1356. Regarding the complainant organization's comments on the Central Planning Commission Act, the Committee had observed in its earlier examination of the case that the legislation establishes strong state intervention in the economy and national economic structure under the aegis of central planning in order to construct the Venezuelan socialist model and had requested the complainant organizations to provide information on the relationship between the allegations and the violation of Conventions Nos 87 and 98. The Committee reiterates this recommendation and indicates that if the organizations have not done so by the Committee's next meeting, it will not pursue its examination of these allegations any further.
1357. Finally, as regards the High-level Tripartite Mission decided upon with the consent of the Government in connection with the issues raised, the Committee observes that this question is dealt with in Governing Body document GB.313/INS/INF/5. Also, the Committee requests the Government to send its observations in relation to the recent IOE communication dated 20 February 2012 alleging repeated failure to engage in tripartite consultations with respect to legislative matters.

## The Committee's recommendations

1358. *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) *Regarding the abduction and maltreatment of the FEDECAMARAS leaders, Messrs Noel Álvarez, Luis Villegas, Ernesto Villamil and Ms Albis Muñoz (Employer member of the Governing Body of the ILO), the latter being wounded by three bullets, the Committee deplores the offences that were committed, emphasizes their seriousness and requests the Government to take all the steps within its power to arrest the other three persons involved in the abductions and wounding, and to keep it informed of developments in the investigations. The Committee notes the Government's statement that a public hearing was scheduled for 20 October 2011 and expresses the hope that the persons guilty of these crimes will soon be convicted and sentenced in proportion to the seriousness of the offences in order that such incidents will not be repeated and requests the Government to keep it informed in this respect. At the same time, the Committee notes with concern the IOE's statement in its additional information that Ms Albis Muñoz, employers' leader and one of the victims of aggression, has asserted that neither of the suspects arrested (Mr Antonio José Silva Moyega and Mr Jason Manjares) were the instigators of the aggression, as well as the IOE's reservations as to the idea that the motive of the aggression was car theft.*
- (b) *Regarding the criminal investigation ordered by the Public Prosecutor's Office into the public declarations by the President of FEDECAMARAS, Mr Noel Álvarez, the Committee wishes to state that, in the context described by the IOE, the declarations do not in its opinion appear to contain any criminal content and should not normally have given rise to a criminal investigation. However, so that it can reach its conclusions in full possession of the facts, the Committee requests the Government to send its observations on the allegation.*
- (c) *Regarding the alleged attacks on FEDECAMARAS headquarters in 2007, the Committee had requested FEDECAMARAS to file an official complaint on the subject with the Public Prosecutor's Office. The Committee reiterates that recommendation and indicates that if the organization has not done so by the Committee's next meeting, it will not pursue its examination of this allegation any further; noting however that an environment of harassment and lack of confidence in the public authorities is not conducive to the proposed lodging of its official complaints.*
- (d) *Regarding the alleged bomb attack on FEDECAMARAS headquarters on 24 February 2008, the Committee notes the Government's statement that the persons charged, Mr Juan Crisóstomo Montoya González and Mrs Ivonne Gioconda Márquez Burgos, have confessed in full to the crimes of public intimidation and unlawful use of identity papers, that a preliminary public hearing was set for 4 November 2011 and that, as soon as a final ruling on the case was handed down, the Committee would be duly informed. The Committee emphasizes the importance that the guilty parties should be punished in proportion to the seriousness of the crimes committed and the*

*employer organization compensated for the loss and damage on account of these illegal acts. The Committee is waiting to be informed of the sentence handed down.*

- (e) Observing the various acts of violence committed against FEDECAMARAS or its officials, the Committee again draws the attention of the Government to the fundamental principle that the rights of workers' and employers' organizations can be exercised only in a climate free of violence, intimidation and fear, as such situations of insecurity are incompatible with the requirements of Convention No. 87.*
- (f) Regarding the Committee's recommendation that the Government restore the La Bureche farm to the employers' leader, Mr Eduardo Gómez Sigala, and compensate him fully for all the damage caused by the authorities in occupying the farm, the Committee notes that there is a contradiction between the allegations and the Government's judgment that the expropriated farm of employers' leader Mr Eduardo Gómez Sigala was idle. Be that as it may, the Committee observes that the Government does not deny the IOE's allegation that the farm is currently a military training centre (as opposed to the Government's statement that the purpose of the land rescue procedure is to encourage the agricultural use of the Valle del Río) or the allegation that Mr Eduardo Gómez Sigala has not received any compensation. The Committee therefore once again calls on the Government to respond fully to the allegations, return the farm property without delay to the employers' leader and compensate him fully for all losses sustained as a result of the intervention by the authorities in seizing his farm.*
- (g) The Committee requests the complainant organizations to send their comments on the information and observations presented by the Government concerning the expropriation of Agroisleña SA, Owen-Illinois and the Turbio steel plant.*
- (h) The Committee invites the complainants to provide their observations on the Government statement on the livestock farmer Mr Franklin Brito.*
- (i) Regarding the alleged confiscation ("rescue", according to the Government) of the farms owned by the employers' leaders, Mr Egildo Luján, Mr Vicente Brito, Mr Rafael Marcial Garmendia and Mr Manuel Cipriano Heredia, the Committee considers that it is impossible to discount the possibility of discrimination. The Committee requests the Government to ensure that they are granted fair compensation without delay and to initiate a frank dialogue with those affected and with FEDECAMARAS on the confiscations/rescues referred to and to keep it informed of developments. The Committee also requests the Government to send its observations on the attacks on the buildings owned by Mr Carlos Sequera Yépez, former President of FEDECAMARAS.*
- (j) Regarding the alleged lack of bipartite and tripartite social dialogue with FEDECAMARAS, the Committee notes with concern the IOE's new allegations concerning the approval without any tripartite consultation of laws that affect the interests of employers and their organizations. The*

*Committee regrets that the Government has not responded specifically to these allegations of the IOE and urges it to do so without delay. Moreover, observing that the serious shortcomings in social dialogue continue to exist, the Committee reiterates its earlier recommendation, as follows:*

- *deeply deploring that the Government has ignored its recommendations, the Committee urges the Government to establish a high-level joint national committee in the country with the assistance of the ILO, to examine each and every one of the allegations and issues in this case so that the problems can be solved through direct dialogue. The Committee trusts that the Government will not postpone the adoption of the necessary measures any further and urges the Government to keep it informed in this regard;*
- *the Committee expects that a forum for social dialogue will be established in accordance with the principles of the ILO, having a tripartite composition which duly respects the representativeness of workers' and employers' organizations. The Committee requests the Government to keep it informed in this regard and invites it to request technical assistance from the ILO. The Committee also requests it once again to convene the tripartite commission on minimum wages provided for in the Organic Labour Act;*
- *observing that there are still no structured bodies for tripartite social dialogue, the Committee emphasizes once more the importance that should be attached to full and frank consultation taking place on any questions or proposed legislation affecting trade union rights and that it is essential that the introduction of draft legislation affecting collective bargaining or conditions of employment should be preceded by detailed consultations with the most representative independent workers' and employers' organizations. The Committee once again requests the Government to ensure that any legislation concerning labour, social and economic issues adopted in the context of the Enabling Act be first subject to genuine, in-depth consultations with the most representative independent employers' and workers' organizations, while endeavouring to find shared solutions wherever possible;*
- *the Committee requests the Government to keep it informed with regard to social dialogue and any bipartite or tripartite consultations in sectors other than food and agriculture, and also with regard to social dialogue with FEDECAMARAS and its regional structures in connection with the various sectors of activity, the formulation of economic and social policy and the drafting of laws which affect the interests of the employers and their organizations;*
- *the Committee requests the Government to ensure that as part of its policy of inclusive dialogue (including within the Legislative Assembly), FEDECAMARAS is duly consulted in the course of any legislative debate that may affect employer interests, in a manner commensurate with its level of representativeness.*

*The Committee deeply deplores that the Government has once again ignored these recommendation despite the fact that the Committee has been insisting on them for years.*

- (k) *Regarding the alleged discrimination by the authorities against FEDECAMARAS and the allegations of favouritism vis-à-vis parallel organizations close to the Government and lacking in independence, the Committee reiterates the conclusions, recommendations and principles contained in its previous examination of the case and requests the Government to reply in detail to the allegations concerning the financing of parallel organizations and of favouritism vis-à-vis EMPREVEN and the “social production companies” and the discrimination against private companies. Regarding the IOE’s new allegations concerning the sending of electronic mails between senior officials and parallel employers’*



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*organizations, the Committee calls on the Government to verify without delay with the senior officials concerned whether or not they or their representatives sent the electronic mail attached to the IOE's deposition.*

- (l) Regarding the Defence of Political Sovereignty and National Self-Determination Bill, the Committee calls on the Government to ensure respect for the abovementioned principle as regards international financial assistance to workers' and employers' organizations so that, if the Bill does indeed apply to them, to take the necessary measures without delay to amend the Bill (or the Act) so as to guarantee explicitly the rights of employers' and workers' organizations to receive international financial assistance without prior authorization from the authorities for activities related to the promotion and defence of the interests of their members.*
- (m) Regarding the complainant organization's comments on the Central Planning Commission Act, the Committee had observed in its earlier examination of the case that the legislation establishes strong state intervention in the economy and national economic structure under the aegis of central planning in order to construct the Venezuelan socialist model and had requested the complainant organizations to provide information on the relationship between the allegations and the violation of Conventions Nos 87 and 98. The Committee reiterates this recommendation and indicates that if the organizations have not done so by the Committee's next meeting, it will not pursue its examination of these allegations any further.*
- (n) The Committee requests the Government to send its observations in relation to the recent IOE communication dated 20 February 2012 alleging repeated failure to engage in tripartite consultations with respect to legislative matters.*
- (o) The Committee draws the attention of the Governing Body to the serious and urgent nature of this case.*

Geneva, 23 March 2012

(Signed) Professor Paul van der Heijden  
Chairperson

*Points for decision:* Paragraph 247  
Paragraph 261  
Paragraph 278  
Paragraph 289  
Paragraph 312  
Paragraph 361  
Paragraph 377  
Paragraph 387  
Paragraph 401  
Paragraph 437  
Paragraph 467  
Paragraph 486  
Paragraph 508  
Paragraph 539  
Paragraph 573  
Paragraph 619  
Paragraph 644  
Paragraph 663  
Paragraph 694

Paragraph 705  
Paragraph 722  
Paragraph 815  
Paragraph 852  
Paragraph 877  
Paragraph 899  
Paragraph 922  
Paragraph 950  
Paragraph 1010  
Paragraph 1045  
Paragraph 1065  
Paragraph 1087  
Paragraph 1097  
Paragraph 1132  
Paragraph 1156  
Paragraph 1201  
Paragraph 1240  
Paragraph 1358