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### THIRD ITEM ON THE AGENDA

## Reports of the Committee on Freedom of Association

### 364th 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 24 and 25 May and 4 June 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 2726, 2847, 2861, 2865, 2873 and 2881), Colombia (Cases Nos 2822, 2823 and 2835), Japan (Case No. 2844) and Mexico (Case No. 2694), respectively.

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3. Currently, there are 164 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 36 cases on the merits, reaching definitive conclusions in 23 cases and interim conclusions in 13 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 2445 (Guatemala), 2508 (Islamic Republic of Iran), 2528 (Philippines), 2712 (Democratic Republic of the Congo), 2727 (Bolivarian Republic of Venezuela), 2745 (Philippines) and 2859 (Guatemala) because of the extreme seriousness and urgency of the matters dealt with therein.

## Urgent appeals

5. As regards Cases Nos 2318 (Cambodia), 2620 (Republic of Korea), 2648 (Paraguay), 2708 (Guatemala), 2713 (Democratic Republic of the Congo), 2723 (Fiji), 2726 (Argentina), 2794 (Kiribati), 2796 (Colombia), 2797 (Democratic Republic of the Congo), 2808 and 2812 (Cameroon), 2814 (Chile), 2817 (Argentina), 2860 (Sri Lanka), 2869 (Guatemala), 2870 (Argentina), 2871 (El Salvador), 2878 and 2879 (El Salvador), 2880 (Colombia), 2885 (Chile), 2894 (Canada), 2896 (El Salvador), 2902 (Pakistan), 2903 (El Salvador) and 2904 (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: 2935 (Colombia), 2936 (Chile), 2937 (Paraguay), 2938 (Benin), 2939 (Brazil), 2940 (Bosnia and Herzegovina), 2941 (Peru), 2942 (Argentina), 2943 (Norway), 2944 (Algeria), 2945 (Lebanon), 2946 (Colombia), 2947 (Spain), 2948 (Guatemala), 2949 (Swaziland) and

2950 (Colombia), 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: 2177 and 2183 (Japan), 2254 (Bolivarian Republic of Venezuela), 2655 (Cambodia), 2684 (Ecuador), 2714 and 2715 (Democratic Republic of the Congo), 2740 (Iraq), 2743 (Argentina), 2753 (Djibouti), 2786 (Dominican Republic), 2811 (Guatemala), 2872 (Guatemala), 2889 (Pakistan), 2892 (Turkey), 2908 and 2909 (El Salvador), 2912 (Chile), 2913 (Guinea), 2914 (Gabon), 2916 (Nicaragua), 2917 (Bolivarian Republic of Venezuela), 2918 (Spain), 2919 and 2920 (Mexico), 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) and 2933 (Colombia).

### **Partial information received from governments**

8. In Cases Nos 2265 (Switzerland), 2673 (Guatemala), 2702 (Argentina), 2749 (France), 2768 (Guatemala), 2806 (United Kingdom), 2824 (Colombia), 2840 (Guatemala), 2858 (Brazil), 2883 (Peru), 2893 (El Salvador), 2897 (El Salvador), 2900 (Peru) and 2922 (Panama) 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 2516 (Ethiopia), 2609 (Guatemala), 2706 (Panama), 2709 (Guatemala), 2758 (Russian Federation), 2761 (Colombia), 2763 (Bolivarian Republic of Venezuela), 2778 (Costa Rica), 2801 (Colombia), 2807 (Islamic Republic of Iran), 2813 (Peru), 2815 (Philippines), 2816 (Peru), 2820 (Greece), 2826 (Peru), 2829 (Republic of Korea), 2830 (Colombia), 2849 (Colombia), 2851 (El Salvador), 2852 and 2853 (Colombia), 2861 (Argentina), 2863 (Chile), 2870 (Argentina), 2874 (Peru), 2877 (Colombia), 2884 (Chile), 2895 (Colombia), 2905 (Netherlands), 2906 (Argentina), 2910 (Peru), 2911 (Peru), 2915 (Peru) and 2934 (Peru) and, the Committee has received the governments' observations and intends to examine the substance of these cases at its next meeting.

### **Withdrawal of complaints**

10. As regards Cases Nos 2845 and 2846 (Colombia), the Committee notes with satisfaction from the documents provided by the Government that, in the framework of the CETCOIT and with ILO assistance, the parties have put an end to the disputes and have come to an agreement in this respect. Moreover, the said documents indicate that the complainant organizations have retracted the complaints. Taking into account this information, the Committee approved the withdrawal of the complaints.
11. Furthermore, with regard to Case No. 2522 (Colombia), the Committee also notes with satisfaction from a document provided by the Government that, in the context of the same activity before the CETCOIT and as a follow-up to the recommendations made by the Committee in the framework of Case No. 2522, the authorities of the Municipality of Buenaventura have committed to employing a trade union leader who had been dismissed

without prior lifting of trade union immunity. However, the Committee is awaiting information to be provided by the Government on other issues pending in this case and will therefore not proceed with the withdrawal of the complaint.

### **Technical assistance/mediation mission**

12. As regards Case No. 2921 (Panama), the Committee notes that at the request of the Government and in the framework of the Special Committee for the Rapid Handling of Complaints concerning Freedom of Association and Collective Bargaining, a technical assistance/mediation mission was conducted in relation to the issues raised in the complaint alleging violations of trade union rights at the Social Insurance Fund. The Committee notes with interest that in the context of the mission the parties signed an agreement which contains concrete commitments, including joint meetings. *In this respect, the Committee expects that all issues raised in the complaint will be dealt with in accordance with the abovementioned agreement and requests the Government and the complainant organizations to keep it informed of developments relating to the implementation of this agreement.*

### **Article 26 complaint**

13. The Committee is awaiting the observations of the Government of Belarus in respect of its recommendations relating to the measures taken to implement the recommendations of the Commission of Inquiry. In light of the time that has elapsed since its previous examination of this case and the additional information provided by the national trade unions, the Committee requests the Government to send its observations as a matter of urgency so that it may examine the follow-up measures taken with respect to the recommendations of the Commission of Inquiry at its next meeting.

### **Transmission of cases to the Committee of Experts**

14. 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: 2698 (Australia), 2737 and 2754 (Indonesia) and 2727 (Bolivarian Republic of Venezuela).

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

#### **Case No. 2698 (Australia)**

15. The Committee last examined this case at its June 2010 meeting [see 357th Report, approved by the Governing Body at its 308th Session, paras 165–229]. On that occasion, the Committee made the following recommendations:
- (a) The Committee wishes at the outset to recognize the efforts that were made by the Government when drafting the Fair Work Act to consult the social partners with the aim of concluding a carefully drafted Act intended to balance a variety of important interests in the field of industrial relations. It encourages the Government, in its review of the application of the FWA, to proceed in the same way of full consultation.
  - (b) The Committee requests the Government to keep it informed of the application of the provisions of the FWA concerning individual flexibility arrangements in practice.

- (c) Recalling that the Collective Agreements Recommendation, 1951 (No. 91), stresses the role of workers' organizations as one of the parties in collective bargaining, and 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 organizations of workers should be encouraged and promoted, the Committee requests the Government to ensure respect for this principle and to provide detailed information on the application of section 172 of the FWA in practice, so as to allow it to determine the impact of this provision on the promotion of negotiations between employers and workers' organizations.
- (d) Taking into account its conclusions on such matters reached in previous cases concerning Australia, the Committee requests the Government to review sections 409(1)(b), 409(4) and 413(2) of the FWA, in full consultation with the social partners concerned.
- (e) The Committee requests the Government to provide detailed information on the application of sections 409(1)(a), 409(3), 423, 424, 426 and 431 of the FWA and to review these provisions, in consultation with the social partners, with a view to their revision, where appropriate.
- (f) The Committee requests the Government to provide detailed information on the practical application of the provisions of Part 3-3, Division 8, of the FWA concerning protected action ballots.
- (g) The Committee requests the Government to provide further clarification on the application of sections 172 and 194 of the FWA concerning the subject matter for collective bargaining and to review these sections, in full consultation with the social partners, in line with the principles cited in its conclusions.
- (h) The Committee requests the Government to provide information on the practical application of section 513 of the FWA, including any statistics relating thereto, in order to allow it to assess the impact of that section on the right of workers' representatives to access the workplace.

**16.** In its communication dated 5 January 2011, the Government notes that the Committee did not conclude that the Fair Work Act, 2009 (FWA), is inconsistent with Conventions Nos 87 and 98 and that it commended the Government's efforts in consulting with social partners. The Government notes that this is consistent with the 2009 comments of the Committee of Experts on the Application of Conventions and Recommendations, which further noted with satisfaction that collective bargaining at the enterprise level is now at the heart of the new workplace relations system, and that statutory individual agreements can no longer be made.

**17.** The Government indicates that, in response to three recommendations in which the Committee had requested the Government to review certain sections of the FWA ((d), (e) and (g)) in consultation with the social partners, it undertook the requested consultations with Australia's social partners – the Australian Chamber of Commerce and Industry, the Australian Council of Trade Unions and the Australian Industry Group – on 1 November 2010. The Government further states that, in reply to the Committee's recommendations, it provides clarification on the practical application of a number of sections of the FWA, statistics (where possible) on their use since commencement and relevant case law. Given that the FWA is still in the early stages of being implemented, the Government indicates that it will continue to closely monitor its implementation and ongoing operation.

**18.** As regards recommendation (b) concerning individual flexibility arrangements (IFA), the Government indicates that, while the FWA does not provide for individual statutory agreements to be made between employers and individual employees, collectively negotiated enterprise agreements are required to include a flexibility term that enables an employee and employer to agree to an IFA that varies the effect of the enterprise agreement between the employer and the employee, with the agreement of that employee. The Government states that, under the FWA, an offer of employment cannot be made

conditional on a person entering into an IFA and employees can terminate an IFA with 28 days notice in writing. The model flexibility term contained in 54.7 per cent of agreements enables an IFA to vary the effect of terms about arrangements for when work is performed, overtime rates, penalty rates, allowances and leave loadings; 8.5 per cent of agreements permit IFAs to be made about any terms of the agreement. The Government adds that, as IFAs are made between employers and individual employees and not separately lodged with Fair Work Australia there is currently no statistical data available on the making or use of IFAs under the FWA. However, section 653 requires Fair Work Australia to research and report every three years (commencing with the period 26 May 2009–25 May 2012) on the extent to which IFAs under modern awards and enterprise agreements are being agreed to, and the content of those arrangements. Also, the Fair Work Ombudsman may investigate complaints in this regard.

- 19.** As regards recommendation (c) concerning the ability to make collective agreements without union involvement (section 172 of the FWA), the Government states that the provisions of the FWA on the making of enterprise agreements facilitate the involvement of unions in the relevant negotiations consistent with Article 4 of Convention No. 98. The Act: (i) automatically enables a union to represent an employee who is a union member in bargaining for a proposed agreement unless the employee chooses to appoint someone else; (ii) requires an employer to advise employees of their right to appoint a bargaining representative and explain the status of unions as default bargaining representatives for their members; (iii) enables employees who are not union members to appoint as a bargaining representative a union capable of representing the employee's industrial interests or else they can appoint another bargaining representative or themselves and bargain with their employer directly; and (iv) requires bargaining representatives to bargain in good faith (otherwise Fair Work Australia may issue a bargaining order). Where a majority of employees wish to bargain collectively and their employer refuses to do so, a union that is an employee bargaining representative can apply to Fair Work Australia to make a majority support determination, in which case an employer is required to bargain with employee bargaining representatives. The Government emphasizes that to date no complaints regarding the application of the relevant provisions have been submitted to Fair Work Australia, and considers that they are operating effectively.
- 20.** As regards recommendation (d) to review sections 409(1)(b), 409(4) and 413(2) concerning the level of bargaining, the Government considers that the bargaining and industrial action frameworks of the FWA are consistent with the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, and with the Committee's view that the determination of the bargaining level is a matter for the discretion of the parties. Under the FWA, employees and employers can freely determine the level at which they wish to bargain. While an emphasis is put on enterprise-level collective bargaining, the FWA also provides for voluntary bargaining at the industry level. The Government indicates that from 1 July 2009 to 30 June 2010 there were 22 applications for the authorization of a single-enterprise agreement covering two or more single-interest employers of which all were granted by Fair Work Australia; and 69 applications for the authorization of a multi-enterprise agreement covering two or more employers, of which 55 were granted; the main criterion for approval being that the employers voluntarily agreed to bargain and make the agreement without coercion. The Government adds that the prohibition on protected industrial action taken in support of claims for multi-enterprise agreements in section 413(2) is consistent with the overall bargaining framework of the FWA, especially with the voluntary nature of multi-employer agreements. The FWA promotes collective bargaining in good faith without however imposing a requirement on parties to reach agreement, and specifically encourages employers and employees to bargain collectively, for example by making a majority support determination where a majority of employees wish to bargain collectively and their employer refuses to do so. Further, while industrial action taken in support of pattern bargaining is not protected, the

FWA allows employers and their employees (and relevant bargaining representatives) to engage in discussions at both enterprise and industry levels about terms and conditions of employment. Also, the making of common claims across multiple workplaces does not prevent a finding that a bargaining representative is genuinely trying to reach agreement with an employer.

- 21.** As regards recommendation (e) to review sections 409(1)(a), 409(3), 423, 424, 426 and 431 of the FWA concerning industrial action and report on their practical application, the Government believes that the industrial action provisions strike the right balance between an employee's right to strike and the need to protect life and economic stability in a manner that is appropriate to national conditions. Unless the action is likely to involve personal injury or damage, or the destruction or taking of property, the FWA protects workers and their unions against a civil suit for damages in relation to that industrial action. It allows employers and employees to bargain about and take protected industrial action in relation to a wider range of matters than was possible under the former Workplace Relations Act. Enterprise agreements under the FWA can be made about, and employees may take protected industrial action to support or advance claims about, or reasonably believed to be about, "permitted matters" (i.e. matters pertaining to the relationship between the employer and its employees, matters pertaining to the relationship between the employer and the employee organization or organizations to be covered by the agreement, deductions from wages for purposes authorized by an employee and the manner of operation of the agreement). This formulation is of long standing and there is substantial jurisprudence about what it means. Unlawful terms and matters that do not bear directly on the relationship between an employer and an employee in those capacities, such as matters of an academic, political or social nature, are excluded from the scope of enterprise agreements, and protected industrial action.
- 22.** Furthermore, the Government indicates that, in very limited circumstances (significant economic harm to the employer(s) and employees in case of protracted industrial action and unlikely dispute resolution in the near future – section 423; endangering life, personal safety and health or welfare of the population or part of it, or threat to cause significant damage to the economy or an important part of it – section 424; ministerial declaration on the grounds of section 424 – section 431; and significant harm to third parties – section 426), the FWA provides for protected industrial action to be suspended or terminated by Fair Work Australia after hearing the parties to the dispute. During the period 1 July 2009–30 June 2010: nine applications for orders to suspend or terminate industrial action were made to Fair Work Australia under section 423, of which all were declined; eight applications were made to Fair Work Australia under section 424, of which four were granted; no minister (including under the former Workplace Relations Act) has exercised the power under section 431; four applications were made to Fair Work Australia under section 426, of which two were granted. The Government strongly believes that the thresholds for suspending or terminating industrial action are appropriately high to balance the rights of employees to take industrial action with the Government's responsibilities for protecting the national economy and the safety, health or welfare of the population and the legitimate interests of other affected parties. With reference to paragraphs 550 and 551 of the *Digest of decisions and principles of the Freedom of Association Committee*, the Government indicates that after termination of protected industrial action under sections 423, 424 or 431 of the FWA, bargaining representatives have a negotiating period of 21 days (extendable to 42 days by Fair Work Australia) in which to resolve the matters at issue; if they are unable to reach agreement, a Full Bench of Fair Work Australia is required to make a binding industrial action related workplace determination which has effect as an enterprise agreement.

23. As regards recommendation (f) to report on the practical application of the provisions in Division 8 of Part 3-3 of the FWA concerning protected action ballots, the Government believes that these provisions are fair, operating as intended and consistent with Article 4 of Convention No. 98, and that the case law regarding protected action ballots demonstrates that the procedures are reasonable and do not frustrate or delay the taking of industrial action. During the period 1 July 2009–30 June 2010, there were 981 applications to Fair Work Australia for a protected action ballot order, of which 794 were approved (81 per cent); 85 per cent of industrial matters were heard within two days of lodgement. The decisions to date indicate that Fair Work Australia does not take an unduly technical approach when determining protected action ballot applications; rather than refusing applications that are not in line with the FWA requirements, it has provided applicants with the opportunity to amend applications where appropriate. This practical approach supports the intent and spirit of the legislation. Furthermore, the Government indicates that pursuant to section 443(1), Fair Work Australia must make a protected action ballot order if an application has been made and it is satisfied that each applicant has been, and is, genuinely trying to reach an agreement, and supplies case law examples illustrating how Fair Work Australia interprets the meaning of “genuinely trying to reach an agreement”. The Government adds that the FWA does not require a majority of all employees who will be covered by a proposed enterprise agreement to vote in favour of industrial action in order for the action to be protected, but rather requires under section 459 that at least 50 per cent of those on the roll of voters participate in the ballot; and that more than 50 per cent of valid votes cast be in favour of the industrial action.
24. As regards recommendation (g) to provide further clarification of the application of sections 172 and 194 of the FWA concerning the content of enterprise agreements and to review them in full consultation with the social partners, the Government submits that these provisions are consistent with Article 4 of Convention No. 98 which envisages the regulation of terms and conditions of employment by means of collective agreement, as appropriate to national conditions. Section 172 enables enterprise agreements to be made about permitted matters, including matters pertaining to the relationship between employer and their employees, or between an employer and an employee organization. Commonwealth workplace relations law has long required industrial instruments to deal with such matters, and the concept has evolved over time in line with changing community understandings and expectations. The Government indicates that, as acknowledged by the Committee, the FWA broadens the scope of agreement content compared to the former Workplace Relations Act. Enterprise agreements can include terms relating to deduction of union fees, union training leave, renegotiation of agreements, cashing out of annual leave, consultation with unions about major change in the workplace and the role of unions in dispute settlement procedures. Terms that would be within the scope of matters pertaining to the relationship between an employer and employees or a union include: staffing levels; engagement of casuals and contractors where it relates to the job security of employees; conversion of casual to permanent employment; restrictions on employers seeking contributions or indemnities from employees in relation to personal injuries caused by and to the person in the course of employment; paid leave for union meetings or activities; promotion of union membership; and methods for providing union information to employees. On the other hand, the Government states that the content of enterprise agreements does not extend to matters of a political or social nature which are outside the sphere of employers’ relationships with their employees and representative organizations of employees. Terms that would not be within the scope of matters pertaining to the relationship between an employer and employees or a union include: general prohibitions on the engagement of labour hire employees or contractors; requirements for employers to make political or charitable donations; limits on employer choice in relation to clients, customers or suppliers aimed at meeting specified employment, environmental or ethical standards; and employers’ corporate social responsibility (e.g. participation in charity events, commitment to climate change initiatives). Moreover, section 194 prevents an

enterprise agreement from containing unlawful terms, such as discriminatory terms (e.g. terms that discriminate against an employee on the basis of race, sex, sexual preference, age or disability) and terms that are not consistent with provisions of the FWA which is given primacy as the source of rights and obligations in relation to the following matters, such as: objectionable terms (i.e. requiring or permitting contravention of the FWA general protections provisions or the payment of a bargaining services fee); terms that confer an entitlement or remedy for unfair dismissal before an employee has completed a minimum employment period as required by Part 3-2 of the FWA; terms that exclude or modify the FWA unfair dismissal provisions in a detrimental way; terms that are inconsistent with the FWA industrial action provisions; or terms that provide for right of entry for the purpose of investigating suspected contraventions, or to hold discussions with employees, or for the exercise of a state or territory occupational health and safety right other than in accordance with the FWA right of entry provisions.

25. As regards recommendation (h) to provide information on the practical application of section 513 of the FWA so as to assess its impact on the right of workers' representatives to access the workplace, the Government emphasizes that the requirement that a person be "fit and proper" to enter premises under the statutory right of entry scheme in the FWA has been part of the Australian workplace relations framework since 2006 and the requirement previously contained in the Workplace Relations Act. In determining whether an official is a "fit and proper person" to hold a right of entry permit, section 513 requires Fair Work Australia to take certain matters into account. The only time that it will not have the discretion to grant an entry permit is where a suspension or disqualification applies to the official's exercise of, or application for, a right of entry under a state or territory industrial or occupational health and safety law. During the period 1 July 2009 to 30 June 2010, Fair Work Australia reported that it received 1,704 applications for an entry permit, of which 82 per cent were finalized within 28 days. No statistics are available regarding how many of the finalized applications resulted in a permit being granted. Only five union officials have had their right of entry permits revoked since June 1998. No entry permits have been revoked since June 2004.
26. *The Committee notes the detailed information provided by the Government. It notes with interest that, when reviewing certain sections of the FWA, the Government undertook consultations with Australia's social partners – the Australian Chamber of Commerce and Industry, the Australian Council of Trade Unions and the Australian Industry Group.*
27. *With respect to recommendation (b), while observing that the provisions of the FWA concerning IFAs seek to protect employees (including prospective employees) from undue influence or pressure being exerted by an employer, the Committee recalls that in a case in which the relationship between individual contracts and the collective agreement seems to have been agreed between the employer and the trade union organizations, such cases do not call for further examination and requests the Government to indicate to the Committee of Experts on the Application of Conventions and Recommendations (CEACR) whether IFAs are compulsory and to provide information on their application in practice including the extent to which IFAs are agreed to and their content, taking into account the relevant report to be issued by Fair Work Australia and any complaints filed with the Fair Work Ombudsman. The Committee further requests the Government to provide information to the CEACR on developments and any relevant statistics in relation to the practical application of the provisions referred to in recommendations (c), (g) and (h) as well as further developments in relation to the review of the provisions mentioned in recommendations (d) and (e).*
28. *With respect to recommendation (f), the Committee notes the Government's view according to which the provisions in Division 8 of Part 3-3 of the FWA concerning protected action ballots are fair, operating as intended and consistent with Article 4 of*



*Convention No. 98, and that the procedures are reasonable and do not frustrate or delay the taking of industrial action. It also notes that during the period 1 July 2009–30 June 2010, the vast majority of applications to Fair Work Australia for a protected action ballot order were approved, and that most applications have been processed swiftly. In light of the case law supplied by the Government, the Committee notes that the application of the relevant provisions in practice by Fair Work Australia has not restricted up to now the means of action open to trade union organizations or prevented them from calling a legal strike.*

### **Case No. 2658 (Colombia)**

- 29.** The Committee last examined this case, which concerns non-compliance by a company with certain clauses in the collective agreement in force and its negotiation with another trade union of clauses affecting the complainant, at its meeting in June 2011. In its previous examinations of the case, the Committee noted that: (1) according to the statements of the Bogotá Telecommunications Enterprise (ETB), it had signed an agreement in 1997 with the National Association of Telephone and Communications Engineers (ATELCA) for the period 1997–2000; and (2) the agreement included specific guidelines on wage increases. The Committee considered that the extension to the members of ATELCA of the wage clauses of the 2006 agreement between the company and the primary union (SINTRATELEFONOS) was a matter of interpretation that should be settled in accordance with the rules and criteria laid down in national legislation. After receiving a communication dated 12 May 2010 in which ATELCA took issue with the Government’s reply, the Committee requested the Government to send its observations and state whether ATELCA had initiated legal proceedings.
- 30.** In a communication dated 2 February 2011, which was received on 23 June 2011, the Government indicates that it requested information from both the company and the Territorial Directorate of Cundinamarca. The company states that it has not violated the right of association or the right to freedom of association. The crux of the complaint is a dispute over the interpretation of a strictly wage-related clause, the violation of which would constitute a punishable act under national legislation. According to the company, the trade union is arguing for a biased interpretation of clause 19 of the collective agreement concluded on 26 May 2006 between the company and SINTRATELEFONOS, the primary trade union, which invokes the principle of equity to the detriment of the most disadvantaged workers. This collective agreement provides for a 3.5 per cent wage increase for the lowest-paid workers. The wage increase for workers who were members of ATELCA was implemented in accordance with the collective agreement concluded with the company for the period 1997–2000, given that ATELCA has not submitted a new list of demands to the company since 1997. The company underlines the fact that ATELCA has not initiated *tutela* proceedings as a means of challenging this situation, or brought the case before the judicial authorities, as it should have done, since there are specific procedures under domestic legislation for resolving such cases, either through administrative proceedings or in the courts.
- 31.** For its part, the Territorial Directorate of Cundinamarca, specifically its Coordinator of Inspection and Monitoring, sent a communication containing details of the administrative proceedings being brought against the company for its non-compliance with the collective agreement that was in force during the period 1997–2000. According to the Directorate, ATELCA lodged a complaint concerning violation of the fifth clause of the 1984 collective agreement. In its Order No. 060534 of 14 September 2006, the Directorate appointed the third labour inspectorate to carry out the relevant administrative investigation. In its Resolution No. 03281 of 14 February 2010, the Coordinator of Inspection and Monitoring reported that there was a legal and economic dispute between the company and ATELCA

over the interpretation of the fifth clause of the collective agreement, which should be resolved by a labour court.

32. *While taking note of this information, the Committee invites the complainant to bring the matter before the courts in order to settle the dispute over the interpretation of clause 19 of the collective agreement. At the same time, given the time that has elapsed, the Committee suggests that the Government endeavour to bring the parties together to resolve this interpretative conflict. The Committee requests to be kept informed of any developments.*

### **Case No. 2423 (El Salvador)**

33. When it last examined the case in March 2010, the Committee made the following recommendations [see 356th Report, paras 59 and 60]:

- Recalling the importance of guaranteeing the right of freedom of association to workers in the security sector and who have been subject to the refusal to grant legal personality since they submitted their request in 2005, the Committee expects that the Government will take the necessary measures for the expeditious recognition of SITRASSPES and SITISPRI and requests the Government to keep it informed in this regard.
- With regard to the procedures initiated by STIPES to impose penalties, the Government reports that fines of US\$6,856.86 were imposed on the enterprise O&M Mantenimiento y Servicios SA de CV in relation to the dismissal of trade union officials and the payment of outstanding wages. In addition, fines of \$2,228.46 were imposed on the enterprise Servicios Técnicos del Pacífico SA de CV in relation to the dismissal of trade union officials and the payment of outstanding wages. The Committee takes note of this information and requests the Government, with regard to the dismissal of the 34 founders of the STIPES trade union, of Mr Alberto Escobar Orellana at the José Simeón Cañas Central American University, of the seven trade union leaders at the clothing company CMT SA de CV and of the trade unionists at the enterprise Hermosa Manufacturing, to continue to promote the reinstatement of the dismissed trade unionists and to keep it informed in this regard, as well as with regard to the outcome of the application for judicial administrative proceedings filed by Mr José Amílcar Maldonado (enterprise CMT SA de CV).

34. In its communication dated 25 October 2011, the Government states, with regard to the Committee's first recommendation (granting of legal personality to the Private Security Services Worker's Union (SITISPRI) and the Private Security Workers' Union of El Salvador (SITRASSPES)), that legal personality was not granted to the abovementioned trade unions under those names. However, starting in 2009, the Ministry of Labour and Social Security amended the criteria forming the basis for resolving such matters and has recognized and granted legal personality to the following trade unions of workers in the private security sector, which many of the founders of the above trade unions have been able to set up or join: the Private Security Industry Worker's Union of El Salvador (SITRAISPES) and the Private Security Enterprises Worker's Union of El Salvador (SITESEPRI). Legal personality has also been granted to the SITRAISPES. *The Committee takes note of this information with satisfaction.*

35. Regarding the dismissal of the 34 founders of the Trade Union of Port Workers' of El Salvador (STIPES) (recommendation (b)), the Government reiterates that it has imposed fines of US\$6,856.86 on the enterprise O&M Mantenimiento y Servicios SA de CV, and \$2,228.46 for the dismissal of trade union officials and for the failure to pay outstanding wages. Regarding the dismissal of Mr Alberto Escobar Orellana at the José Simeón Cañas Central American University, the Government states that the employee in question reached an out-of-court settlement with the university authorities.

36. Regarding the dismissal of seven trade union officials at the clothing company CMT SA de CV and of the trade unionists at the enterprise Hermosa Manufacturing SA, the Government states that it has permanently shut down their operations in El Salvador, and in cases where complaints were filed with the courts and the rulings found in favour of the complainant workers, the corresponding labour benefits were paid after criminal proceedings for concealment of assets were initiated against the employer. With regard to the dismissals in the enterprise CMT SA de CV, the Government indicates that the administrative process of sanctioning the enterprise CMT SA de CV for carrying out de facto dismissals of the company's workers and trade union officials without following the legal procedure has been concluded. However, the enterprise has ceased operations but has not notified the authorities of the official or formal cessation of its operations. The Ministry of Labour and Social Security reiterates that its labour inspectorate took timely administrative action with a view to reinstating the trade union officials.
37. *The Committee takes note of this information and requests the Government to continue promoting the reinstatement of the 34 founders of STIPES and the payment of outstanding wages. Finally, the Committee requests the Government to ensure that the sanctions proceedings it has initiated against the enterprise CMT SA de CV for the dismissal of seven trade union officials are followed by the enforcement of the sanctions decided upon in the sanctions proceedings.*

### **Case No. 2557 (El Salvador)**

38. At its March 2010 meeting, the Committee made the following recommendations on the questions still pending [see 356th Report, para. 699]:
- (a) As regards the dissolution of the Sweets and Pastries Industrial Trade Union (SIDPA), the Committee, noting that a criminal complaint has been lodged with the Third Magistrate's Court of San Salvador for falsification of documents and facts used to justify judicial dissolution of the union, expects that the court proceedings will be concluded without delay and will make it possible to identify and punish those responsible. The Committee requests the Government to keep it informed in this regard and of any further decision or action taken by the Human Rights Ombudsman.
  - (b) As regards the allegations concerning acts of interference by the employer in a trade union's affairs by means of economic incentives and the anti-union dismissals, between 12 March and 7 May 2007, of 16 trade unionists following the dissolution of the trade union, the Committee regrets that the Government has not sent its observations in that regard. The Committee recalls that no one should be subjected to prejudicial measures because of his or her legitimate trade union membership or activity. The Committee urges the Government to carry out an in-depth investigation of these matters without delay and, if the allegations are proven, to take the necessary measures to reinstate without delay the trade union members in their posts with back pay, as well as to take the measures and impose the sanctions provided for in law so as to remedy such acts. The Committee urgently requests the Government to keep it informed of developments in this regard.
39. In its communications dated 21 October and 19 December 2011, the Government refers firstly to the Committee's recommendation (a) (complaint lodged by Mr Óscar Antonio Roque, in his capacity as a rank-and-file member of the Sweets and Pastries Industrial Trade Union (SIDPA), and specifically its branch in the enterprise Productos Alimenticios DIANA, SA de CV, for falsification of documents and facts by Mr Carlos Hernán Méndez Pérez, who was General Secretary of the abovementioned branch). The Government reports that, according to a communication from the Attorney-General's Office, the case has been closed and no judicial investigations are pending given that, on 8 February 2010, the accused, Mr Carlos Hernán Méndez Pérez and Mr Pablo Ernesto Sánchez Pérez, were publicly convicted of the offence of use or possession of false documents constituting a

breach of public trust, and sentenced to a three-year prison term. Mr Pablo Ernesto Sánchez Pérez was also convicted of the offence of falsification of facts and sentenced to a three-year prison term. The court substituted community service days for the prison term. It was also acknowledged in the abovementioned decision that the document on the basis of which SIDPA was dissolved was a forgery and the corresponding court proceedings intended to annul the document should proceed.

40. The Government adds that following the dissolution of the abovementioned trade union, no attempt has been made to set up a new trade union in the enterprise. Regarding the request by the Committee on Freedom of Association to be kept informed of any further decision or action taken by the Human Rights Ombudsman, the Government reports that the only final decision taken by the Ombudsman was the one transmitted to the Committee in previous replies.
41. As regards the dismissal of 16 trade unionists between 12 March and 7 May 2007, the Government states that it has conducted an investigation into these matters in the General Directorate for Labour Inspection, and that the Industrial and Commercial Inspection Department of the General Directorate for Labour Inspection has a file (reference No. 07-09-05) on worker and SIDPA Disputes Secretary Mr Daniel Ernesto Morales Rivera. According to the inspection report in the file, this worker had that capacity and had been dismissed without regard for the legally required procedure. As a result, the employer party was advised to reinstate the worker, but the parties eventually agreed that sums equivalent to the wages that remained unpaid for reasons ascribable to the employer would be paid. As regards the cases of the other dismissed trade unionists, namely, Mr José Álvaro Castillo López, Mr Julio César Martínez Ramírez, Ms Josefa del Carmen Samayoa López, Mr Santos Osmín García Martínez, Mr Óscar Alfredo Ramírez and Ms Judith Beatriz Evangelista Navarro, there are no records of requests for conciliation or legal complaints concerning their dismissal. As regards the seven dismissed trade union officials, namely, Mr Daniel Ernesto Morales Rivera, Ms Irma Antonia Linares Mendoza and Mr Juan Antonio Vargas, the administrative authority was asked to take conciliatory action but the application was abandoned when a settlement was agreed upon with the enterprise without the involvement of the Ministry.
42. *The Committee takes note of this information. The Committee notes with interest the criminal conviction related to the falsified document that was used as the basis for the legal dissolution of SIDPA. The Committee fears that the dissolution of SIDPA may have a dissuasive effect on the workers and their capacity to form unions and invites the Government to promote and encourage the principles of freedom of association and collective bargaining. The Committee further observes that, of the dismissed trade unionists, six did not seek an intervention by the Ministry of Labour, whereas four others did do so but abandoned their applications after agreeing on a settlement with the enterprise. The Committee requests the Government to keep it informed of the situation of the six remaining dismissed trade unionists.*

### **Case No. 2630 (El Salvador)**

43. When it last examined this case in November 2011, the Committee requested the Government to keep it informed of the ruling handed down by the Administrative Disputes Chamber of the Supreme Court of Justice in regard to the accreditation of the Trade Union Association of Workers of the Confitería Americana SA de CV Enterprise (ASTECASACV) for the collective agreement [see 362nd Report, para. 48], whose accreditation had initially been challenged by the General Secretary of the Trade Union of Workers of the Confitería Americana SA de CV Enterprise (STECASACV), who is alleged to have subsequently dropped the challenge in question.

44. In its communication of 15 February 2012, the Government reports that the Administrative Disputes Chamber of the Supreme Court of Justice has yet to hand down any ruling regarding the accreditation of ASTECASACV for the collective labour agreement. The Government states that it will keep the Committee informed in due course when it is notified that the ruling has been handed down.
45. *The Committee takes note of this information and is waiting to be informed of the ruling handed down in this case.*

### **Case No. 2735 (Indonesia)**

46. The Committee last examined this case at its November 2010 meeting, and on that occasion reached the following recommendations [358th Report, paras 559–612]:
- (a) Bearing in mind that agreements should be binding on the parties, the Committee expects that all remaining disputes as to the application of the CBA will be resolved in the near future. Noting that, according to the joint agreement of 6 March 2008, separate negotiations are to be held on three enumerated points including the employee salary adjustments in line with the CBA, and noting with interest the various attempts already made by the Ministry of Manpower and Migration to conciliate the parties, the Committee requests the Government to continue to take active steps to intercede with the parties with a view to facilitating the speedy settlement of the dispute between the state-owned enterprise PT (Persero) Angkasa Pura 1 and the SP-AP1 union. It expects to be kept fully informed on any progress achieved in this respect. The Committee also requests the Government to keep it informed on the final outcome of the judicial procedures before the Supreme Court on the question of salaries and to communicate the text of the ruling once it is handed down.
  - (b) The Committee requests the Government to ensure that Mr Arif Islam is reinstated in the position that he occupied in the company PT (Persero) Angkasa Pura 1 at the time of dismissal, with compensation for lost wages and benefits, in accordance with the recommendations made by the National Commission on Human Rights, Commission IX of the House of Representatives and the Head of the Manpower and Social Agency of the City Government of Balikpapan. If, given the time that has elapsed since the dismissal from his duties at the company PT (Persero) Angkasa Pura 1, it is determined by a competent independent body that it is no longer possible to reinstate him in that particular post, the Committee requests the Government to take steps without delay to review with Mr Islam the relevant available posts for his appointment and to ensure that he is paid full and adequate compensation which would represent a sufficiently dissuasive sanction for anti-trade union dismissals.
  - (c) The Committee requests the Government to ensure that the workers who had been suspended are properly reintegrated in the workforce and fully resume the duties that were assigned to them at the time of suspension, under the terms and conditions prevailing prior to the strike, and with full compensation for lost wages and benefits for the period of their suspension, in accordance with the recommendations made by the National Commission on Human Rights and Commission IX of the House of Representatives, as well as the Ministry of Manpower and Migration letter of 6 March 2009.
  - (d) With regard to the alleged anti-union harassment, the Committee requests the Government to take the necessary steps to ensure that an independent inquiry is instituted without delay, with a view to fully clarifying the circumstances, determining responsibilities, and, where appropriate, imposing sanctions on the guilty parties and issuing appropriate instructions to police and military so as to prevent the repetition of such acts in the future, in accordance with the conclusions of Commission IX of the House of Representatives. It urges the Government to keep it informed of progress achieved in this regard.

- (e) The Committee requests the Government to institute an independent inquiry without delay to ensure that any acts of employer interference are identified and remedied, and, where appropriate, that sufficiently dissuasive sanctions are imposed so that such acts do not reoccur in the future. It requests the Government to keep it informed of developments in this regard.
47. In a communication dated 15 August 2011, the complainant indicated that the management of PT (Persero) Angkasa Pura 1 and the Serikat Pekerja PT Angkasa Pura 1 Union (SP-AP1) entered into negotiations with good will which led to the signing of a Pact on an Industrial Relationship Normalization on 20 August 2010. This Pact solved the dispute. Consequently, the complainant declared that the case related to the collective bargaining agreement had been successfully settled by the signing of a new agreement on October 2010. However, the complainant stated that Mr Arif Islam had not yet been reinstated to his position in the company as requested by the Committee. It indicated that solving this issue would require the involvement of the Ministry of Manpower and Transmigration, as well as the Ministry of Transport, which had yet to be done.
48. In a communication dated 24 August 2011, the Government confirmed the signing of a Pact of Industrial Relations Normalization on August 2010 by the President Director of the company and the Chairperson of the SP-AP1. Following the signing of the Pact, the verification of trade unions membership in the company was conducted on 30 August 2010. A collective labour agreement was then signed on October 2010 by the management of the company and both trade unions (SP-AP1 and the Asosiasi Karyawan Angkasa Pura 1 (AKA)) and registered by the Ministry of Manpower and Transmigration. In this regard, the Government specified that all pending matters had been reviewed and fully accommodated in a new Collective Labour Agreement signed on 2 October 2010.
49. With regard to the situation of Mr Arif Islam, the Government indicated that, since he was deployed to the company, the authority to relocate his assignment is devoted to the Ministry of Transportation. The Government referred to a number of letters issued by the Ministry concerning his employment status, and reiterated the information concerning the letters instructing him to go back to work at the Ministry of Transportation (July 2008) and at the Berau Airport, East Kalimantan (December 2008). According to the Government, Mr Islam has never worked at the Berau Airport or ever reported to the Director-General of Air Transportation. The Government also referred to a letter dated 19 May 2011, whereby it was indicated that Mr Islam is still a civil servant in the Directorate-General of Air Transportation, and that he has not been dismissed. Finally, the Government stated that following a monitoring report of the labour inspection, the remaining wages of Mr Islam had been paid by the company.
50. With regard to the recommendation of the Committee that workers who had been suspended be properly reintegrated in the workforce and fully resume the duties that were assigned to them at the time of suspension, the Government indicated that the company had paid the suspended workers for three months of wages in accordance with a letter of the Ministry of Manpower and Transmigration of May 2009 concerning the payment of wages during suspension.
51. With regard to the recommendation concerning the need to institute an independent inquiry without delay to clarify the circumstances of alleged acts of anti-union harassment, as well as any act of employer interference, the Government states that there is no specific need to establish an independent body to settle the case, since it is proceeding with the prevailing laws and regulations. It specified that the police office of Jakarta issued an SP3 in March 2009, against the Director of PT Angkasa Pura 1 for violation of freedom of association rights, however, the case was dropped due to insufficient evidence.

52. *In view of the above, the Committee welcomes the settlement of the labour dispute by both parties and the signing of a Pact of Industrial Relationship Normalization in August 2010, followed by the signing of a new Collective Labour Agreement in October 2010, which accommodated the pending matters.*
53. *While noting the Government's statement that Mr Islam had been fully compensated for his lost wages and benefits following a report from the labour inspectorate, the Committee regrets that the Government merely reiterates that the latter was assigned to Berau Airport but never showed up to his new place of assignment. In this regard, the Committee notes the proposal for re-employment but, however, wishes to recall that, given the fact that Mr Islam was dismissed for carrying out legitimate trade union activities, it previously requested the Government to take the necessary steps for his reinstatement in the position that he occupied in the company PT (Persero) Angkasa Pura 1 at the time of dismissal, with compensation for lost wages and benefits. However, if given the time that has elapsed since the dismissal from his duties at the company, it is determined by a competent independent body that it is no longer possible to reinstate him in that particular post, the Committee requested the Government to take steps without delay to review, with Mr Islam, the relevant available posts for his appointment and to ensure that he is paid full and adequate compensation which would represent a sufficiently dissuasive sanction for anti-trade union dismissals. The Committee firmly expects the Government to take all necessary measures to meet with Mr Islam and the company to try to find a solution to this matter and to keep it informed in this regard.*

### **Case No. 2737 (Indonesia)**

54. The Committee examined this case at its November 2010 meeting [see 358th Report, paras 613–643] and on that occasion it formulated the following recommendations:
- (a) The Committee urges the Government to take without delay all necessary measures, including sanctions where appropriate, to enforce the recommendations and orders issued by the Bandung Manpower Office concerning the reinstatement of officers and members of the SPM at the Hotel Grand Aquila in Bandung.
  - (b) The Committee urges the Government to take steps, in full consultation with the social partners concerned, to amend its legislation to ensure comprehensive protection against anti-union discrimination in the future, providing for swift recourse to mechanisms that may impose sufficiently dissuasive sanctions against such acts. The Committee requests the Government to keep it informed of all steps taken in this regard.
  - (c) The Committee also requests the Government to keep it informed of any measures taken to follow up the recommendations of the National Commission for Human Rights in relation to the present case.
  - (d) The Committee requests the Government to indicate any court action taken by the District Attorney of Bandung or any sanction taken in relation to the allegation of infringement of freedom of association rights by the hotel management.
  - (e) The Committee draws the legislative aspects of this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.
55. In its communication dated 24 August 2011, the Government recalls that following mediation procedures which took place in December 2008 (concerning dismissal of nine trade union officers) and September 2009 (concerning 119 members of the Independent Trade Union (SPM) Hotel Grand Aquila), the employer refused to follow up the mediators' recommendations. The Government indicates that there are two groups of workers who have different positions as to how the dispute relating to their dismissals should be resolved: the first group (34 workers) did not wish to address the Industrial Relations Court to settle the dispute; with regard to the second group (59 workers), the

Government informs that the Bandung District Industrial Relations Court has rejected the plaintiffs' claim for a payment equivalent to double wages and granted only about half of the requested amount. This group of workers has filed an appeal to the Supreme Court. The Government further indicates that it is implementing and monitoring the recommendations of the National Commission for Human Rights in accordance with the procedures and mechanisms provided for by the legislation in force.

- 56.** With regard to recommendation (b), the Government indicates it has taken note of the Committee's advice and that a review of Act No. 21 on Labour Union (2000) is being conducted.
- 57.** *The Committee notes the information provided by the Government. The Committee recalls that in the framework of the previous examination of this case, it took note of the numerous Bandung Manpower Office and its mediator's orders and recommendations directed to the hotel management for the reinstatement, with payment of wages, of nine officers and 119 members of the SPM. It further took note of the recommendation dated 7 April 2010 from the National Commission on Human Rights concerning the labour dispute between the SPM and the hotel management in which the National Commission recommended to the President of the Republic of Indonesia to instruct the relevant government official in the labour affairs department to immediately resolve the problems through the mechanism of existing law, whether civil or criminal, and to order a direct monitoring by government officials to ensure that workers' rights to freedom of association at the Hotel Grand Aquila in Bandung are ensured and protected. The Committee notes the Government's general statement that the recommendations of the National Commission for Human Rights are being implemented. It understands from the Government's communication that faced with the employer's refusal to comply with the above recommendations, a group of 59 workers filed a case with the Industrial Relations Court, while another group (34 workers) preferred not to file such a complaint. The Committee notes that the first group, unsatisfied with the decision of the Industrial Court as to the monetary amount to be paid to the dismissed workers, filed an appeal with the Supreme Court. The Committee understands, therefore, that 128 workers (nine officers and 119 members of the SPM) have not yet been reinstated. It observes that over three years have passed since the first recommendation to the hotel management on the dispute and that letters of reprimand were also sent reminding of sanctions in case of non-compliance, without result to date. The Committee once again recalls that the ultimate responsibility for ensuring respect for the principles of freedom of association lies with the Government. It therefore once again urges the Government to take without further delay all necessary measures to enforce the recommendations and orders issued by the Bandung Manpower Office concerning the reinstatement of officers and members of the SPM at the Hotel Grand Aquila in Bandung. If reinstatement is not possible due to the time that has elapsed, the Committee requests the Government to ensure that these workers are paid adequate compensation so as to constitute a sufficiently dissuasive sanction against such acts. It further requests the Government to indicate concrete steps taken to implement the recommendations of the National Commission for Human Rights in relation to the present case and to indicate any court action taken by the District Attorney of Bandung or any sanction taken in relation to the allegation of infringement of freedom of association rights by the hotel management. It requests the Government to keep it informed in this respect.*
- 58.** *The Committee notes the Government's indication that it is conducting a review of Act No. 21 of 2000, the Committee expects that the necessary steps will be taken, in full consultation with the social partners concerned, to amend its legislation to ensure comprehensive protection against anti-union discrimination, providing for swift recourse to mechanisms that may impose sufficiently dissuasive sanctions against such acts. It requests the Government to provide information on steps taken in this regard to the*



*Committee of Experts on the Application of Conventions and Recommendations, to which it refers legislative aspects of this case.*

### **Case No. 2754 (Indonesia)**

**59.** The Committee examined this case at its March 2011 meeting and on that occasion made the following recommendations [see 359th Report, para. 683]:

- (a) The Committee requests the Government to provide information on the present employment status of Mr Muchlish, indicating whether he is still exercising his functions as Chairperson of the SEKAR–DPS and, if so whether he is granted access to the PT. DPS to enable him to carry out his representative function.
- (b) Noting the divergent views of the complainant and the enterprise set out in the Government’s reply concerning the motivation for the transfer of Mr Muchlish, the Committee requests that the Government encourage dialogue between the union and the enterprise on the employment status of Mr Muchlish including, but not limited to, the possibility of rehiring him in another post, should he so desire and should this be practicable.
- (c) The Committee requests the Government to keep it informed on any follow-up to the recommendation of the mediator of the Manpower Office of Surabaya City to the effect that the company revoke the suspension of Mr Arie Wibowo, General Secretary of the SEKAR–DPS, and 16 other members of the union committee and pay back wages.
- (d) As regards the indication from the Government that a negotiation is ongoing in the company concerning the reinstatement of the eight dismissed workers, the Committee requests the Government to make efforts to bring about a negotiated solution to this matter, particularly given the fact that, according to the Government, they were fired for having undertaken demonstrations in reaction to the firing of their Chairperson and for not changing their attitude, and in a context where, according to the complainant but not refuted in the Government’s reply, attempts to discuss the matter in dispute went unanswered by the management. The Committee requests the Government to keep it informed of any progress made in this regard.
- (e) The Committee requests the Government and the complainant to indicate whether the SEKAR–DPS is still organizing activities at the PT. DPS.
- (f) The Committee urges the Government to take steps, in full consultation with the social partners concerned, to amend its legislation to ensure comprehensive protection against anti-union discrimination in the future, providing for swift recourse to mechanisms that may impose sufficiently dissuasive sanctions against such acts. The Committee requests the Government to keep it informed in this regard.

**60.** In its communication dated 26 October 2011, the Government provides the following information obtained during a meeting which took place on 15 September 2011 between the Ministry of Manpower and Transmigration, Manpower and Transmigration Office of East Java province, and Manpower and Transmigration Office of Surabaya City. Mr Muchlish, not satisfied with the decision of the Industrial Relations Court dated 20 August 2010, filed an appeal with the Supreme Court. However, following a meeting with the management of the PT. Dok Dan Perkapalan Surabaya (PT. DPS), an agreement has been reached between Mr Muchlish and the company. Pursuant to this agreement, Mr Muchlish withdrew the appeal pending before the Supreme Court, as both parties agreed to resolve the dispute through an amicable settlement, and not to press any charges in the future, whether under the penal or the civil law. The Government recalls that pursuant to the 2010 decision of the Industrial Relations Court, Mr Muchlish was dismissed from the PT. DPS; therefore he is no longer the Head of the SEKAR–DPS.

- 61.** The Government further indicates that the Manpower and Transmigration Office of Surabaya City has conducted mediation between the management of the company and Mr Arie Wibowo and the other eight workers. However, as the discussion reached a dead end, on 29 December 2010, the mediator issued the following suggestion: pursuant to section 156(2) of Act No. 13 in Manpower (2003), a double severance pay should be paid by the company to the workers concerned, i.e. Mr Wibowo and the other eight workers; pursuant to section 156(3) of the same Act, workers should receive a reward for the employment period and a 15 per cent reimbursement pursuant to section 156(4); in addition, the company should pay full salary to workers during the period the workers were not employed. On 25 February 2011, the management conducted a separate meeting with Mr Wibowo and the eight dismissed workers during which an agreement was reached on the following:
- (1) both parties agree that the dismissal of workers takes effect on the day of the signing of the agreement, i.e. on 25 February 2011;
  - (2) both parties agree not to press any legal charges;
  - (3) the employer agrees and is ready to provide reference letters or statement of employment history as well as a gratification allowance in the amount agreed by both parties;
  - (4) the mutual agreement is made in good will to find the best amicable settlement allowing to maintain good communication and good relationship, without any intervention or pressure from either party.
- 62.** The Government further indicates that, while this union still exists, only several people remained to administer it.
- 63.** With regard to Act No. 21 on Labour Union (2000), the Government indicates that it is currently gathering the material and views of the social partners and independent institutions on the possible amendment of this Act.
- 64.** *The Committee notes the information provided by the Government. While the Committee notes that settlement agreements have been reached with Mr Muchlish, Mr Wibowo and the other eight dismissed workers, it regrets to note that the dismissal of the SEKAR–DPS Chairperson, Mr Muchlish, and its General Secretary, Mr Wibowo, resulted in the situation, where while the union “still exists, only several people remain to administer it”, as described by the Government. The Committee further regrets that no information has been provided with regard to other workers, suspended following their participation in the October 2009 strike. The Committee recalls in this respect that a mediator of the Manpower Office of Surabaya City recommended that the suspension be revoked and back wages be paid. The Committee therefore once again requests the Government to keep it informed of any follow-up to this recommendation.*
- 65.** *The Committee notes the Government’s indication that it is conducting a review of Act No. 21 of 2000, the Committee expects, as it did in Case No. 2737, that the necessary steps will be taken, in full consultation with the social partners concerned, to amend its legislation to ensure comprehensive protection against anti-union discrimination, providing for swift recourse to mechanisms that may impose sufficiently dissuasive sanctions against such acts. It requests the Government to provide information on steps taken in this regard to the Committee of Experts on the Application of Conventions and Recommendations, to which it refers legislative aspects of this case.*

**Case No. 2613 (Nicaragua)**

66. The Committee last examined this case regarding dismissals and transfers of trade union officials and members at its March 2011 meeting, and on that occasion it requested the Government to: (a) keep it informed of the outcome of the judicial proceedings pertaining to the dismissal of Alvin Alaniz González, Jazmín del Sagrario Carballo Soto and Rolando Delgado Miranda, of the Nicaraguan Social Security Institute (INSS); (b) keep it informed of the outcome of the current judicial proceedings initiated by the dismissed workers of the company ENACAL Granada; and (c) keep it informed of the final outcome of the judicial action for reinstatement of the trade union official, Ricardo Francisco Arista Bolaños, against the Directorate General of Revenues (DGI), which is currently in process before the First Labour Court of the Judicial District of Managua. Likewise, the Committee once again urged the Government to take measures, including legislative measures if necessary, to ensure that in the future responsibility for declaring a strike illegal lies with an independent body that has the confidence of the parties involved [see 359th Report, paras 923–946].
67. In a communication dated 17 October 2011, the Government indicates that: (1) a decision in first instance is currently pending for the judicial proceedings pertaining to the dismissal of Alvin Alaniz González, Jazmín del Sagrario Carballo Soto and Rolando Delgado Miranda, of the INSS; (2) no decision has been handed down for the judicial proceedings initiated by the dismissed workers of ENACAL Granada and the situation has not changed since the communication of 9 December 2010; and (3) a decision in first instance is pending for the judicial action for reinstatement of the trade union official, Ricardo Arista Bolaños, against the DGI, currently in process before the First Labour Court of the Judicial District of Managua.
68. *The Committee takes note of this information. Recalling that justice delayed is justice denied [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 105], the Committee expects the judicial authorities to hand down a decision shortly with regard to all the abovementioned cases and requests the Government to keep it informed in this regard.*

**Case No. 2383 (United Kingdom)**

69. The Committee last examined this case at its March 2011 meeting [see 359th Report, approved by the Governing Body at its 310th Session, paras 159–185]. On that occasion, the Committee noted with regret that little progress had been made with respect to its recommendation to improve the current mechanisms for the determination of prison officers' pay in England, Wales and Northern Ireland and on the establishment of appropriate mechanisms to compensate private custody officers in private sector companies for the limitation of the right to strike and once again requested the Government to vigorously pursue its efforts in this respect.
70. In its communications dated 15 November 2011 and 29 February 2012, the Government indicates that it has been working hard to ensure that adequate compensatory mechanisms are offered to prison officers in the public sector prison service. The Government assures that the National Offender Management System (NOMS) takes the issues lying behind the Committee on Freedom of Association report very seriously. The Government informs that since the last examination of this case, it has agreed on a new national disputes procedure with the Prison Officers' Association (POA), implemented from March 2011, which is running successfully alongside the local disputes procedure that was already in place. This disputes agreement provides access to binding arbitration where there is a failure to agree on proposed national changes to terms and conditions with regard to leave, ill health, grievances and disciplinary procedures or working arrangements (excluding pay, as that is

for the Prison Service Pay Review Body (PSPRB) to determine), which the Government considers an effective compensatory mechanism. Regarding other compensatory measures for officers in the public sector, the Government continues to work on ensuring that they are appropriate and operating well and with the confidence of all parties. Any changes invariably necessitate consultations across government departments and other stakeholders, which are currently ongoing.

71. The Government further indicates that NOMS and the POA have been involved in extensive and constructive negotiations on a package of wide-ranging workforce reform in prisons. Those negotiations were successful and resulted in the POA formally endorsing the proposals; the POA membership voted in favour of the reforms with a majority vote of more than 80 per cent. NOMS is extremely pleased with the progress made in fostering a positive relationship with the POA in recent months and hopes to continue working in partnership with the POA and all the NOMS trade unions.
72. The Government further informs that it is pursuing meetings with the three private contractors who currently manage prisons in the United Kingdom, with a view to analysing the existing compensatory mechanism for prison officers in the private sector and to consider whether any further changes are necessary.
73. Furthermore, under the second phase of the programme for offender custodial services and works and future prison competitions, a competition to run nine prisons is to be put out to tender. The relevant *Official Journal of the European Union* (OJEU) contract notice was issued on 21 October 2011. The OJEU highlighted that the issue of compensatory mechanisms for prison custody officers in respect of limitations on their ability to strike would be addressed through the competitive process.
74. In addition, full and genuine consideration is also being given to other recommendations of the Committee. This includes the consideration of changes aiming to ensure that all parties have faith in the independence of the PSPRB. The Government concludes by stating that NOMS considers the Committee's recommendations as being of the highest priority and that it will continue its work to address all legitimate concerns.
75. *The Committee notes the information provided by the Government with satisfaction. Observing that it has been dealing with this case since 2005 and has been requesting the Government to initiate consultations with the complainant and the prison service with a view to achieving a satisfactory solution to the need to provide for an appropriate mechanism to compensate for the strike prohibition, the Committee wishes to recognize the efforts made by all the parties concerned and commends the Government's desire to address the issues raised in this case. It encourages the Government to maintain full, frank and meaningful consultations with all interested parties in the future.*

#### **Case No. 2744 (Russian Federation)**

76. The Committee last examined this case at its March 2011 meeting and, on that occasion, it requested the Government to clarify whether the Federal Air Traffic Controllers' Union of Russia (FPAD) was allowed to recuperate all of its documents, seals and other property from the office it had previously occupied [see 359th Report, paras 193–197].
77. In its communication dated 15 February 2012, the Government confirms that the FPAD chairperson had been given the opportunity to collect all documents and other property from the office it had previously occupied.
78. *The Committee takes due note of this information.*

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79. 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>
1865 (Republic of Korea)	March 2009	March 2012
1962 (Colombia)	November 2002	June 2008
2086 (Paraguay)	June 2002	November 2011
2096 (Pakistan)	March 2004	March 2011
2257 (Canada)	November 2004	November 2011
2291 (Poland)	March 2004	March 2012
2292 (United States)	November 2006	November 2011
2301 (Malaysia)	March 2004	March 2012
2304 (Japan)	November 2004	November 2010
2355 (Colombia)	November 2009	March 2012
2356 (Colombia)	November 2009	March 2012
2361 (Guatemala)	November 2011	–
2382 (Cameroon)	November 2005	November 2011
2384 (Colombia)	June 2008	June 2009
2399 (Pakistan)	November 2005	June 2011
2400 (Peru)	November 2007	November 2011
2422 (Bolivarian Republic of Venezuela)	June 2011	–
2433 (Bahrain)	March 2006	March 2012
2450 (Djibouti)	March 2011	March 2012
2453 (Iraq)	June 2006	March 2012
2460 (United States)	March 2007	November 2011
2478 (Mexico)	March 2010	March 2011
2488 (Philippines)	June 2007	June 2011
2547 (United States)	June 2008	November 2011
2575 (Mauritius)	March 2008	March 2012
2602 (Republic of Korea)	March 2012	–
2611 (Romania)	November 2008	March 2012
2616 (Mauritius)	November 2008	March 2012
2634 (Thailand)	March 2009	March 2012
2652 (Philippines)	March 2010	–
2678 (Georgia)	June 2010	November 2011
2704 (Canada)	March 2012	–
2710 (Colombia)	November 2011	–
2717 (Malaysia)	June 2011	March 2012
2724 (Peru)	November 2010	November 2011
2741 (United States)	November 2011	–
2750 (France)	November 2011	–

Case	Last examination on the merits	Last follow-up examination
2751 (Panama)	March 2012	–
2752 (Montenegro)	March 2012	–
2755 (Ecuador)	June 2010	March 2011
2760 (Thailand)	March 2011	March 2012
2771 (Peru)	March 2011	November 2011
2780 (Ireland)	March 2012	–
2781 (El Salvador)	November 2011	–
2788 (Argentina)	November 2011	–
2789 (Turkey)	March 2012	–
2793 (Colombia)	November 2011	–
2804 (Colombia)	November 2011	–
2809 (Argentina)	March 2012	–
2819 (Dominican Republic)	March 2012	–
2825 (Peru)	November 2011	–
2831 (Peru)	November 2011	–
2834 (Paraguay)	November 2011	–
2837 (Argentina)	March 2012	–
2838 (Greece)	November 2011	–
2841 (France)	November 2011	–
2842 (Cameroon)	November 2011	–
2850 (Malaysia)	March 2012	–
2854 (Peru)	March 2012	–
2856 (Peru)	March 2012	–
2867 (Plurinational State of Bolivia)	March 2012	–
2868 (Panama)	March 2012	–
2875 (Honduras)	March 2012	–

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

**81.** In addition, the Committee has received information concerning the follow-up of Cases Nos 1787 (Colombia), 2153 (Algeria), 2228 (India), 2229 (Pakistan), 2241 (Guatemala), 2268 (Myanmar), 2362 (Colombia), 2400 (Peru), 2428 (Bolivarian Republic of Venezuela), 2430 (Canada), 2434 (Colombia), 2488 (Philippines), 2512 (India), 2527 (Peru), 2533 (Peru), 2559 (Peru), 2590 (Nicaragua), 2594 (Peru), 2595 (Colombia), 2603 (Argentina), 2637 (Malaysia), 2638 (Peru), 2639 (Peru), 2652 (Philippines), 2654 (Canada), 2660 (Argentina), 2664 (Peru), 2667 (Peru), 2674 (Bolivarian Republic of Venezuela), 2677 (Panama), 2679 (Mexico), 2680 (India), 2685 (Mauritius), 2690 (Peru), 2695 (Peru), 2697 (Peru), 2699 (Uruguay), 2701 (Algeria), 2703 (Peru), 2719 (Colombia), 2722 (Botswana), 2724 (Peru), 2725 (Argentina), 2730 (Colombia), 2733 (Albania), 2736 (Bolivarian Republic of Venezuela), 2746 (Costa Rica), 2747 (Islamic Republic of Iran), 2757 (Peru), 2764 (El Salvador), 2771 (Peru), 2775 (Hungary), 2795 (Brazil), 2818 (El Salvador), 2832 (Peru), 2836 (El Salvador) and 2843 (Ukraine), which it will examine at its next meeting.

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CASE NO. 2847

DEFINITIVE REPORT

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

- **the Confederation of Workers of Argentina (CTA)**
- **the Trade Union Federation of Health Professionals of the Argentine Republic (FESPROSA) and**
- **the Trade Union Association of Health Professionals of Buenos Aires Province (CICOP)**

*Allegations: The complainant organizations allege that the authorities of Buenos Aires Province are obstructing the exercise of the right to strike by ruling that absences of provincial government employees resulting from the exercise of the right to strike will be subject to salary deductions; the complainants also allege undue delays in the processing of the application for legal recognition submitted by FESPROSA*

- 82.** The complaint is contained in a communication dated April 2011 from the Confederation of Workers of Argentina (CTA), the Trade Union Federation of Health Professionals of the Argentine Republic (FESPROSA) and the Trade Union Association of Health Professionals of Buenos Aires Province (CICOP). FESPROSA and the CTA presented new allegations in a communication dated 29 June 2011.
- 83.** The Government sent its observations by communication received on 23 May 2012.
- 84.** 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. The complainants' allegations**

- 85.** In their communication dated April 2011, the CTA, FESPROSA and CICOP state that they are submitting a formal complaint against the Government of Argentina for the violation of Convention No. 87 through actions that restrict the right to strike and are discriminatory.
- 86.** The complainants state that CICOP is a first-level trade union, legal registration No. 1708, whose scope of activity covers the whole territory of Buenos Aires Province. CICOP is affiliated to FESPROSA (a second-level organization, legal registration No. 2580) and the CTA (a third-level organization, legal registration No. 2027).
- 87.** According to the complainants, the present complaint is in response to conduct of the Government of Buenos Aires Province that violates the rights established in ILO Conventions Nos 87, 98, 135, 151 and 154. The complainants consider that the following violations have occurred:

- (a) The Ministry of Health of Buenos Aires Province, by decision No. 4575/09 of 27 November 2009, issued a threat, without any authority to do so, in response to the direct industrial action undertaken by the unions in the hospitals and health centres of the province, that it would impose salary deductions on workers who took part in strike days, thereby impinging on the free exercise of the right to strike, in clear violation of the legislation in force and the principles of the ILO. In this way, it violated the right to decide whether or not to participate in the strike action called by the trade union.
- (b) On 16 March 2011, in the context of union action called by CICOP, the Provincial Directorate of Hospitals, which comes under the Ministry of Health of Buenos Aires Province, sent a memorandum to the directors of all hospitals in the province requesting them to state which workers among those whose names appeared on a list – consisting exclusively of CICOP members – were working as normal, with a view to taking disciplinary measures against those who were reported as failing to do so. According to the complainants, this constitutes clear interference and harassment with regard to the union and its members.

- 88.** The complainants report that, on 27 November 2009, the Executive Authority of Buenos Aires Province, by joint decision of the Chief of the Cabinet of Ministers (No. 949), the Minister of Government (No. 47), the Minister for Economic Affairs (No. 248), the Minister for Justice (No. 1525), the Minister for Security (No. 1930), the Minister for Production (No. 447), the Minister for Agriculture (No. 85), the Minister for Infrastructure (No. 898), the Minister for Social Development (No. 183), the Minister for Labour (No. 288), the Secretary-General for Governance (No. 199), the Secretary for Human Rights (No. 701), the Secretary for Sport (No. 275), the Secretary for Tourism (No. 269), the Executive Director of the Provincial Organization for Sustainable Development (No. 126), the President of the Institute of Culture (No. 1166) and the Director-General for Culture and Education (No. 3705), ruled that “... the absences of provincial government employees resulting from the exercise of the right to strike and not justified on any of the grounds established by the regulations in force will be subject to salary deductions for the month in question ...”. According to the complainants, the arbitrary and intimidatory approach on the part of the authority constitutes an obstruction to the regular exercise of the legally protected right to strike. It also impinges on the collective and individual will of those supporting the strike measures called by the trade union.
- 89.** The union action taken by CICOP on various occasions related to pay disputes and to talks concerning the working environment and conditions of work for all health professionals in Buenos Aires Province. The aforementioned action can take various forms, including assemblies, protests and strikes. It is at the assemblies that decisions are taken regarding the duration and nature of the action, and this information is then duly communicated to the relevant bodies. To date, the forceful measures taken have not been described as illegal by any judicial authority. In this context, the provincial Executive, far from trying to settle the dispute through negotiation, is seeking to delay any solution and has adopted an intimidatory measure which violates the legitimate right to strike.
- 90.** The complainants assert that since the adoption of the abovementioned decision and until very recently, the Government of Buenos Aires Province effected salary deductions for strike days in just a few specific and limited cases but refrained from doing so systematically and en masse in view of the various labour disputes and union action measures that occurred in that period. The threat to do so in future is clearly intended to restrict the exercise of the right to strike, undoubtedly in the awareness of the intrinsic illegality of the measure. However, the situation has now changed drastically. As part of a labour dispute which started in early March 2011 and because of the failure to reach agreement on salaries during collective bargaining in the sector, the CICOP congress of



delegates decided to take union action in all hospitals in the province on 16 and 17 March 2011, with further action to follow if no agreement was reached. In response to this, the day before the action (15 March), the Provincial Directorate of Hospitals – which comes under the Ministry of Health of Buenos Aires Province – sent a memorandum to the directors of all hospitals under its authority, stating that the Ministry, pursuant to decision No. 4574/09, would affect salary deductions from employees taking part in the union action called by CICOP. The complainants reiterate that no provincial or national administrative authority for labour matters has instructed CICOP to abandon its measures and engage in negotiations. The measures which have been implemented have not been deemed illegal by any judicial authority.

- 91.** On 17 March, the President of CICOP sent a letter to the Minister of Health of Buenos Aires Province and to the Provincial Director of Hospitals, which read as follows:

We have taken note of a memorandum issued on 15 March 2011 by the Provincial Directorate of Hospitals of this Ministry, informing the authorities of various hospitals in the province that the relevant department will make salary deductions from employees who take part in the union action planned by CICOP for 16 and 17 March. The purpose of the present letter is to point out to the Minister that such a measure is based on grounds that are legally erroneous and therefore unconstitutional, so that you may review the decision and cancel the illegal deduction measure proposed therein. According to the correct legal view, which we hereby uphold, strike days cannot be deemed equivalent to days not worked, as if it was a question – among other things – of a unilateral decision made by the health workers. It is not an arbitrary act of volition; a strike is a measure to which we, the health workers, are bound to have recourse in view of the lack of a solution to the labour and public welfare issues raised by our sector. The right to strike exists without any limitations or restrictions and it cannot be deemed equivalent, as incorrectly claimed in the measure referred to above, to individual absence from work. While the first type of action, of a collective nature, is governed primarily by the National Constitution and the Constitution of Buenos Aires Province, and also by ILO Convention No. 87 and others related to it, the second type of action, of an individual, isolated and sporadic nature, of not attending work, whether in the public or private sector, which consequently does not qualify for remuneration, is governed by individual labour law and public or private employment laws, as the case may be. The strike with assemblies in the workplace which we are obliged to conduct is the result of non-compliance by the provincial Government, our employer, which you represent, in particular with the provisions of the law governing employer–worker negotiations, as well as with article 39 of the Constitution of Buenos Aires Province, a fact that can solely be ascribed to the State. Local and national jurisprudence, in the cases of teachers, government employees and officials of the judiciary, repeatedly and systematically support the obligation of the State to refrain from making salary deductions for strike days, on the basis of the legal grounds set forth above. For all the above reasons, Minister, we call for the review that this case would appear to merit. We hope to be informed within 24 hours of receipt of the present communication that the erroneous and illegal approach in ordering deductions for strike days has been modified. Your silence with regard to our request will be construed as a refusal in legal terms, and recourse will be had to the corresponding legal channels in order to secure application of the National Constitution and the Constitution of Buenos Aires Province (CD Nos 177535870 and 177535883, copies of which are attached).

- 92.** To date, no reply to these communications has been received. Meanwhile, on 16 March, while the union action was taking place as planned, the Provincial Directorate of Hospitals sent a new memorandum to all hospital directors, ordering them to provide, the following day, a list of the employees who were exercising their legitimate constitutional right to strike, with a view to making salary deductions. The memorandum read as follows:

With reference to note No. 1, please find attached the list of professionals in your department. Kindly send particulars of workers on active duty or on call on 16 and 17 March. Any persons off duty or on vacation, or on sick leave, ART leave [for occupational accident or disease] or any other official leave that constitutes an exemption from any deduction, should

be taken off the list. The non-extendable deadline for providing this information, in order to avoid the imposition of deductions, is 11.00 hours on 18 March 2011.

According to the complainants, this memorandum, which is already of a serious nature since the publication of the text amounted to a threat against fully exercising the right to strike, can only be described as blatant discrimination, inasmuch as the memorandum came with a list containing only the names of union members, so that each director would remove from the list those who were working as normal and those who were on leave, off duty, etc. with a view to subsequently deducting pay from all staff on the list about whom no information had been supplied.

- 93.** In other words, in order to determine which workers should be subjected to the illegal salary deduction, the Ministry of Health takes it for granted that only CICOP members take part in union action – when in reality such action usually has total support from health professionals in the province, whether or not they are union members – and also presumes that all members take part in union action unless evidence is provided to the contrary.
- 94.** The complainants state that, in view of this escalation of the dispute, the President of CICOP sent a letter to the Minister of Labour, Employment and Social Security, which read as follows:

On the day concerned, the Minister of Health of Buenos Aires Province sent a circular to all directors of hospitals under his authority ordering them to provide, the following day, a list of employees who were exercising their legitimate constitutional right to strike. This memorandum, which is already of a serious nature since the publication of the text amounts to a threat against fully exercising the right to strike, can only be described as blatant discrimination, inasmuch as the circular came with a list containing only the names of members of our union. I call on the authority that the State has conferred on you to find the means to preserve the exercise of the rights established in the National Constitution with regard to labour matters and we request you to adopt the corresponding measures to stop this illegal conduct, since the threat of deductions, together with the dispatch of a specific list of workers who would then be liable to such harassment, constitutes conduct that is no longer governed by the rule of law. Without prejudice to the above, our union has its own contribution to make, taking the corresponding legal action against those responsible for the intimidatory text, and also personally against those in the hospitals who implement the illegal instructions.

According to the complainants, the Minister of Labour has not yet replied to this letter.

- 95.** According to the complainants, in decision No. 4575/09, the Ministry of Health of Buenos Aires Province states that “the absences of provincial government employees resulting from exercise of the right to strike and not justified on any of the grounds provided for by the regulations in force will be subject to salary deductions for the month in question ...”. The interference of the provincial Executive, obliging those in charge of hospital units to send a copy of the list of CICOP members, and the threat to make salary deductions for strike days imply a clear violation of freedom of association, and of the right to strike and to engage in collective bargaining, inasmuch as the strike is part of the context of negotiations concerning pay and conditions of work.
- 96.** The complainants add that this deduction is a form of retaliation and an indication of what must be regarded as a discriminatory penalty, being imposed on persons exercising what is constitutionally defined as a fundamental right. This is incompatible with Convention No. 87, as are the threat of pay deductions from workers for taking part in a strike and the intimidatory request, the day before the strike, for a list of members of the union calling the strike.

97. In their communication of 29 June 2011, FESPROSA and the CTA state that FESPROSA is a second-level organization registered as a union since 2007 with a membership of 25,000 public health professionals in 22 provinces. The complainants indicate that the application procedure for legal recognition of FESPROSA began on 28 July 2008, file No. 1-2015-1284154, the constitution being signed by three legally recognized associations: the Association of Health Professionals of Buenos Aires Province, the Association of Health Professionals of Mendoza and the Association of Health Professionals of Salta Province.
98. The complainants add that the National Directorate of Trade Union Associations referred the application to the Federation of Health Workers' Associations (FATSA), which asked for clarification of the scope of activity of FESPROSA. The latter duly replied, clarifying the scope of the legal recognition requested. FATSA sent a further request, asking for details of the scope of territory and membership, and opposed the recognition requested by FESPROSA, asking for a list of members, in order to determine which was the most representative body. FESPROSA explained that it was not seeking to incorporate all health workers but just those workers with university qualifications who were employed in public establishments, and hence was not seeking to displace FATSA, and so the latter's request for the list was not appropriate.
99. According to the complainants, it should be noted that in the application for legal recognition from FESPROSA there is no need to determine which is the "most representative" body since there is a "radial ascending" system which reflects the recognized status of first-level organizations (primary trade unions) in that of second and third-level organizations (federations, confederations or congresses), and so the latter comprise the combined representative natures of their member unions. Hence there is no reason why the Government should refuse the requested trade union recognition, especially when that criterion was already applied on many occasions by the Ministry of Labour, Employment and Social Security.
100. The complainants state that after analysing the granting of legal recognition to each of the member organizations of FESPROSA, the National Directorate of Trade Union Associations issued a decision on 6 May 2010 advising that the application for legal recognition from FESPROSA should be accepted. On 17 May 2010, the Secretariat of Labour endorsed this opinion and referred it to the Minister of Labour with the draft decision granting legal recognition as a second-level trade union to FESPROSA. The same day, 17 May 2010, the file was referred to the office of the Chief of Cabinet of the Ministry of Labour, where it has remained pending until now, despite a request being made on 9 December 2010 for the matter to be dealt with promptly, no reply having been received to date.
101. In conclusion, the complainants state that without any doubt the Government is committing recurrent violations of Article 3 of ILO Convention No. 87, inasmuch as it is systematically restricting the workers' right to organize, in this case by failing to grant the legal recognition requested by FESPROSA.

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

102. In its communication received on 23 May 2012, the Government forwards the response of the Ministry of Health of the Province of Buenos Aires and indicates that it does not arise from the course of events and the initiated negotiations that salary deductions for non-worked days due to the exercise of the right to strike amount to a negation or restriction of the right to strike.

### C. The Committee's conclusions

- 103.** *The Committee observes that in the present case the complainant organizations challenge decision No. 4574/09 adopted by the authorities of Buenos Aires Province stating that the absences of provincial government employees resulting from the exercise of the right to strike and not justified on any of the grounds provided for by the regulations in force will be subject to salary deductions for the month in question. The complainants allege that as part of a labour dispute it was decided to take industrial action on 16 and 17 March, with further action to follow until such time as an agreement was reached in all the provincial hospitals, and that the Provincial Directorate of Hospitals, one day before the start of the action, sent a memorandum to all hospital directors stating that pursuant to the aforementioned decision it would make salary deductions with respect to employees who took part in the union action (according to the complainants, the day after the start of the union action, the authorities requested the hospital directors in a new memorandum to provide a list of the staff exercising the right to strike). The Committee observes that the complainants claim that the dispatch of the abovementioned memoranda amounted to a threat to full enjoyment of the right to strike and was discriminatory in nature inasmuch as the full list of union members was also attached so that each hospital director could remove from the list those who were working as normal.*
- 104.** *While observing that, according to the allegations, the complainants carried out the strike and noting that they were aware of the text of decision No. 4574/09 and the decision of the Provincial Directorate of Hospitals to the effect that deductions would be made for strike days, and also that the strike was not deemed illegal by the judicial authority, and that the Government indicates that it does not arise from the course of events and the initiated negotiations that salary deductions for non-worked days due to the exercise of the right to strike amount to a negation or restriction of the right to strike, the Committee recalls that it has pointed out on several occasions 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]. In these circumstances, the Committee will not pursue the examination of these allegations. The Committee nevertheless recalls that, according to the allegations, the wage deductions were carried out or threatened to be carried out only in respect of the trade union members and not the other strikers. The Committee emphasizes that this would be contrary to freedom of association principles and therefore requests the Government to examine these questions with the social partners so as to ensure respect for the principle of non-discrimination among workers.*
- 105.** *As regards the allegations that the labour administrative authority has not responded to the application for legal recognition submitted by FESPROSA in July 2008, despite the fact that the National Directorate of Trade Union Associations and the Secretariat of Labour gave their approval in May 2010, the Committee regrets the delay of nearly four years and urges the Government to make a decision without further delay in this regard.*

### The Committee's recommendation

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

*The Committee urges the Government to make a decision without further delay regarding the application for legal recognition submitted by FESPROSA.*

CASE NO. 2865

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

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

***Allegations: The complainant organization challenges the decision of the administrative authority dated 6 December 2010 invalidating the convocation and holding of supplementary elections within the CTA***

- 107.** The complaint is contained in a communication from the Confederation of Workers of Argentina (CTA) dated April 2011. The CTA sent additional information in a communication dated 30 January 2012.
- 108.** The Government sent its observations in communications dated 11 August, 3 November 2011 and 15 May 2012.
- 109.** 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. The complainant's allegations**

- 110.** In its communication of April 2011, the CTA, a third-level organization of trade unions and workers, states that it recently held leadership elections which gave rise to interference from the Ministry of Labour, Employment and Social Security (MTESS) (Ministry of Labour). Specifically, the CTA states that its complaint constitutes a challenge to the decision of 6 December 2010 of the Trade Unions Directorate at the Ministry of Labour (file No. 1407454/10) invalidating, for reasons cited in the decision, the convocation and holding of supplementary elections within the CTA on 9 December 2010. The aforementioned decision states that the basis for holding the meeting of the national executive committee at that office on 25 November 2010 with the attendance required by the (union) regulations and for convening supplementary elections to be held on 9 December 2010 in the form prescribed by the aforementioned constitution was not correctly established, and so the validity thereof cannot be recognized owing to non-compliance with the regulations.
- 111.** The CTA states, in accordance with the facts which, in its view, represent a violation of Convention No. 87, that for the purpose of convening elections to renew the leadership of the CTA at national, local and regional level, an agreement was concluded on 14 September 2010 between lists 1 and 10 – which both had official authorization to take part in the elections – and the national electoral board to accept arbitration and the establishment of an autonomous tribunal for the settlement of electoral disputes in order to resolve any disputes that might arise between the lists of candidates in the leadership elections due to be held on 23 September 2010. In this way, union autonomy would be protected and there would be no involvement on the part of the labour administrative authority or any other body of the administration (Ministry of Labour) in internal union or electoral disputes. After the elections went ahead on the aforementioned date, the results

for some entire districts and for certain polling stations in other districts were the subject of challenges by lists 1 and 10, initially made to the national electoral board as the authority supervising the elections and subsequently, in accordance with the signed agreement, to the autonomous tribunal established by that agreement.

- 112.** The CTA indicates that, as a result of the various decisions issued by the autonomous tribunal for the settlement of disputes further to the challenges from both lists, supplementary elections were due to be held in the districts of Misiones, Tucumán and Mendoza and at 50 polling stations in another seven districts. According to the CTA, the voting which took place in the aforementioned polling stations and districts and was declared null and void by the autonomous tribunal represented only 10 per cent of the polling stations that took part in the elections on 23 September 2010, the results from the remaining 90 per cent of polling stations and districts remaining unchanged in accordance with the decision of 22 October 2010 of the national electoral board; this was not contested by lists 1 and 10 and, following the obvious deduction of the annulled results, yielded a difference of 11,453 votes in favour of list 1. With respect to the appeals that each list lodged with the autonomous tribunal in due course, the latter ruled that the results obtained in the abovementioned districts should be null and void and that, inasmuch as the void results could alter the final result and to meet the requirements of the national electoral board, the CTA national executive committee should convene supplementary elections in due time and form.
- 113.** The CTA draws the attention of the Committee on Freedom of Association to the fact that, under the regulations of the CTA, the only body with authority to convene elections and, consequently, supplementary elections is the national executive committee (section 30). On this basis and in conformity with the ruling of the autonomous tribunal, the national electoral board (JEN), by an official notification dated 25 October 2010, convened a meeting of the national executive committee to be held at 12 p.m. on 1 November 2010, stating in the notification that the meeting was pursuant to the ruling of the CTA autonomous tribunal for the settlement of electoral disputes, its purpose being that the committee would consider convening supplementary elections for the national leadership in some provinces and polling stations, in accordance with the majority pronouncements of the tribunal. On the same day (1 November 2010), the notary Ms Gabriela Rúa Peñavera established a formal record of the attendance of 17 members of the national executive committee and of their approval of the proposal made by Mr Pablo Micheli to convene supplementary elections for 24 November 2010. The meeting, which was convened by the national electoral board pursuant to the ruling of the tribunal, was not attended by the members of the national executive committee who had stood for election on 23 September 2010 as list 10 candidates, including the general secretary whose term of office had expired, Mr Hugo Yasky.
- 114.** The CTA states that regardless of the fact that those attending the meeting approved the convening of supplementary elections for 25 November 2010, the choice was made to continue seeking agreements with the members of list 10 in order to complete the elections on the same basis of consensus as in the first part. On account of the complexity involved, there would be a need to harmonize modes and forms of composition relating to the various disputes that could arise in the different districts. Following intensive negotiations, it was agreed between the members of lists 1 and 10 that supplementary elections would be held on 9 December 2010. As a result of this agreement and in view of the approaching end of the academic year (a settlement of the dispute was urgently needed since teachers comprise the membership of the first-level trade union to which the list 10 candidate belongs), Mr Hugo Yasky, the former general secretary, sent a registered letter convening a new meeting of the national executive committee to be held on 25 November at CTA national headquarters. The date already having been agreed, the registered letter reaffirmed the proposal to hold supplementary elections on 9 December 2010.

- 115.** The registered letter sent to each of the members of the national executive committee, summoning them to attend the meeting of 25 November 2010, already specified the date of 9 December 2010 for the supplementary elections. In this context, on 25 November 2010, the persons summoned by Mr Hugo Yasky met at the established time (4 p.m.) at the union headquarters and waited for 30 minutes before starting the meeting. Hence, on 25 November 2010, it was decided to convene supplementary elections in accordance with existing agreements and to set the date of 9 December 2010 for the elections, as proposed by Mr Hugo Yasky. The decision reached at the national executive committee meeting was referred to the national electoral board so that it could issue the convocation for supplementary elections for 9 December 2010. On 28 and 29 November 2010, the convocation for these supplementary elections was published in the *Diario Crónica*, a national newspaper. The national electoral board then issued decisions dated 26 November and 1 December 2010 giving notice of the elections to be held as supplement to those of 23 September 2010.
- 116.** The CTA alleges that the former general secretary (Mr Hugo Yasky) surprisingly called a new meeting of the executive committee for 9 December 2010, the date set for the supplementary elections. At that meeting the secretariat and members ratified the supplementary elections by a 16–15 vote. Thus, at the 9 December 2010 meeting attended by 31 members, the supplementary election process was upheld and, as a preventive measure should there be any suggestion of the slightest procedural flaw in the convocation issued by the national executive committee at its meeting of 25 November 2010, any potential technical defect was completely rectified, recognition thus being given with formal rigour and scrupulousness to the democratic electoral will of the CTA membership, especially those who exercised their right to vote in the elections of 23 September 2010 and the supplementary elections of 9 December 2010.
- 117.** Prior to the abovementioned meeting of the national executive committee endorsing all decisions taken at the meeting of 25 November 2010, Mr Pablo Micheli, the outgoing deputy secretary and general secretary elect of the CTA, was notified on 3 December 2010 of the opposition made by Mr Hugo Yasky to the challenge to the certification of leadership claimed to have been unlawfully extended as of 2 November 2010 by the Ministry of Labour, which had prolonged the expired terms of office of the members of the national executive committee “pending the assumption of office by the leaders elected in the convened elections”. In the aforementioned submission Mr Hugo Yasky, apart from opposing the challenge to the certification of leadership issued by the Ministry of Labour, applied for an “administrative declaration of judicial ineffectiveness of the electoral convocation issued by list 1”. The CTA adds that further to the completion of the supplementary elections on 9 December 2010, the national electoral board conducted a definitive scrutiny on 14 December 2010 of the supplementary elections of the CTA, which had been convened on 28 November 2010, held on 9 December 2010 and won by list 1 (led by Mr Micheli). The national electoral board then announced the appointment of the elected candidates, installing the members of the national executive committee in office. It should be noted that the aforementioned action of the national electoral board was recorded in notarial deed No. 131 of 14 December 2010.
- 118.** The CTA alleges that the decision of the Ministry of Labour of 6 December 2010 constitutes an act of interference on the part of the Ministry. Specifically, this decision states that the basis for holding the meeting of the national executive committee at that office on 25 November 2010 with the attendance required by the (union) regulations and for convening supplementary elections to be held on 9 December 2010 in the form prescribed by the aforementioned constitution was not correctly established, and so the validity thereof cannot be recognized owing to non-compliance with the regulations. The Ministry of Labour does not have competence for the matter which is the subject of the administrative act issued in the light of articles 14bis (guarantee of free and democratic

trade union organizations) and 75(22) of the National Constitution inasmuch as, since the reform of 1994, a series of international human rights instruments recognized as having constitutional status have been incorporated into the latter (including ILO Conventions Nos 87 and 98, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights). Article 3 of Convention No. 87 establishes the right of workers' and employers' organisations to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. Accordingly, the public authorities must "refrain from any interference which would restrict this right or impede the lawful exercise thereof".

- 119.** The CTA points out that these rules of interpretation are no different from those confirmed by the Supreme Court of Justice of Argentina in the recent *ATE* and *Rossi* cases, definitively consolidating the method of application of freedom of association in domestic law with the scope recognized in the international sphere by the ILO supervisory bodies. According to the CTA, all the above clearly shows the obstacles that would deny any competence to the Ministry of Labour to establish itself as the supervisory body for trade union elections in general, and it is therefore the labour courts that have competence to deal with this matter.
- 120.** In conclusion, the CTA affirms that the Ministry of Labour has no competence to deal with its electoral process. The Ministry has violated freedom of association as delineated by the Supreme Court of Justice in the light of the principles stated above and the views expressed on numerous occasions by the ILO supervisory bodies, the guarantees laid down by articles 14bis (guarantee of free and democratic trade union organizations) and 75(22) of the National Constitution, ILO Conventions Nos 87 and 98, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. In addition, this administrative authority has declared its lack of competence in this specific case through the observations made in relation to the approval of the amendments to the CTA regulations concerning extension of the categories of workers eligible for membership and direct affiliation as a legitimate mode of acquiring member status.
- 121.** The CTA indicates that all of the above clearly shows that the full observance and real validity of the guarantee of freedom of association, of the principle of non-interference and of the right of trade unions to elect their representatives in full freedom is only compatible with a system of legal supervision implemented by independent bodies. In the case of the Argentine legal system, the only independent body is the national judiciary.
- 122.** The CTA reiterates that the issue here is of supplementary elections ordered by an autonomous tribunal appointed by lists 1 and 10 and endorsed by the CTA national electoral board. Accordingly, such elections could only take place as part of the electoral process of which 90 per cent had been completed and which required for its completion supplementary elections in three districts (Misiones, Tucumán and Mendoza) and in 50 polling stations (of another seven districts) where the results had been declared null and void by the tribunal whose decisions were binding for lists 1 and 10 and also for the national electoral board, which was one of the signatories of the agreement through which it came into existence. It should be noted that the Ministry of Labour has competence for acts of registration, and it is in this connection that it was notified of the elections of 23 September and the supplementary elections of 9 December. In an act of deliberate confusion, aware of the incompatibility with freedom of association and of the views of the ILO supervisory bodies, the act of interference in question is that the 7 December 2010 decision of the Trade Unions Directorate at the Ministry of Labour was included in the notification sent to the authority for registration of the electoral process.



- 123.** The CTA also refers in this specific case, in addition to the above, to the exclusion of competence decided on by lists 1 and 10 with respect to the autonomy of the CTA, which resulted in them signing, on 14 September 2010, the agreement to accept arbitration and to establish the autonomous tribunal for the settlement of electoral disputes in the CTA. This states, *inter alia*, that one of the founding principles of the CTA is the strict respect for autonomy, which is reflected in its regulations and its history and has been incorporated as a value in all its structures. In terms of purpose, both lists state explicitly that the protection of the autonomy of associations in electoral matters has been explicitly recognized by the ILO and a key consequence of this is non-interference by the labour administrative authority or any government body (Ministry of Labour, Employment and Social Security) in inter-union and electoral disputes.
- 124.** The CTA indicates that despite the pledges to respect autonomy and avoid intervention from the Ministry of Labour and the judiciary made by the two most representative strands of the CTA at the time of the leadership elections (lists 1 and 10), the former general secretary instituted legal proceedings to have the supplementary elections held on 9 December 2010 declared null and void, the competent body being National Labour Court No. 26. This involved an application for an innovatory protective measure suspending the assumption of office prescribed by the CTA national electoral board. This measure was rejected and there was no appeal from the plaintiffs. It is our understanding that pending a judicial ruling revoking the autonomous decision of the national electoral board, that decision remains fully in force and must be implemented and complied with. However, the Ministry of Labour continues to recognize the members whose term of office has expired as the CTA leadership, on the basis of an extended term of office and a provisional certification of leadership. It should be noted that the object of this request for intervention is concerned exclusively with the decision of the Trade Unions Directorate at the Ministry of Labour (file No. 1407454/10) invalidating, for reasons cited in the decision, the convocation and holding of supplementary elections within the CTA on 9 December 2010.
- 125.** The CTA states that the subject of the complaint is not an internal dispute within the union: on the contrary, it addresses the act of interference from the Ministry of Labour which undermines the autonomy of the CTA. Finally, the complainant organization sends a copy of the ruling issued by the Labour Court of First Instance, rejecting the action seeking to quash the decision to convene the supplementary elections held on 9 December 2010.
- 126.** In its communication of 30 January 2012, the CTA reiterates that the case refers exclusively to the intervention of the Ministry of Labour of 6 December 2010, in which the political authority questions the legitimacy of convening supplementary elections. In no way is the complaint concerned with the extension unlawfully granted by the Ministry of Labour to the leadership whose term of office had expired. The CTA states that on the basis of the jurisprudence of the Committee, the national electoral board decided to provisionally install in office the leadership elected on 23 September 2010 and in supplementary elections on 9 December 2010. The second-instance ruling of Division No. 4 of the National Labour Appeals Chamber overturning the first-instance ruling of Court No. 26 was appealed against in a complaint to the Supreme Court of Justice in view of the rejection of the extraordinary appeal. Under Argentine procedural legislation, an appeal does not have a suspensory effect until the court rules on its viability. To date, no such ruling has been issued. The CTA alleges that throughout this time no action was taken with a view to a further convocation of supplementary elections.
- 127.** According to the CTA, the list defeated in the elections has no intention of convening elections, which would thus enable the CTA to return to normal. The CTA considers that the new facts are as follows: (1) the filing of the appeal with the Supreme Court seeking revocation of the ruling of the National Labour Appeals Chamber; and (2) the installation of the leadership in office pending a definitive decision by the national electoral board.

**B. The Government's reply**

- 128.** In its communications dated 11 August and 3 November 2011, the Government states that, firstly, the submission of a complaint needs to be made in accordance with the procedural rules of the Committee on Freedom of Association and the principles of public international law relating to labour matters. The ILO supervisory system does not recognize individual submissions, only collective ones. Any issue examined in this international forum must have the backing of a trade union organization or group of workers which the Committee considers sufficient to be regarded as an organization. In this case none of the requirements have been met, since the complainant does not have the status of elected representative of the CTA on account of the judicial circumstances surrounding the actions described, a situation which has not been resolved by the justice system. Therefore this lack of official backing is not in conformity with international law. Moreover, this issue corresponds to the sphere of public international law and consequently follow-up action must be taken by the supervisory bodies, with no admittance of the discretionary powers of the Committee on Freedom of Association in the treatment thereof, since this is an exceptional situation involving self-limitation of the sovereignty of States – article 53 of the Vienna Convention; according to the Treaty of Versailles, States are only obliged to respond if required to do so by an organization of workers, international bodies not being obliged to deal with individual cases. Because of the above, prior to any proceedings, the complainant must rectify the abovementioned omission in order to be in conformity with the provisions of international law relating to disputes. The Argentine State refuses to deal with the case until such action is taken, without prejudice to the reply set forth below.
- 129.** The Government sends the second-instance ruling relating to “*Confederation of Workers of Argentina (CTA) v. Electoral Board – amparo proceedings*” (Case No. 51.586/2010), in which Division No. 4 of the National Labour Appeals Chamber overturned the first-instance ruling of National Labour Court No. 25. Accordingly, the appeals court ordered the revocation of the decision in point I of the appealed ruling and upheld the application of the CTA requesting the supplementary elections held on 9 December 2010 to be declared null and void.
- 130.** In the Government's view, the foregoing confirms what it has stated repeatedly concerning alleged unofficial intervention by the Government in the CTA elections: namely, that the democratic institutions of the country are wholly functional, and this implies judicial scrutiny of acts of government.
- 131.** The Government affirms that the intervention of MTESS (Ministry of Labour) was legitimate and respected collective autonomy in conformity with Convention No. 87 on freedom of association because the Ministry of Labour intervened at the request of one of the parties involved in accordance with section 56 of Act No. 23551 – a legal provision that was never questioned by the ILO central bodies. The intervention was legitimate because the competence of the “autonomous arbitration tribunal” established by the parties, having reached the limits of its competence, declared its task to be completed and ordered its self-dissolution on 17 November 2010. There is a legal obligation for the administration and for those administrated, namely to protect the property of associations that find themselves without leadership. The Government indicates that section 1969 of the Civil Code states that any person whose term of office has expired is obliged to continue his activities in the form of maintenance tasks, otherwise he will be held liable for damages in the event of dereliction of duty; consequently, the action taken by the Ministry was also for the benefit of all the parties concerned. The Government has an obligation to fulfil its legal duty. The continuation of duties in the form of maintenance tasks following expiry of a term of office requires administrative authorization. Consequently, the State also has the obligation to adopt measures to maintain the assets of the organization. The decision that

extended the term of office of Mr Yasky was restricted to essential institutional acts to comply with the requirements of the legislation, which is the general criterion applied by the Ministry of Labour in similar situations.

- 132.** The Government points out that the decision to extend the term of office issued by the Ministry of Labour and validated by the judiciary was objective because it provides for the extension of all terms of office, the purpose being, precisely, not to interrupt the working of the organization. This conduct on the part of the administration is in accordance with Article 8(1) of Convention No. 87. Both parties validated the intervention, recognizing this competence because all the elections of the organization were subject to scrutiny by the Ministry of Labour.
- 133.** The Government indicates that this legitimacy – apart from being based on the administration’s own powers and the obligation of the outgoing executive committee – and the correct conduct of the Ministry derives from adequate judicial scrutiny of acts of government since the Argentine system is among the most rigid and militant and the action of the administrative authority results from a procedure that was validated by the Supreme Court of Justice in “*Juárez Faustino et al. v. Ministry of Labour and Social Security – Trade Unions Directorate-General – amparo proceedings*” (Cases Nos 313 and 433). This is the context in which section 61 of Act No. 23551 must be taken: “All definitive decisions of the labour administrative authority concerning matters governed by this law, once the administrative channels have been exhausted, may be subject to judicial challenge by means of an appeal or summary proceedings, as appropriate, and in the form established by sections 62 and 63 ... .”
- 134.** The actions of the Ministry of Labour were validated by the judiciary on two occasions: first, at the outset, when the protective measure requested by the sector of Mr Hugo Yasky for the legal reasons described above was issued and which was ignored by the opposing party, which acted outside the law because the election procedure was launched – and this gave legitimacy to the action of the Ministry of Labour; second, through the appeal ruling, which confirmed the cancellation of the election results, as already notified to the Committee, and which forms part of these actions. The action of the Ministry of Labour is part of a functional intervention complementary to the administrative acts at the disposal of the executive authority.
- 135.** The Government adds that, initially, no reference will be made in the present reply to the statements of the complainants referring to the conduct of the parties to the electoral process since these are not matters for the Government to assess and are currently under examination in the justice system. The reply will therefore be limited to the intervention that was appropriate for the Government in the context of the principles of freedom of association and will only refer to the activity of the parties in so far as they relate to the activity of the State, which, as already indicated, occurred in the context of constitutional principles and guarantees and, moreover, in accordance with the principles of freedom of association, particularly Article 3 of ILO Convention No. 87. Without prejudice to this, it should be noted that the terms of the submission suggest an intent that goes beyond that of an international complaint, using the latter as an instrument to serve internal purposes, obstructing and distorting the action of the State, when the complainants themselves have engaged in conduct similar to that challenged in the submission.
- 136.** As regards the circumstances prior to the intervention of the Ministry of Labour, the Government states that the CTA held elections on 23 September 2010, in which the Ministry did not intervene, respecting in all its terms the commitment to arbitration signed by competing lists 1 and 10 and the national electoral board of the CTA itself. This process concluded with the partial cancellation of the election, by decision of the independent body, on grounds of observed electoral fraud, as revealed by copies of the judgments of the

autonomous arbitration tribunal. As a result of the declaration of partial nullity, the arbitration tribunal declared that it would be necessary to hold supplementary elections in all provincial and local districts and at all polling stations where the results were cancelled. In the Government's opinion, the statement that even if the challenges had been accepted they would only represent 10 per cent of the electorate is irrational; the Government considers this to be a dogmatic statement which is not substantiated by any documentation.

**137.** The intervention of the Ministry of Labour was at the request of one of the parties following a practice based on a judicial ruling which established that it was appropriate, and so there was a logical and natural sequence in the situation. Indeed, the autonomous arbitration tribunal considered its task completed and ordered its own dissolution on 17 November 2010, declaring itself no longer competent to deal with the matter, after issuing decisions on all appeals that were submitted to it. Moreover, it maintained that, when the leadership reached the end of its term of office on 30 September 2010 and with appeals pending before the autonomous arbitration tribunal against the results announced by the CTA electoral board, the signatories to the arbitration agreement requested the independent body to take a decision with regard to extension of the term of office of the CTA leadership but the autonomous tribunal declared that it had no competence to that effect.

**138.** As regards the intervention by the Ministry of Labour to preserve trade union autonomy in line with the requests made by the complainants on other occasions, the Government declares that, first, the complainant has not made any observation regarding the substantive content of the decision. In other words, there is no discussion regarding the Ministry's statement that in the administrative actions the basis for the presence required by the regulations for the meeting of the executive committee on 25 November was not correctly established, a matter which is being examined by the courts. The complainant, in the initial submission regarding labour matters, merely criticizes the "timeliness, value and appropriateness of the intervention" and refers to a series of considerations and evaluations relating to the views of the ILO supervisory bodies which are not applicable in this case, for various reasons which will be examined in detail below but which can be summarized in terms of Argentine law being one of the strictest in the international system as regards the supervision of administrative acts.

**139.** Consequently, the acts undertaken by the administration are fully compatible with the provisions of articles 14bis and 74(22) of the Constitution, contrary to the claim made by the complainant organization, and the various freedom of association cases that are unconnected with the reality of the country, in terms of both circumstances and legal aspects, are not applicable. Hence it should be noted that the criticism of the complainant relates to the administrative decision to extend the expired term of office of the leadership – including the plaintiffs – for practical reasons concerned strictly with maintaining the administrative functioning of the organization because the channels established by the parties themselves for the implementation and safeguarding of the election process had been exhausted. The Government points out that both parties validated the intervention in recognition of this competence and on the basis put forward by the administration to extend the term of office of the leadership, which, specific and clearly limited as it was, was also validated by the judicial system in the two pending cases – the dispute between the parties is before the courts – since no ruling was issued ordering the extended leadership to be changed.

**140.** The Government states that, as the Committee on Freedom of Association is aware, section 58 of Act No. 23551 establishes that the Ministry of Labour is the sole executive authority with regard to trade unions. On 29 October 2010, the National Trade Unions Directorate received a submission from Mr Hugo Yasky in which, referring to his status of general secretary of the CTA whose term of office had expired on 30 September 2010, he

stated that since there had been no definitive result to the elections and that supplementary elections would be necessary in a number of districts in 11 provinces with the involvement of some 300,000 voting union members, he asked the certification of leadership to be renewed on a provisional basis until such time as the organization resumed normal functions. Mr Yasky requested such a decision as a matter of urgency with a view to taking essential action regarding administration of the CTA assets and to convening the necessary supplementary elections so that the organization could return to normal, taking particular account of the fact that, under section 30 of the CTA regulations, any decision to call elections is a matter for the national executive committee of the CTA.

- 141.** In the light of the issue raised concerning the elections held on 23 September 2010 and taking into account that the terms of office of the members of the executive committee had expired on 30 September 2010, the National Trade Unions Directorate extended the terms of office of the leadership on 2 November 2010 subject to the limits stated, namely until the assumption of office of the leaders elected in the new elections which were due and in order to perform the necessary tasks to conserve and manage the assets of the CTA. The continuity of the term of office of the leadership registered in the abovementioned administrative department and within the limits stated constitutes a uniform and customary criterion that was applied previously by the labour administration in similar circumstances, including with respect to the CTA itself in 2006. In the light of the above, the complainant organization lacks veracity and contravenes its own proceedings.
- 142.** The Government also adds that section 56(4), second paragraph, of Act No. 23551 states as follows: “In the event of the absence of leadership within a workers’ trade union or the body to which leadership duties have been assigned, and in so far as the regulations of the association concerned or of the federation of which it forms a part have not established any means of regularizing the situation, the executive authority may also appoint an official to perform the necessary tasks or to regularize the situation.” This is also without prejudice to the fact that section 56(4), first paragraph, of the Trade Unions Act authorizes the Ministry of Labour to “call elections for bodies which are responsible within workers’ organizations for the governance, administration and supervision of the acts undertaken by the latter, and also for performing any other acts needed for the appointment of the members of these bodies through the elections. To this end they may also appoint the persons who will be responsible for performing those acts. All of the above applies in cases where, further to being instructed to do so, the body authorized to take the action concerned fails to execute the instruction within a set period of time.”
- 143.** The criterion applied by the labour executive authority to cases of absence of leadership consists of providing for the temporal continuity, within a restricted scope, of the most recent certified leadership so that the latter may complete the electoral process and other internal union action required to restore normal functioning. This is the most appropriate approach inasmuch as this preserves the autonomy of trade unions which go through such a situation of institutional abnormality, instead of having direct intervention from the administrative authority in the internal affairs of such organizations. Hence there are no doubts concerning the rationality of the action taken by the State as regards extension of the term of office.
- 144.** As regards the timeliness of the administrative intervention and its lack of arbitrariness and the scrutiny of administrative acts by the judiciary, the action of the Argentine State can never entail any risk of arbitrariness that undermines collective autonomy or violates the provisions of articles 14bis and 75(22) of the Constitution. This is because the voluntary action taken by the administration was a choice of both parties recognizing reasonable conduct in the action of the State. Furthermore, in terms of legal certainty on the basis of the Constitution, the complainant’s claim that the conduct of the administration violates Article 3 of Convention No. 87 and is therefore at fault is baseless. The complainant refers

throughout its submission to a series of opinions of the Committee supposedly asserting that the intervention of the State might be arbitrary. However, as stated above, a closer look at the legislation of Argentina shows that the system is far from allowing any possibility of “arbitrariness” since there is constant, ongoing supervision by the highest levels of the judiciary.

- 145.** The Government explains that prior to the elections of 23 September 2010, the CTA submitted all elections to inspection by the National Trade Unions Directorate without any challenges being made to the scrutiny of the administrative authority or any questioning of the constitutional nature of section 15 of Decree No. 467/88. Accordingly, the application of section 15 of the regulatory decree is justified by the need to ensure the effective force of the constitutional principle of internal trade union democracy established in article 14bis of the National Constitution and in section 8 of Act No. 23551, as upheld by the Supreme Court of Justice in “*Juárez, Rubén Faustino et al v. Ministry of Labour and Social Security (National Trade Unions Directorate) – amparo proceedings*”, 10 April 1990 (Cases Nos 313 and 433).
- 146.** The Government affirms that the intervention of the Ministry was not of its own accord but at the request of the parties and in line with an existing legal ruling of the Supreme Court of Justice. Both parties had asked the Ministry to extend the term of office in the last two elections; on the first occasion, this was done by the complainant. The extension of the term of office includes the retention by the complainants of the posts that they held before the elections, thereby avoiding any kind of legal objection preventing international representation of their sector at the Conference, and with no risk of delays as claimed. The issue is currently being examined by the courts and so the objection based on the complainant’s quotations from the opinions of the supervisory bodies, to the effect that the administrative decision might be arbitrary, is also invalid. The justice system has not changed the decision to extend the term of office or issued any protective measure that would reduce its impact; nor has the complainant questioned the content of the decision at the international level. Hence it cannot be alleged that the intervention of the Ministry was arbitrary, quite apart from the criticisms made in the complaint regarding the conduct of the opposing party, which, as stated above, is not party to the discussions with the Ministry.
- 147.** Finally, the Government reiterates that the status of general secretary of the CTA invoked by the complainant, Mr Pablo Micheli, lacks documentary support, according to the relevant procedures at the National Trade Unions Directorate. Nor has it been validated, up to the date of the present submission, in the court proceedings in progress: “*Micheli, Pablo v. Ministry of Labour – amparo proceedings* (Case No. 54.788/10) and “*Confederation of Workers of Argentina (CTA) v. CTA National Electoral Board – amparo proceedings*” (Case No. 51.586/10), both of which are before National Labour Court of First Instance No. 26 in Buenos Aires.
- 148.** The Government adds that, with regard to the statement by the complainants that Mr Micheli constitutes the sole valid representative as an officer appointed by the CTA electoral board, it refers to the administrative act of 6 December, which was confirmed by the judicial body, extending the term of office of the existing leadership, as shown by the complainant’s own documentation – a ruling by the prosecutor and by the second officiating magistrate. Both this and the previous judicial ruling both before and after the supplementary elections ruled in favour of maintaining the existing committee, bearing in mind that the extension of the term of office established in the administrative act has precise limits geared to convening new elections in the same conditions, form and manner as the previous elections, as requested by the complainant, in which an extension of the term of office had also been requested. Furthermore, the administrative action was at the request of one of the parties when the competence of the autonomous tribunal set up by

mutual agreement of the parties to the dispute had been exhausted. In short, the ministerial action was validated with its limited scope of competence, in which the extension of the term of office was granted for the sole purpose of performing tasks to maintain the functioning of the trade union organization; this is the sole activity performed by the administration.

- 149.** The Government reiterates that the intervention of the Ministry of Labour was at the request of one of the parties, in a context of absolute freedom, in accordance with a remedy which both parties have used when established judicial review channels have been exhausted and with judicial scrutiny of the administrative act.
- 150.** The Government indicates that it is inappropriate to link the present case to quotations from opinions of the ILO, stating that the intervention of labour ministries accompanying a judicial submission should not have a suspensory effect on the validity of that election pending the final outcome of the judicial action. In this case, contrary to what was quoted, the judicial action was instituted not by the administration but by one of the interested parties requesting a protective measure. Moreover, the ILO has never questioned administrative intervention on the part of the executive authority in so far as there are adequate judicial controls. In the present case the administrative act was reviewed by two judges, who deemed the act to be reasonable, at least as regards the extension of the term of office, since the election had been conducted. In the first case, when Mr Hugo Yasky requested the preventive suspension of the elections of 9 December 2010 and the protection of trade union rights – section 47 of Act No. 23551 – the magistrate duly took account of the reasonableness of the administrative act, which was analysed in substantive and procedural terms. In more technical terms, it could be said that the administrative act was evaluated by the Public Prosecutor’s Office, which also endorsed the act.
- 151.** The second evaluation was made by the current officiating magistrate who overturned the innovatory protective measure and upheld the decision of the administration regarding the leadership, with the limits and purpose prescribed by the Ministry of Labour. There is no doubt whatsoever that the decision of the administration was subjected to judicial scrutiny on two occasions, its judicial value being assessed both times. This applies in particular to the second magistrate who, even at the level of the Public Prosecutor’s Office, conducted a thorough analysis of the position of both parties to the dispute and examined the value of the administrative act issued by the Ministry and the administrative act issued by the electoral board of the trade union determining the presumption of sufficient legitimacy of the ministerial decision to endorse the extension of the terms of office, within the limited scope of administrative decision-making.
- 152.** In other words, nobody can doubt that the judicial controls functioned properly. This is in line with the judicial interest in protecting freedom of association; consequently, there was no act by the administration which distorted, obstructed or modified any trade union right. This is a dispute that started at the administrative level and is now being examined at the judicial level with all constitutional guarantees and international labour instruments in force in Argentina. The Ministry has taken measures aimed at ensuring the maintenance that was necessary.
- 153.** The Government adds that before 9 December 2010 the intervention of the Ministry originated on the basis of a convocation for supplementary elections published in a Buenos Aires newspaper on 26 and 27 November 2010, calling elections to be held on 9 December, at the request of list 10. This is the last action of the Ministry since despite the decision of the labour department suspending any elections the process continued, giving rise to a judicial application for protective measures from list 10, whereby the officiating magistrate suspended the act of 9 December 2010, validating the extension of the term of office. The complainant organization claimed that it was not notified in time

and so the elections went ahead, subsequently giving rise to other situations unconnected with this challenge in the local judicial sphere but whose repercussions as regards the legal action produced a situation of moral violence with respect to the officiating magistrate, who transferred competence to another magistrate (Labour Court No. 26), who confirmed the extension of the term of office.

- 154.** According to the Government, the important thing is that when the Ministry adopted the measure there was no winner in the election and hence it was bound to invalidate any holding of elections on 9 December 2010. For the administration, it was a question of an event which did not take place under its jurisdiction but under judicial jurisdiction and hence outside the supervisory scope of the international body, which is obliged to focus on the specific act undertaken by the Ministry of Labour, namely the extension of the term of office for specific purposes which was validated by the courts, since it is this which has judicial consequences. Hence, it is a matter for the State as far as the continuing validity of elections further to the challenge is concerned and pending a definitive decision, the elections are monitored from the start by the judicial authorities and fall outside the competence of the labour department, in accordance with the principles of freedom of association.
- 155.** The Ministry intervened because the trade union organization was without leadership, the term of office having expired, and the leadership was extended exclusively for administrative tasks that were necessary prior to the elections; this is the only thing that must be considered in the international jurisdiction, since these are the sole effects of the decision of the administration which affected third parties and entered the sphere of freedom of association. Otherwise, the judiciary has taken action since the outset and this action of the State is in line with the interests protected by freedom of association. There is unanimous international recognition that the administration may take steps to preserve the functioning of trade union organizations. What the Ministry did was to exercise the administrative authority that exists in legislation all over the world, subject to strict judicial supervision, whose act was endorsed on account of its reasonableness. Accordingly, the complainant has focused on the intervention of the Ministry and in these terms the international dispute has remained blocked; the action of the judiciary and the evaluation thereof within the supervisory system has been excluded from this international dispute. The Government wishes to avoid further confusion and distortions in addition to those that already exist in this matter.
- 156.** The Government points out that certain statements by the complainant seek to slow down, distort or influence both the work of this international body and that of the judiciary in Argentina. Situations of non-existent privileges are claimed, thereby misleading the ILO. The same misleading action is seen in the bogus claim of recognition of the validity of the elections by the labour administration, when the action by the Ministry predates the holding of the elections; at the time the elections were held, competence lay with the judiciary further to the issue of a protective measure. In any case, it is for the judiciary to make the assessment. It is a matter of criteria of judicial appraisal, which must be respected. The complainant organization also seeks to mislead by appearing to claim that views expressed by the supervisory system can influence the judicial process in the context of legitimate recognition of the competence of the State with adequate judicial scrutiny. According to the Government, the Supreme Court of Justice ruled that judicial appraisal could not be subject to influence by the opinions of the ILO supervisory bodies.
- 157.** Finally, the Government concludes that the complainant causes confusion by citing cases of ILO jurisprudence, ascribing impossible conduct to the administration, since decisions were called for on a matter which was not under its jurisdiction. The work of the Ministry ceased before the elections and so it did not officially establish any winner. The conduct of the Ministry was in line with the international rulings on the matter. It restricted itself to



extending a term of office prior to the elections as part of the task of recording anomalies in the election process, the discussion of which is a judicial matter. What is beyond discussion is the judicial confirmation of the extension of the term of office for the performance of administrative acts. In its communication of 15 May 2012, the Government indicates that the issue of the CTA elections is currently before the judicial authorities and thus outside the Ministry's competency. It would therefore be totally inappropriate for the Ministry of Labour to intervene in any way.

### C. The Committee's conclusions

- 158.** *Before examining the substance of the allegations, the Committee notes the Government's statements to the effect that: (1) the ILO supervisory system does not recognize individual submissions, only collective ones, and that any issue examined in this international forum must have the backing of a trade union organization or group of workers which the Committee considers sufficient to be regarded as an organization; and (2) in this case none of the requirements have been met, since the complainant (the Government refers to the union officer who signed the complaint, Mr Micheli) does not have the status of elected representative of the CTA on account of the judicial circumstances surrounding the actions described. The Committee observes that the complaint alleges interference by the Government in the electoral process of the CTA and that the complainant considers that the list headed by Mr Micheli won the elections, with this union official having been appointed general secretary. The Committee therefore considers that the issues of substance raised in the case should be examined.*
- 159.** *The Committee observes that in the present case the complainant organization states that, for the purpose of renewing the national, local and regional leadership of the CTA, elections were held on 23 September 2010 and that, as a result of challenges to the electoral process, the autonomous tribunal of the CTA declared the voting that took place at 10 per cent of the polling stations null and void (the results in the remaining 90 per cent were upheld, according to the complainant, and this was not contested by any of the electoral lists and the deduction of the annulled results yielded a difference of more than 11,000 votes in favour of the list headed by Mr Micheli), supplementary elections were convened for 9 December 2010, and these were won by the electoral list headed by Mr Micheli. The Committee notes that the complainant contests the decision of 6 December 2010 of the administrative authority (file No. 1407454/10) invalidating the convocation and holding of supplementary elections within the CTA on 9 December 2010 (i.e. the call for elections which, according to the complainant, affected 10 per cent of the polling stations).*
- 160.** *The Committee notes that the Government in its reply upholds the legality of the decision of the administrative authority of 2 November 2010 to extend the term of office of the CTA leadership. However, the Committee observes that the complaint is not concerned with this issue but with the decision of the administrative authority invalidating the convocation and holding of supplementary elections within the CTA on 9 December 2010. The Committee notes the Government's statements that: (1) the intervention of the MTESS was legitimate and respected collective autonomy, in conformity with the National Constitution and Convention No. 87; (2) on completion of the electoral process of the CTA on 23 September 2010, the autonomous arbitration tribunal of the CTA ruled that it was necessary to hold supplementary elections in all provincial and local districts and polling stations where the results had been annulled (thereby concluding its tasks and being automatically dissolved); (3) the statement of the complainants that even if the challenges had been accepted they would only represent 10 per cent of the electorate is irrational; according to the Government, this is a dogmatic statement which is not substantiated by any documentation; (4) Division No. 4 of the National Labour Appeals Chamber overturned the first-instance ruling of National Labour Court No. 26 and ordered the supplementary*

*elections held on 9 December 2010 to be declared null and void (the complainant filed an appeal with the Supreme Court of Justice seeking revocation of this judgment); (5) the foregoing confirms that the democratic institutions of the country are wholly functional, and this implies judicial scrutiny of acts of government; and (6) the issue of the CTA elections is currently before the judicial authorities and thus outside the competency of the Ministry of Labour.*

- 161.** *In the light of the above, as regards the decision of the administrative authority of 6 December 2010, challenged by the complainant, which invalidated the convocation and holding of supplementary elections within the CTA on 9 December 2010, the Committee reminds the Government that any intervention by the public authorities in trade union elections runs the risk of appearing to be arbitrary and thus constituting interference in the functioning of workers' organizations, which is incompatible with Convention No. 87, Article 3, which recognizes their 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. 429].*
- 162.** *Finally, regretting the time that has elapsed without a definitive solution to the electoral dispute within the CTA, which without doubt seriously undermines the functioning of this organization, the Committee firmly expects the judicial authorities to take a decision on all the pending issues in the very near future. The Committee requests the Government to keep it informed in this respect.*

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

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

*The Committee regrets the time that has elapsed without a definitive solution to the electoral dispute within the Confederation of Workers of Argentina (CTA), which without doubt seriously undermines the functioning of this organization, and firmly expects the judicial authorities to take a decision on all the pending issues in the very near future. The Committee requests the Government to keep it informed in this respect.*

CASE NO. 2873

DEFINITIVE REPORT

## Complaint against the Government of Argentina

presented by

- the United Trade Union of Education Workers of Mendoza (SUTE) and
- the Confederation of Education Workers of Argentina (CTERA)

*Allegations: The complainant organizations challenge a decree and ordinance issued by the authorities of the city of Mendoza which in their opinion denies and penalizes the right to demonstrate collectively*

- 164.** The complaint appears in a communication from the United Trade Union of Education Workers of Mendoza (SUTE) and the Confederation of Education Workers of Argentina (CTERA) dated 4 May 2011.
- 165.** The Government sent its observations in a communication dated 13 February 2012.
- 166.** 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. The complainants' allegations

- 167.** In their communication dated 4 May 2011, SUTE officially registered as trade union No. 866 by the Ministry of Labour, Employment and Social Security, and the CTERA alleges that two pieces of legislation have been adopted that are prejudicial to the interests of education workers in the Province of Mendoza who are members of CTERA and of other workers in the Province. The legislative acts are in serious breach of the principles laid down both in international law and in Argentina's own legislation with respect to freedom of association. The legislation that the complainants challenge is as follows: Decree No. 863 issued by the mayor of the city of Mendoza and published in the *Official Gazette* of the Province of Mendoza on 30 June 2008, and Ordinance No. 3016 issued by the Deliberating Council of the municipality of Mendoza, which was never applied to the SUTE or its representatives until 4 August 2002.
- 168.** The complainant organizations consider that these municipal orders are in breach of Article 3 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), ratified by Argentina on 18 January 1960, inasmuch as the Convention guarantees workers' organizations the right to organize their activities and to formulate their programmes. They state that the public authorities' interference in these matters is liable to prevent or hinder the legal exercise of those rights. They add that the regulations issued by the municipality were challenged in the Supreme Court of Justice of the Province of Mendoza, through the only channel provided for in the Province's Civil Code of Procedure, in a bid to have them declared unconstitutional. The appeal was lodged with the Second Chamber of the Supreme Court as case No. 94017, "United Trade Union of Education Workers against the Municipality of Mendoza, on grounds of unconstitutionality".

**169.** The appeal was rejected by the Court without refuting the grounds advanced by the complainant and in violation of the latter's right to offer and produce evidence, which is a manifest infringement of article 8.1 of the American Convention on Human Rights. The ruling was not challenged judicially, despite the fact that the Supreme Court of Justice of Argentina regularly does so, pursuant to article 280 of the Code of Civil and Commercial Procedure which empowers it to overturn both extraordinary federal appeals and direct appeals or complaints at its own discretion (this is the only judicial channel for obtaining a review of a decision handed down by the Supreme Court of Justice of a province). Moreover, the case law of both the Supreme Court of Justice of Mendoza both of the Province of Mendoza and the federal Supreme Court of Justice has repeatedly confirmed that the latter is not competent to hear cases involving provincial public law. This has led to a de facto situation in which the formal admission of extraordinary appeals and/or complaints has been left purely and simply to the discretion of the said Supreme Courts.

**170.** According to the SUTE and CTERA the provisions that they are challenging violate the terms of ILO Convention No. 87 in so far as they prohibit and punish (by the imposition of fines and the threat of imprisonment) the holding of collective demonstrations within the capital of the Province of Mendoza. Decree No. 863/2008 reads as follows:

Article 1 – Use of the esplanade of the municipality shall be authorized for the holding of demonstrations and similar events within the city of Mendoza and, on such occasions, the venue shall be fitted out with adequate platforms and loudspeakers free of charge. The parties concerned must accordingly submit a request the Executive Department at least 48 hours prior to the event, indicating the name and address of the organization and of its legal or statutory representative, with the number of the relevant identity document, as well as the time the event is scheduled to start and to finish.

Article 2 – Demonstrations and similar events starting from any location other than that indicated in the preceding article shall proceed along the sidewalks, duly respecting pedestrian crossings and traffic signals.

Article 3 – The presiding Court of Misdemeanours shall be immediately notified of any failure to abide by the municipal regulations in force. The enforcement of the penalties provided for under ordinance No. 3016/13603/90 shall be the responsibility of the Directorate of Traffic of the municipality of Mendoza.

Article 4 – Cultural, sporting, educational, governmental and religious events involving the use of public roads within the meaning of Ordinance No. 3016/13603/90 shall be subject to prior authorization by the Executive Department, for which purpose a request must be submitted at least 72 hours prior to the event in accordance with Act No. 3909.

Article 5 – This provision shall be publicized as broadly as possible through the Press.

Article 6 – This provision shall be published, communicated and included in the Book of Decrees.

**171.** The complainants go on to state that article 1 of Ordinance No. 3016 of 1990, which was applied to the SUTE for the first time in August 2008, stipulates: “The holding of any type of event on public thoroughfares within the area comprising the streets known as Patricias Mendocinas, Rioja, Córdoba, Godoy Cruz, Colón and Vicente Zapata is prohibited, other than the holding of events which by their size and conduct do not hinder the normal movement of pedestrians and vehicles; such events may be authorized by the Executive Department”. Decree No. 863/2008 stipulates: “Article 3 – The presiding Court of Misdemeanours shall be immediately notified of any failure to abide by the municipal regulations in force”. This refers to article 38 of the Code of Misdemeanours of the municipality of Mendoza, which stipulates: “Any person who disregards a legal provision adopted by the competent authority in the interests of justice, public safety or health shall, unless the act constitutes a more serious offence, be sentenced to 30 days under arrest or to a fine of up to 3,000 pesos”.

- 172.** According to the complainants, the municipality of Mendoza has clearly provided not only that trade unions that organize demonstrations be fined but also that the Court of Misdemeanours should be duly notified; the latter may order union officials or any workers participating in a march to be placed under arrest for up to 30 days. In other words, both the Ordinance and the Decree being challenged lay down rules of conduct which, if disobeyed, give rise immediately to a fine and/or up to 30 days under arrest. As can be seen from the provisions referred to, the fines are applicable both to the trade union that convenes a demonstration and to the workers who take part in it. This means that the municipality may impose a fine that is equal to two or three times the average wage of a member of the teaching staff, and even more in the case of non-teaching staff; at the same time, there is a real possibility that both union officials and workers taking part in a demonstration may be placed under arrest.
- 173.** The complainants explain that Argentina's Constitution establishes that the State is a national unit comprising Provinces which retain powers that are not vested in the federal Government and that in turn the latter recognize an internal political division (articles 121 to 123 of the Constitution). These internal political units are known in the Provinces as municipalities and, as in the case of the city of Mendoza, as departments. Each department possesses an executive governing body (the Office of the Mayor) and a deliberating body (the Deliberating Council). The powers of the municipalities are set out in general terms by the national Constitution (autonomy); in the case of the Province of Mendoza, these powers are governed by Mendoza's provincial Constitution, as established by the latter, are complemented by Provincial Act No. 1709 (the Municipalities Organic Act). The city of Mendoza is the capital of the Province (article 2 of the provincial Constitution) and the seat of all the provincial authorities (executive, legislative and judiciary).
- 174.** The headquarters of the General Directorate of Schools, which is the principal employer of education workers, is in the city of Mendoza, where numerous private employers (private management schools) are also located. The municipal regulations challenged by the complainants impede the people's exercise of their right to demonstrate collectively, and therefore also that of the SUTE and of its members. The SUTE has already been sanctioned for exercising the right to demonstrate collectively, having been heavily fined for that reason since August 2008.
- 175.** The complainants maintain that the restrictions they are challenging have no legal basis. On the contrary, the Provincial Transit Act currently in force provides explicitly for the possibility of using public thoroughfares for demonstrations (article 73, Act No. 6082). Even the law that was in force when Ordinance No. 3016 was adopted contained no provision prohibiting the use of public thoroughfares for demonstrations or requiring authorization for such purposes. Article 3 merely stipulates that the Directorate of Traffic of the Province of Mendoza may make temporary arrangements for the movement of people and vehicles when circumstances so demanded for reasons of public order and safety (article 3(c), Act No. 4305). Moreover, the restrictions denounced by the complainants have no basis in fact since, under the pretext of regulating people's right, they curtail the right to demonstrate only when the demonstration is in support of a demand or complaint; any other demonstration is allowed to take place even if it makes it impossible for people to move about and irrespective of the extent or degree to which traffic is disrupted. The ban applies to the entire territory of the municipality of Mendoza and thus prevents the exercise of freedom of association even in the limited sense of freedom of action and freedom to demonstrate in support of demands made of the workers' employers and/or the public authorities.
- 176.** According to the complainants, the ban on the use of public areas in exercise of the right to demonstrate is an infringement of the fundamental principles laid down in Articles 19, 20.1 and 29.2 of the Universal Declaration of Human Rights (UDHR), Articles 3, 4, 5.1, 8.1(a)

and (c), 8.2 and 8.3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Articles 2.1, 3, 19.1, 19.2, 21, 22 and 26 of the International Covenant on Civil and Political Rights (ICCPR). The municipal Decree challenged by the complainants maintains that mass demonstrations in support of a demand or complaint “entail the restriction of other individual and collective rights and cause traffic congestion and disruption in the city which pose difficulties for people and for private vehicles buses that use the thoroughfares every day and whose legitimate rights are thus affected”. Consequently, such demonstrations are prohibited anywhere other than on the esplanade of the municipality, whereas other “events” are specifically authorized under article 4 of the Decree. In other words, it is only when the “events” are in support of a demand or complaint that they constitute undesirable and reprehensible conduct, while sporting, religious, government-sponsored and other events supposedly do not disrupt traffic. Moreover, according to the Decree challenged by the complainants, collective and mass demonstrations that are not in support of a demand or complaint do not restrict other people’s individual rights or cause traffic congestion, or at least do not do so to the point where they need to be prevented, as in the case of demonstrations by workers demanding better wages or better working conditions or voicing their opinions, demands or complaints.

- 177.** According to the complainants, the Decree they are challenging requires demonstrators – when marching in support of a demand or complaint – to keep to the sidewalks and observe traffic signals or to meet on the esplanade in front of the municipality; this shows clearly that the Decree prevents freedom of expression and demonstrations only when workers meet to inform their fellow citizens publicly of their working conditions and their demands. Such activities as these are punishable by fines and possibly by up to 30 days’ imprisonment without any justification, since Decree No. 863/2008 is obviously not concerned with the flow of traffic or the use of public spaces but is aimed simply at preventing demonstrations in support of a demand or complaint, which is an essential and universal means of expression of workers all over the world. The Decree also strikes a blow against the right to establish trade unions and to participate in union activities, since it imposes restrictive conditions on demonstrations that it does not impose on associations that are not concerned with lodging complaints or demands with the authorities or with employers.
- 178.** The complainants state that it is abundantly clear that the Decree violates the principle of equality. Denying the complainants and their representatives the use of public areas is the method that the municipality has chosen to restrict their freedom of association while in practice there is no such ban on other people or groups in exactly the same circumstances. The wording of international treaties varies, but Article 1 of the UDHR and Article 3 of the ICESCR refer to the equality of all human beings in dignity and rights and to their equal right to enjoy all their rights, thereby consecrating or recognizing the right to equality in the same way as do Articles 2.1 and 3 of the ICCPR. This principle of international human rights law has been grossly violated by the Decree challenged by the complainants, inasmuch as it deems reprehensible only those trade union demonstrations or other mass demonstrations in support of demands and complaints.
- 179.** The complainants add that the regulation they are challenging violates the principle of legality embodied in the aforementioned international treaties, all of which stipulate that the exercise of recognized rights are subject only to restrictions provided for in law. Decree No. 863/2008 does not comply with the restrictions imposed by law and is not itself a law.
- 180.** It is the complainants’ understanding that any rule or regulation that restricts or regulates human or constitutional rights or other fundamental guarantees must be adopted by a democratically elected legislative body, in order to safeguard the democratic goals and principles on which the international treaties on human rights are based.

**181.** The complainants wish to make it clear that the provincial Constitution, by investing the administration of local interests and services solely in the Office of the Mayor, has created a body whose competence is limited and which has the power to administer or govern itself only within the bounds of organic laws adopted by a higher body, i.e. the provisions of the Constitution and other legislation in force. That being so, the Executive Department of the city of Mendoza, acting through the Mayor and the Municipal Council, is guilty of a violation of freedom of association, inasmuch as it claims to exercise legislative powers which are explicitly denied it and whose exercise in practice violates the principles of equality, legality and reasonableness by undermining the free exercise of trade union rights. The ban imposed by the Mayor disregards workers' rights in respect of a particularly sensitive issue for trade unions, namely, the possibility of publicizing their demands or official position in pursuit of their goals by making them known to workers and other citizens by the only means at their disposal, i.e. by word of mouth in public areas to which other people have access. Worse still, the ban is an attempt to hide the demonstrating workers from public view, thereby violating the most elementary principles of the international system of human rights.

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

**182.** In a communication dated 13 February 2012, the Government provided the reply from the authorities of the city of Mendoza. The latter note from their analysis of the complaint that the complainants maintain that Ordinance No. 3016/90 and Decree No. 863/2008 violate Article 3 of ILO Convention No. 87, ratified by Argentina in 1960, and that the provisions they contain were contested before the Supreme Court of Justice of the Province of Mendoza, which rejected the appeal. The complainants based their appeal on grounds of the unconstitutionality of the municipal regulations, which they argue are in breach of Convention No. 87.

**183.** The authorities state that, as the complainants themselves recognize, they took the matter to the provincial Supreme Court of Justice on the grounds of their unconstitutionality. The appeal lodged by the SUTE was rejected by the Second Chamber of the provincial Court in case No. 94017, under the heading "United Trade Union of Education Workers against the Municipality of Mendoza". Since no appeal was lodged against the ruling, as the complainant recognizes, it was deemed confirmed and accepted. The Court stated categorically that: "The right to protest may, like any other right, be subject to reasonable regulations if it is intended thereby to maintain public order and safety in the movement of people and vehicles or ensure peaceful social coexistence. The requirement of mere advance notice in order to ensure public order and avoid detracting from other people's rights that are likewise guaranteed by the Constitution is deemed to be reasonable. Allowing demonstrations to take place under the organizers' own arrangements does not imply the restriction of any right but rather its legitimate exercise". In other words, the provincial Court itself, in examining the case, declared that the regulations in question were not in breach of any precept whatsoever inasmuch as it was designed to enable demonstrations to take place in an orderly manner, which does not entail the restriction of any right but rather its legitimate exercise.

**184.** The city authorities note that the complainants claim that the municipal regulations prohibit the holding of collective demonstrations within the provincial capital of Mendoza, and that it is punishable by fines or a possible prison sentence. According to the authorities, this interpretation of the regulation is erroneous since, to begin with, it does not prohibit collective demonstrations but seeks to ensure people's freedom of movement, by arranging for peaceful demonstrations and placing platforms and loudspeakers at their disposal, subject to prior authorization, or by confining the demonstrators to the sidewalks and requiring them to respect the pedestrians and obey traffic signals (articles 1 and 2 of Decree No. 863/2008); similarly, prior authorization is required only if the demonstration

hinders the normal movement of pedestrians and/or vehicles (article 1 of Ordinance No. 3016/90). In other words, not a single paragraph of the provision concerned imposes a ban on demonstrations as the complainants claim.

- 185.** This latter point, too, was recognized by the Supreme Court of Justice of the Province, which in its ruling stated: “The Court pointed out that, from its reading of article 2 of Decree No. 863, the trade union has no legitimate concern, inasmuch as the regulation does not prohibit the holding of marches or demonstrations elsewhere than on the esplanade in front of the municipality but merely regulates them by requiring that they take place on the sidewalks and that they respect pedestrian crossing and traffic signals. Such arrangements cannot be classified as “denying a right”, since the restrictions imposed are perfectly reasonable legal regulations, inasmuch as regulations aimed specifically at the movement of pedestrians on sidewalks and the abuse of that right are in full compliance with the fundamental principles of constitutional law. That being so, there is no way the article can be accused of being unconstitutional and undermining supposedly *supralegal* fundamental rights, since it is obvious that the regulations adopted under the legislation in force constitute no more than a reasonable and legitimate restriction that cannot possibly be considered a curtailment of any right. It may be concluded from the above that the complainant has not demonstrated in any credible way that it has suffered any such prejudice as it claims as a result of the enforcement of either Decree No. 863 or Ordinance No. 3016, given that the former reflects the logic and prudence that should prevail when regulating a right and the regulation adopted by the Deliberating Council was agreed to by the trade union. Consequently, the latter’s claim to have suffered a prejudice has to be rejected”.
- 186.** The city authorities state that the provisions in question clearly endeavour to balance the prejudice sustained by the complainants against that caused to the rest of the community. It is common knowledge that the main thoroughfares in the city centre are brought to a standstill every day by the steady increase in the number of vehicles using them, as well as the large number of public transport buses, and that even in normal circumstances this causes regular traffic jams in the city’s main arteries. If, in addition, the traffic is held up by demonstrations, the situation becomes even more fraught. It is the workers using the thoroughfares who suffer and the right to freedom of movement that is whittled away, and this in turn prevents people from getting to work and back and from receiving prompt treatment in health centres. If the city thoroughfares are used in such a way that the rights of the general public are disregarded or restricted, then prior authorization has to be required so that their use can be properly regulated and its consequences foreseen, with the traffic police controlling the traffic at certain points or through some other solution. At the same time, the point must be made that the complainants have their own institutional means of resolving their disputes, such as joint committees or the legitimate use of the right to strike. This is recognized in the preambular paragraphs of Decree No. 863/2008, which states that “it is reasonable and desirable that the exercise of the right to present demands and to hold meetings be reconciled with the right to freedom of movement, both of which have equal constitutional validity”.
- 187.** Furthermore, far from requiring that trade unions organizing demonstrations be fined or that their members be arrested, as the complainants maintain, the municipality uses Decree No. 863/2008 to offer demonstrators several options that do not deny them their rights. For example, with prior authorization they can use the esplanade in front of the municipality free of charge and equipped with platforms and loudspeakers. If they use another location, they can march on the sidewalks, provided they respect the pedestrians and traffic signals. If they want to organize other kinds of events involving the use of public thoroughfares, they must seek prior authorization, failing which they are liable to the fine provided for in the Ordinance or else the presiding Court of Misdemeanours is notified.



- 188.** There is nothing whimsical about this provision, which can be found in the former Provincial Traffic Act (Act No. 4305, superseded by Act No. 6082) which by means of regulatory Decree No. 200/79 used to prohibit pedestrians from using the streets (article 49). This is precisely what happens when a demonstration takes to the public thoroughfares. Article 73 of the current Provincial Traffic Act (Act No. 6082) stipulates: “The use of public thoroughfares is prohibited for purposes other than the movement of vehicles, such as processions, demonstrations, meetings, exhibitions and running, cycling, equestrian or motor car races. Authorization may be granted by the public authorities only if: (a) the free flow of traffic can be maintained normally by using alternative routes; (b) the relevant bodies certify that they will assure the necessary safety measures for people and assets at the location; and (c) the organizing body itself, or a duly contracted insurance company, accepts full responsibility for any damages sustained by third parties or by the road network as a result of an event involving certain risks”. Obviously, the general principle, which is set out in greater detail in the Act than previously, is that the use of public thoroughfares for purposes other than road traffic is prohibited, and that any exception to this rule is dependent on compliance with the conditions laid down therein and subject to prior authorization from the relevant authority – which, as shall be seen, is ipso facto the municipality.
- 189.** Notification of the presiding Court of Misdemeanours is based on article 50 of the provincial Code of Misdemeanours, entitled “Abusive use of the right of assembly”, which stipulates: “Any person or persons organizing meetings in public areas in breach of the lawful regulations governing safety and general convenience shall incur a fine of up to 3,000 pesos”. This shows that the complainant organizations’ claim that “trade unions organizing demonstrations are fined or their members are arrested” is therefore false.
- 190.** Article 3 of Decree No. 863/2008 stipulates that, in cases of non-compliance with the municipal regulations in force, the presiding Court of Misdemeanours must be immediately informed. It is then for the said Court to determine whether the Code of Misdemeanours has been breached and, if so, to impose a penalty – a decision that is not the responsibility of the municipality.
- 191.** Regarding article 2 of the Decree challenged by the SUTE, which claims that it undermines the rights of the trade union and its members, the relevant text reads: “Demonstrations and/or other events held in a location other than that indicated in the previous article must use the sidewalks and respect pedestrian crossings and traffic signals”. On this point the Province’s Supreme Court of Justice stated in its aforementioned ruling: “As indicated above, it is not this article but Ordinance No. 3016 and article 73 of the Provincial Traffic Law that prohibit the use of public thoroughfares for demonstrations, unless they have been authorized by the competent authority and on condition the normal flow of traffic can be maintained using alternative routes and provided safety measures are in place and there are no risks involved”.
- 192.** As the Public Prosecutor stated in the Court’s ruling, the possibility that the Decree affords for anyone to use public thoroughfares for demonstrations without seeking authorization does not imply, or provide grounds for claiming, that this unrestricted concession is unlawful when it invokes inconveniences that have to be avoided in order to comply with the requirements of the regulation. A requirement based on people’s convenience cannot be deemed manifestly unreasonable, nor does it infringe any constitutional right.
- 193.** The complainants also claim that the wording of the regulation implies that the fines and possibility of arrest referred to extend both to the trade union and to workers taking part in a demonstration; but it is not true that the said provisions they challenge are open to any such interpretation, as they do not impose sanctions on workers taking part in a demonstration. No workers have ever been sanctioned, and the SUTE has been charged

only with causing an obstruction in violation of article 73 of Act No. 6082 and article 1 of Ordinance No. 3016/90.

- 194.** As to the point headed “Scope of the regulations being challenged” in which the complainants claim, inter alia, that (i) the restrictions introduced have no legal basis, (ii) the Traffic Act in force provides for the possibility of holding demonstrations, (iii) the provisions they are challenging restrict the right to demonstrate only when they are in support of demands or complaints and not otherwise, and (iv) the ban is a blanket prohibition that applies throughout the territory of Mendoza, the city authorities maintain that the complaint is completely unfounded for a number of reasons. To start with, Ordinance No. 3016/90, which was adopted by the Deliberating Council of Mendoza on 18 December 1990 and entered into force upon its publication in the *Official Gazette* on 25 February 1991, provides for the imposition of a fine on any person who violates article 1 thereof, which bans any kind of demonstration or similar event on public thoroughfares within the area comprising the streets known as Patricias Mendocinas, Rioja, Córdoba, Godoy Cruz, Colón and Vicente Zapata, save for events whose size and conduct do not disrupt the normal movement of pedestrians and/or vehicles and which may be authorized by the Executive Department. In other words, a regulation is now being challenged which has been in operation for more than 19 years and which does not entail any violation of the Constitution whatsoever.
- 195.** Moreover, as indicated above, the Ordinance derives from Provincial Act No. 4305 which, by means of Decree No. 200/79 banned pedestrians from the streets (article 49). Subsequently, the current Provincial Traffic Act (Act No. 6082) was adopted which banned the use of public thoroughfares for purposes other than the movement of people and/or vehicles but provided that in specified exceptional cases such use might be authorized under the powers conferred by article 73, which has already been examined. The same applies to article 50 of the provincial Code of Misdemeanours. In other words, the provincial regulation is the legal standard under which the provisions of Ordinance No. 3016/90 and Decree No. 863/2008 should be assessed.
- 196.** The Province’s Supreme Court of Justice has ruled that: “It is an undeniable fact that the streets are public assets of the State, as stipulated in article 2340(7) of the Civil Code to the effect that the streets, squares, paths, canals, bridges and any other public construction destined for the use of the community are reserved for the immediate and direct use and enjoyment of the inhabitants as a whole. It is generally agreed that they belong to the public domain of the municipality” (Rivera, Julio C. *Instituciones del Derecho Civil*, Parte General, Bs. As., Perrot, 1993, vol. II, No. 1017; Salomoni Jorge L., *Teoría general de los servicios públicos*, Bs. As., ad hoc, 1999, page 360). Article 1 of Ordinance No. 3016/90 is quite clear. It imposes a general ban on “the holding of demonstrations or other public events on public thoroughfares, except for events whose size and conduct do not disrupt the normal movement of pedestrians and/or vehicles and which may be authorized by the Executive Department”. This latter part of the said article makes it quite clear that there is no “total ban” such as the complainants allege. The whole point of the regulation is as far as possible to reconcile the right to demonstrate and present demands with the right of all citizens to freedom of movement, to a healthy environment – which becomes highly polluted in traffic jams – and, in general, to carry out their daily activities normally. Demonstrations are thus authorized on condition they do not disrupt the normal flow of traffic.
- 197.** The same applies to Decree No. 863/2008, except that in this case the administrative authority goes even further and provides a venue for demonstrations, i.e. the esplanade in front of the municipality, which in addition it offers to equip with platforms and loudspeakers at no charge. Having proposed a fully equipped venue for demonstrations, the next article declares, not that any demonstration held elsewhere than in the specified

location is prohibited, but that any such event must take place on the sidewalks and must respect the pedestrians and traffic signals. This entails making it possible to reconcile conflicting rights.

- 198.** Contrary to the claims of the complainants, the city authorities maintain that, far from extending the ban imposed by the regulatory Ordinance, Decree No. 863/2008 sets out and amplifies the possibilities that exist for holding demonstrations, as has been explained in the preceding paragraphs, even to the point of accepting that the free movement of pedestrians could be sacrificed. Furthermore, it is not true that the ban has been extended to the entire city and thus goes beyond the framework of Ordinance No. 3016/90. The complainants forget to mention that Act No. 6082 – adopted after the said Ordinance – prohibits the use of public thoroughfares for purposes other than the movement of people and/or vehicles throughout the Province and not just in the city. It can therefore hardly be claimed in this respect that the Decree violates the Constitution in any way.
- 199.** The authorities insist that the principles of the Committee on Freedom of Association have definitely not been violated, since there is no trace of any “ban on the right to demonstrate” in the regulation under examination, as the complainants claim. Nor do the provisions in question discriminate in any way against the type of event referred to. There are also no grounds whatsoever for maintaining that the provisions violate the fundamental principles of the international declarations and treaties cited by the complainants or that they constitute “degrading treatment” or a slight on the dignity of any citizen. On the contrary, it is obvious from everything that has been said that the whole issue stems from the attempt to reconcile the rights of all the inhabitants of Mendoza without distinction of any kind.
- 200.** There is no violation of the right to freedom of expression and of opinion, either, since their exercise is not curtailed and demonstrations in support of demands and complaints are by no means banned, as the complainants would have people believe. The extensive arguments advanced by the latter on this point seem to overlook the fact that Act No. 6082 imposed a blanket ban on the use of public thoroughfares for purposes other than pedestrian and vehicular traffic and that Ordinance No. 3016/90 refers to any type of demonstration or similar event on public thoroughfares.
- 201.** The Decree under examination introduces a distinction that is quite reasonable, since experience has shown that the kind of demonstrations referred to in article 2 entail the use of the city streets; that is why it stipulates that they must keep to the sidewalks so as not to disrupt the traffic. Article 4 refers to other types of event, which do not necessarily occupy public thoroughfares. Even if they do, under article 1 of Ordinance No. 3016/90 they can still be held so long as their size and conduct does not disrupt the normal movement of pedestrians and/or vehicles, which is why they can be held without the explicit prior authorization of the Executive Department.
- 202.** It should be noted that article 2 of Decree No. 863/2008 does not stipulate any requirement as to prior authorization, precisely so as not to undermine demonstrators’ rights. Prior authorization is required only for the use of the esplanade in front of the municipality. Consequently, far from introducing a form of negative discrimination, the Decree actually facilitates the organization of this type of demonstration, provided the procedure laid down in article 2 is adhered to. It is therefore untrue that it undermines the principle of equality. Besides, no other kind of event can take over the public thoroughfares either, given the prohibitions already referred to in Act No. 6082 and Ordinance No. 3016/90. On the other hand, it is quite true that the pedestrians’ freedom of movement will be restricted, but this is precisely because the restriction of certain individual rights is the sacrifice that must be made to protect the right to demonstrate.

- 203.** The city authorities state that the regulation challenged by the complainants infringes neither the principle of legality nor the American Convention on Human Rights, both of which allow certain legal restrictions on rights when they are imposed in the general interest, as the complainants themselves recognize. Yet the latter try to ignore both the authenticity of the laws analysed here and the municipality's competence to issue its own regulations on the subject, claiming that its competence extends only to purely "administrative" matters and disregarding the municipality's degree of autonomy. They thus demonstrate a considerable ignorance of current institutional law. The point needs to be made that the blanket ban for the whole Province was made official by Act No. 6082 and that the complainants have never questioned that Act's constitutionality. At the municipal level, it is Ordinance No. 3016/90 that lays down the conditions for exercising the right of assembly and Decree No. 863/2008 that establishes rules based on those provisions. The city authorities add that the laws adopted by the provincial legislature on the subject invariably make it a general principle that the use of public thoroughfares for demonstrations is subject to certain conditions; the Ordinance challenged by the complainants does no more than that, even though the complainants do everything they can to present it under a different light.
- 204.** In ruling on the matter, the Province's Supreme Court of Justice stated: "Ordinance No. 3016 was duly adopted by the Deliberating Council in the exercise of the powers conferred on it by article 200(3) of the provincial Constitution, under which make it responsible for the health, welfare establishments not run by private companies and public thoroughfares, in conformity with the laws adopted by the legislature on the subject. ... That is why the Mayor, in the exercise of the powers conferred on him/her and acting within his/her sphere of competence, offers the use of part of the municipality's public domain so that demonstrations do not cause chaos in the streets – which are intended for the immediate and direct enjoyment of the inhabitants and are in the charge of the police. This is why, subject to their seeking prior authorization, anyone wishing to organize a demonstration or other similar event can use the esplanade in front of the municipality."
- 205.** There is no juridical or logical justification for feigning to be unaware of the constitutional authority of the legislature, the Deliberating Council and the municipality's Executive Department to resort to the police in the way provided for. Moreover, the Mendoza city authorities believe that the regulation challenged by the complainants does not go against the opinions of the Committee on Freedom of Association, as the complainants claim. The latter consider that the purpose of the regulation "is not substantial, since pedestrians and vehicle drivers suffer only minor inconvenience". It will be noted that, while the complainants arbitrarily play down the right of pedestrians and vehicles to freedom of movement, Decree No. 863/2008 explicitly states in its preambular paragraphs that its purpose is to reconcile the exercise of the right to present demands and the right of assembly with the right of people and vehicles to move about freely, both of which it recognizes as having equal constitutional validity. In other words, whereas the complainants refer pejoratively to the right of citizens to move about freely, the municipality places both sets of rights on an equal constitutional footing in an attempt to reconcile the interests of both parties.
- 206.** Finally, the authorities state that they can only request that the representation presented by the complainants be rejected, inasmuch as the provisions they are challenging are in no way designed to achieve the objectives that they suggest. On the contrary, the provisions are a reasonable attempt to reconcile the rights of a democratic society that have been established by competent and legitimate bodies, as was recognized by the Province's Supreme Court of Justice in its ruling on case No. 94017, "United Trade Union of Education Workers against the Municipality of Mendoza de Mendoza, on grounds of unconstitutionality" – a ruling which is now definitive and has been recognized as such by the complainants.

### C. The Committee's conclusions

207. *The Committee observes in the present case that the complainant organizations challenge Decree No. 863/2008 issued by the Mayor of the city of Mendoza on 30 July 2008 and Ordinance No. 3016/90 issued by the Deliberating Council of Mendoza's municipality, which in its opinion prohibit and punish the holding of collective demonstrations. (The said Decree (i) authorizes the use of the esplanade in front of the municipality – equipped at no charge with adequate platforms and loudspeakers – for the holding of demonstrations and similar events and stipulates that similar events starting from any other location must use the sidewalks and observe the pedestrian crossings and traffic signals, and (ii) provides that the presiding Court of Misdemeanours shall be informed of any failure to comply with the said regulations and that the Directorate of Traffic of the city of Mendoza may impose such sentences as are laid down in Ordinance No. 3016/90 – possible arrest of up to 30 days and fine of up to 3,000 pesos).*
208. *To begin with, the Committee takes note that the complainant organizations and the government of the city of Mendoza state that the Supreme Court of Justice of the Province of Mendoza rejected a plea of unconstitutionality lodged by the SUTE against the Decree and Ordinance that it is challenging. According to the complainants, the Court rejected the appeal without refuting the evidence presented, thereby violating their right to present evidence, and no appeal was lodged against the ruling because the case law of the federal Supreme Court of Justice has repeatedly confirmed that it is not competent to rule on matters of provincial public law.*
209. *The Committee also takes note that the government of the city of Mendoza states that the judicial authority of the Province maintained that “the right to demonstrate – like any other right – may within reasonable bounds be regulated in the interests of public order and the safety of pedestrians and vehicles or of peaceful social coexistence”. The Committee also takes note of the statement of the government of the city of Mendoza that: (1) the regulations challenged by the complainants do not prohibit collective demonstrations but are to ensure people's freedom of movement, by arranging for peaceful demonstrations and placing platforms and loudspeakers at their disposal, subject to prior authorization, or by confining the demonstrators to the sidewalks and requiring them to respect the pedestrians and traffic signals, prior authorization being required in such cases only if the demonstration hinders the normal movement of pedestrians and/or vehicles; (2) none of the provisions prohibit demonstrations as the complainants claim, a fact that has been recognized by the Supreme Court of Justice of the Province of Mendoza; (3) the regulations seek to balance the prejudice sustained by the complainants against that caused to the rest of the community, it being common knowledge that the main thoroughfares in the city centre are brought to a standstill every day by the steady increase in the number of vehicles using them; (4) if, in addition, the streets are blocked by demonstrations, then the traffic can become so dense that workers using the roads suffer, freedom of movement is curtailed and people are prevented from getting to work or to health centres; (5) as a result, if the usage of the city thoroughfares disregards or restricts the rights of the general public, prior authorization is required so that their usage can be properly regulated and its consequences foreseen, with the traffic police helping to control the traffic; (6) far from stipulating that trade unions organizing demonstrations should be fined or their members arrested, the Decree offers demonstrators several options that do not deny them their rights (i.e. they can use the esplanade in front of the municipality or, if they use another location, they can march on the sidewalks provided they respect the pedestrians and traffic signals); (7) for any other event requiring the use of public thoroughfares a request must be made for prior authorization, failing which the fine provided for in the Ordinance applies and the presiding Court of Misdemeanours is notified and the corresponding sanction imposed – a decision which is not the responsibility of the municipality; (8) the regulation challenged by the complainants does*

*not stipulate any penalty for workers taking part in a demonstration and no such penalty has ever existed, the entire responsibility being placed on the SUTE for causing an obstruction in violation of article 73 of Act No. 6082 and article 1 of Ordinance No. 3016/90 (the complainant sent the Committee a copy of a municipal resolution fining the SUTE for obstructing the traffic in several streets of Mendoza); (9) Ordinance No. 3016/90 introduces a federal ban on demonstrations or similar events on public thoroughfares, except for those whose size or conduct does not hinder the normal movement of pedestrians and/or vehicles and which may be authorized by the Executive Department; and (10) the regulation does not imply any discrimination against the type of demonstrations in question and there are no grounds for claiming that the provisions being challenged violate freedom of opinion or of expression.*

**210.** *In the light of all the foregoing information and of the ruling in question, the Committee will not pursue its examination of these allegations.*

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

**211.** *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. 2881

DEFINITIVE REPORT

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

- **the Congress of Argentine Workers (CTA) and**
- **the Judicial Federation of Argentina (FJA)**

***Allegations: The complainant organizations allege that judicial workers not exercising acts of public authority do not enjoy the right to collective bargaining***

**212.** The complaint is contained in a communication dated 23 June 2011 from the Congress of Argentine Workers (CTA) and the Judicial Federation of Argentina (FJA).

**213.** The Government sent its observations in communications dated 13 February and May 2012.

**214.** 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 Labour Relations (Public Service) Convention, 1978, (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

### **A. The complainants' allegations**

**215.** In their communication dated 23 June 2011, the CTA and the FJA indicate that they submit a complaint against the Government of Argentina for violation of Conventions Nos 87 and 154.

- 216.** The complainants indicate that, currently, at the national level as well as in the vast majority of the provinces, judicial workers in Argentina are neither guaranteed the right to collective bargaining nor protected by a collective agreement. Indeed, judicial workers in Argentina have never enjoyed this right nor benefited from any such agreement. They point out that the right to collective bargaining is being denied to workers who do not exercise acts of public authority, but who, within the various judicial services, provide administrative and management tasks and services, and in general, any service supporting the operation of courts of justice at the national and provincial government levels.
- 217.** Moreover, except in four provinces (Córdoba, Santa Cruz, Neuquén and Mendoza) out of 22 and the Autonomous City of Buenos Aires, the right to collective bargaining has never been enforced, nor have collective bargaining agreements been concluded in the rest of the country, especially at the national level. Joint committees are operational in only two of these four provinces – Santa Cruz and Neuquén – whereas this right is denied in Córdoba and Mendoza. Moreover, even at the national level, the State Government has neither recognized nor ensured the right to collective bargaining, nor has any collective labour agreement ever been concluded for judicial workers.
- 218.** This complete absence of collective bargaining – with the few exceptions noted above – and particularly the absence of any collective agreement for judicial workers at the national level as well as in most of the provinces, is accompanied by intense unilateral activity of the governments at the national, provincial and Autonomous City of Buenos Aires levels moving towards determining salaries, wages and all other working conditions which should result from collective bargaining. In other words, the employer imposes its conditions, with workers being limited to the fate of their accession contract, without the possibility for engaging in any collective discussion.
- 219.** The complainants note that during the 2009 legislative session, the House of Deputies of Argentina approved a draft national law on the right to collective bargaining for all judicial workers, which set out a procedure for negotiation and a system for the provinces and the Autonomous City of Buenos Aires to adhere to this procedure with a view to establishing a common national scope, without prejudice to collective bargaining at the autonomous or federal levels. Nevertheless, after being submitted to the Senate, and in spite of having been dealt with in committees, the Senate did not take action on the draft law, which subsequently lapsed in December 2010. Consequently, there is no legal framework governing the collective bargaining of the judicial sector.
- 220.** The complainants note that the Government has failed to meet its obligations under ILO standards, especially its obligation to enforce and comply with ILO Convention No. 154 which the Government of Argentina ratified through Act No. 23544 in 1988. In accordance with paragraph 5(d) of article 19 of the ILO Constitution, once a member State has ratified a Convention, it must “take such action as may be necessary to make effective the provisions of such Convention”. Thus, in accordance with its obligation as under the provisions of the Convention, the Government must guarantee the right to collective bargaining of public service workers, including those in the judiciary.
- 221.** The complainants note that when a right is recognized under an international treaty, it is enforceable even in the absence of domestic regulation, all the more so when the right in question is recognized under the National Constitution. In that regard, the complainants maintain that the State of Argentina remains in violation of its obligation to guarantee collective bargaining rights to judicial workers by failing to take the necessary measures to ensure the effective implementation of such rights. Assuming that the federal authorities do not consider this matter to fall under their remit, the complainants note that: (a) firstly, as mentioned above, a member State’s obligations extend beyond the submission and subsequent ratification of an international standard; (b) in addition to ratification, it must

take all the necessary measures to implement the international standard; (c) these measures include: (i) those relating to the workers under their (federal) jurisdiction, and, (ii) those relating to the workers in other jurisdictions who have the same right; and, (d) consequently, the obligation under international law refers to all those to whom the standard is intended without exception.

**222.** The complainants note that the Government has not taken any measure to guarantee the right to collective bargaining of judicial workers at the federal level (for example, by adopting a national Parliament act to that end, or establishing itself directly or indirectly as the employer in any negotiation). According to the complainants, there is no valid reason or justification for the State of Argentina to continue to fail to comply with its collective bargaining obligations with regard to the administration of justice in its various jurisdictions.

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

**223.** In its communication dated 13 February 2012, the Government forwards the response of the Supreme Court of Justice of the Nation (CSJN). According to the Government, the Court's response states that the Framework Act Regulating National Public Employment No. 25164 is not applicable, because it excludes judiciary staff from its specific scope, setting out that such staff is governed by a special rule (article 5), and there is thus no gap in domestic law. Therefore, for the Court, the scope of Convention No. 154 on collective bargaining in the public sector (which Argentina ratified in a timely manner) does not cover Argentina's judiciary staff.

**224.** The CSJN states the following in relation to the complaint:

- for the purpose of this complaint, the judiciary is placed on equal footing with the public sector or public service with a clear aim of imposing the conclusion of collective agreements, following the wording of ILO Conventions, which specifically refer to “public service”;
- the claim that the judiciary of Argentina is an integral part of its national public service is clearly unfounded, since the judiciary is vested with the authority to exercise judicial oversight over the latter's activities, following the principle of the separation of powers of a federal and republican State;
- thus, the Framework Act Regulating National Public Employment No. 25164 has specifically excluded Argentina's judiciary staff from its scope – which includes collective bargaining (article 3) – stipulating that this staff is governed by a special rule (article 5), and there is thus no gap in domestic law;
- the complaint lacks specific evidence of wrongs on which to base the claim of effective violations of the rights of judicial workers, indicating a possible lack of understanding of their actual professional status, or the intentional disregard thereof;
- thus, it fails to recognize that these workers enjoy the same policy of privileges and exemptions as judges and public officials (Decree No. 34/77), except as regards the latter's professional incompatibilities (articles 8 and 10 of the Rules of the national justice system), and, like them, their income is guaranteed under a system of self-sufficiency, characteristic of the national judiciary (Act No. 23853). Thus, in exercising its powers, the Court has made no hierarchical distinction between employees or the type of work they carry out; the judiciary supports all its employees with the primary task of carrying out its key role;



- neither of the trade union organizations (the complainants) is the most representative of judicial employees, at least as regards the scope of the national judiciary, of which the activity is glaringly inexistent;
- since the claim is not about regulating the free exercise of the right to organize, the recommendations by the ILO Committee of Experts to the Argentine State that the “most representative status should not imply privileges other than priority of representation in collective bargaining, in consultations with the authorities and in the appointment of delegates to international bodies” would not apply;
- whereas, on the contrary, in the context of the complaint in question, and particularly vis-à-vis the national judiciary, full effect should be given to the ILO Constitution, which sets out the notion of the most representative industrial organizations (article 3, paragraph 5), indicating that the claimants are not;
- with regard to the CTA, it is noted that, because this confederation has been “simply registered”, as it claims, it cannot defend collective interests because it lacks the exclusive rights enjoyed by trade union associations with union status recognized under article 31 of Act No. 23551; it is thus presenting its case jointly with the FJA, which has trade union status, but no influence in this judiciary; and
- Mr Pablo Micheli, who presented himself as Secretary-General of the CTA, did not have such unquestionable trade union representation as to be able to take a complaint before an international body against the National State for violation of international treaties; the conflict within this union association, which gave rise to the decision of 13 July 2011 of the National Labour Appeals Tribunal, in the case entitled “*Congress of Argentine Workers (CTA) v. the National Electoral Board (CTA)*” on proceedings filed for the protection of constitutional rights (*amparo*)” is public.

225. In its communication of May 2012, the Government indicates that the relevant consultations are undertaken in the judicial services that are not governed by a collective agreement.

### C. The Committee’s conclusions

226. *The Committee notes that, in the present case, the complainant organizations allege that judicial workers not exercising acts of public authority (i.e. those providing services within the judicial services, such as administrative and management tasks and services, or, in general, any service supporting the operation of the courts) do not enjoy the right to collective bargaining.*

227. *The Committee notes that the Government has sent the reply from the CSJN on the case and that the CSJN indicates that the Framework Act Regulating National Public Employment No. 25164 excludes judiciary staff from its specific scope, setting out that such staff is governed by a special rule and, therefore, for the Court, Convention No. 154 does not cover Argentina’s judiciary staff. The Committee notes that in its reply, the CSJN states that: (1) the claim that the judiciary of Argentina is an integral part of its national public service is clearly unfounded, since the judiciary is vested with the authority to exercise judicial oversight over the actions of the public service, following the principle of the separation of powers of a federal and republican State; (2) the Framework Act Regulating National Public Employment No. 25164, which covers collective bargaining, expressly excludes from its scope national judiciary staff, setting out that such staff is governed by its special rule; (3) judiciary workers enjoy the same policy of privileges and exemptions as judges and public officials, except as regards the latter’s professional incompatibilities, and, like them, their income is guaranteed by a system of self-sufficiency*

*under the judiciary; (4) the complainant organizations are not the most representative of judicial employees, at least as regards the scope of the national judiciary; and (5) the relevant consultations are undertaken in the judicial services that are not governed by a collective agreement.*

- 228.** *The Committee recalls that in the preparatory work leading up to Convention No. 151, it was established that judges of the judiciary did not fall within the scope of implementation of the Convention; nevertheless, said Convention does not exclude the auxiliary staff of judges. Also, according to Article 1 of Convention No. 154, ratified by Argentina, only armed forces and the police may be excluded from its scope. Furthermore, the same article states that the Convention applies to all branches of economic activity and that as regards public service, special modalities of application of this Convention may be fixed by national laws or regulations or national practice. Therefore, although the Committee notes that judiciary workers in Argentina are not covered by the Framework Act Regulating National Public Employment and that the characteristics of the judicial sector may make it necessary to apply special modalities as regards collective bargaining (especially with regard to salaries, since state budgets must be approved by Parliament), it deems that auxiliary staff of the judiciary must have the right to collective bargaining. The Committee requests the Government, as under Article 5 of Convention No. 154, to take measures adapted to national conditions, including legislative measures if necessary, to promote collective bargaining between the judiciary and the trade union organizations concerned.*
- 229.** *With regard to the statement by the CSJN that the complainant organizations are not the most representative and that the CTA, because it is merely registered, cannot defend collective interests as it lacks the exclusive rights for that purpose, which are recognized for trade union associations with union status as under Act No. 23551, the Committee recalls that it has considered that systems of collective bargaining with exclusive rights for the most representative trade unions 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 [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 950]. The Committee also recalls that, in the context of Case No. 2477, it “strongly urged the Government to take a decision without delay regarding the CTA’s application for trade union status (made almost three years ago)” [see Report No. 346, June 2007, para. 246].*
- 230.** *Lastly, with regard to the statement by the CSJN that the signatory of the complaint did not have such unquestionable trade union representation as to be able to take a complaint on the violation of international treaties before an international body, the Committee notes that a complaint relating to the electoral process of the CTA is indeed currently pending. The Committee notes that in any case, the present complaint has been presented jointly by the CTA and the FJA.*

### **The Committee’s recommendation**

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

*The Committee requests the Government, pursuant to Article 5 of Convention No. 154, to take measures adapted to national conditions, including legislative measures if necessary, to promote collective bargaining between judiciary authorities and the trade union organizations concerned.*

CASE NO. 2882

INTERIM REPORT

**Complaint against the Government of Bahrain  
presented by  
the International Trade Union Confederation (ITUC)**

*Allegations: The complainant alleges serious violations of freedom of association, including massive dismissals of members and leaders of the General Federation of Bahraini Trade Unions (GFBTU) following their participation in a general strike, threats to the personal safety of trade union leaders, arrests, harassment, prosecution and intimidation, as well as interference in the GFBTU internal affairs*

- 232.** The complaint is contained in a communication from the International Trade Union Confederation (ITUC) dated 16 June 2011. The ITUC sent supplemental information in communications dated 10 November 2011 and 3 February 2012.
- 233.** The Government sent its partial observations in a communication dated 29 February 2012.
- 234.** Bahrain 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. The complainant's allegations**

- 235.** In its communication dated 16 June 2011, the ITUC submitted a complaint, on behalf of its affiliates, including the General Federation of Bahraini Trade Unions (GFBTU), against the Government of Bahrain for serious violations of the ILO principles of freedom of association.
- 236.** The ITUC refers to earlier complaints submitted by the GFBTU of serious violations of freedom of association and, in particular, the denial of the right to organize of public sector workers and restrictions to the right to strike and denounces the absence of any measures to implement the relevant recommendations of the Committee on Freedom of Association.
- 237.** The ITUC then refers to the GFBTU's convening of two general strikes on a series of economic and social demands as well as in support of democratization and reform on 20 February and 13 March 2011. The first strike was called off after one day. The second strike was called off after nine days following the intervention of Saudi and United Arab Emirates (UAE) troops, and after assurances by the Government that it would open a dialogue and a commitment that no reprisals would ensue.
- 238.** Soon after the end of the strikes, many state-owned and private sector companies as well as ministries fired a large number of union members and leaders (to date the GFBTU have registered 1,876 workers) who had participated in the general strikes or supported those actions. In many cases, the letter of dismissal explicitly stated this participation as the main reason justifying the measure.

- 239.** There have been continuous threats to the personal safety of trade union leaders including arrests, harassment, prosecution and intimidation. Furthermore, there is an ongoing campaign in the media (on Bahraini TV channels in particular) against the GFBTU and its leadership.
- 240.** The ITUC adds that, on 12 June 2011, the Joint Committee of Major Companies issued a communication urging the leaders of the GFBTU to resign from their position without delay or face criminal as well as civil legal charges for their role in what they refer to as an illegal strike. All attempts by the trade unions to reinstate social dialogue had been rejected by the Government. In these circumstances, the ITUC requested that the Governing Body consider referring this case to the Fact-Finding and Conciliation Commission on Freedom of Association.
- 241.** In its communication dated 10 November 2011, the ITUC provides further information on behalf of Education International (EI) and the GFBTU. The complainant recalls the events of February 17 when the security forces moved in the Pearl roundabout and, using tear gas and batons, dispersed the protestors. Tanks occupied the area. Several people were reported killed and hundreds sustained injuries. Public security forces continued the attacks into the following day, using live rounds against protestors and mourners, leaving more dead and wounded.
- 242.** On 19 February, the GFBTU welcomed the proposed national dialogue initiative of the Crown Prince, while stressing that a precondition was the cessation of the use of force against peaceful protesters. To ensure the protection and safety of citizens, the GFBTU called for a general strike starting on 20 February, which it suspended that same day after the army withdrew from the streets and guarantees were made to provide for respect of freedom of assembly.
- 243.** In the following weeks, the demonstrations continued. Trade union leaders and union members participated in them, demanding economic, social and political reforms. Throughout this period, the GFBTU issued public statements emphasizing national and labour unity, affirming the GFBTU's support for the national dialogue initiative (which had failed to materialize), and stressing the necessity for the Government to fulfil its commitments, including respect of basic freedoms and investigations into the violent aggressions perpetrated against peaceful protesters.
- 244.** Events took a dramatic turn when, on 13 March, state security forces fired tear gas and rubber bullets at protesters in an attempt to clear the sit-ins, with reports of unidentified armed civilians also attacking protesters. Hundreds of protesters were wounded and hospitalized. In response to the use of excessive force against protesters and the endangerment of civil peace, the GFBTU called for a general strike with the purpose of finding a solution to the crisis without delay and without further bloodshed.
- 245.** Instead, on the following day, 14 March, Gulf Cooperation Council Peninsula Shield Forces, consisting mainly of Saudi and UAE troops, arrived in an armoured convoy at the request of the Government of Bahrain. On 15 March, the King declared a three-month state of emergency under article 36(b) of the Constitution, which prohibited most forms of public assembly and speech related to such assembly, as well as the operation of non-governmental organizations, political societies and unions. Reports also emerged of security forces occupying medical facilities, denying access to care to the wounded, harassing doctors and nurses and redirecting the wounded to military facilities – where they were certain to be detained and interrogated.

- 246.** Stressing that the security situation and aggressions against commuting workers did not allow for the resumption of work until a return to normalcy, the GFBTU maintained the general strike. After meeting with the Minister of Labour and the President of the Shura Council, who communicated assurances from the Deputy Prime Minister that aggressions against workers would cease and no reprisals would occur, that the checkpoints would ease and security would be provided for national and resident workers, the GFBTU called off the strike on 23 March. It urged workers to coordinate with their trade unions and the management of their enterprises to record any violations to their safety and present them to the GFBTU. It also stressed the need for workers to exert every effort to preserve social and national cohesion and called on management in the public and private sectors to be understanding of the exceptional circumstances and safeguard the rights of all workers. The GFBTU also reiterated the necessity of preparing enabling conditions for genuine dialogue leading to a solution to the crisis.
- 247.** On 24 March, the GFBTU and the Bahrain Chamber of Commerce and Industry (BCCI) issued a joint statement (attached to the complaint) calling on all those responsible in the public and private sectors to show understanding for the exceptional circumstances the country was going through with regards to workers. Both parties stressed that dialogue was the best means to exit from the crisis. The BCCI praised the decision of the GFBTU to call off the strike and resume work.
- 248.** In the following weeks, however, the BCCI underwent a political change due to a shift in the internal balance of powers, which tilted the organization in favour of the Government. Around this time, prominent trade union leaders and hundreds of rank and file members were fired; some faced criminal prosecution for their role in organizing and participating in strikes and/or demonstrations. In demanding the dismissal of workers who went on trade union endorsed strikes or who otherwise demonstrated for political and socio-economic reforms, largely in state-owned or invested enterprises (including Bahrain Petroleum Company (BAPCO), Aluminium Bahrain (ALBA), Bahrain National Gas (BANAGAS), Gulf Air, Bahrain Telecommunications Company (BATELCO), APM Terminals, Arab Shipbuilding and Repair Yard (ASRY), Gulf Aluminium Rolling Mill Co. (GARMCO) and Bahrain Airport Services (BAS)), the Government actively worked to intimidate and dismantle an independent, democratic and non-sectarian trade union movement. The Government also persecuted public sector union members and leaders.
- 249.** On 12 June, the Joint Committee of Major Companies, which includes companies wholly or partly owned by Mumtalakat, the Government's investment arm, which is also represented on the board of the BCCI, issued a communication to the GFBTU leadership, asking its executive council of 15 members to "voluntarily" resign immediately or face civil and criminal prosecution.
- 250.** The dismissals continued for months. Government workers, especially those in health, education and municipal sectors (which by the nature of their work frequently interface with the public), continued to be suspended or fired for their actual or suspected participation in, inter alia, political activity earlier this year. Dismissals increased since June, as the Government, through "investigation committees", sought to cleanse the public service of workers it deemed to be a threat due to their political opinions. Roughly 550 municipal workers were fired or suspended. The GFBTU also reported that at least 132 teachers were fired, as well as 14 university professors who were fired on 12 August. Teachers facing dismissal report having to appear before a disciplinary board with no opportunity to mount a legal defence of any kind. The salaries of those under investigation were either stopped completely, or halved. Further, it appears that pro-government employees are replacing dismissed workers. According to the Bahrain Teachers Association (BTA), 2,500 teachers have been brought in from Egypt to replace dismissed

Bahraini teachers, together with another 6,500 unqualified local volunteers. This is resulting in the serious deterioration of the quality of education.

- 251.** At the time of the complaint, the Minister of Labour had refused to discuss the dismissals of government workers with the GFBTU, disclaiming any responsibility and instead referring government workers to the Civil Service Board. 2,815 workers in both the public and private sector were dismissed or suspended, affecting 14,069 family members. Despite public promises to the contrary, the Government largely failed to reinstate workers illegally dismissed. The GFBTU indicated that only 336 workers had been reinstated at the time of the complaint and 212 workers had their suspensions revoked. Many of the reinstated workers had to agree to unacceptable, indeed illegal, conditions to get their jobs back. Workers had to agree not to take part in any further political activity, to waive the right to join legal complaints pending before the Ministry of Labour and Ministry of Justice, to waive any payments or benefits they may have been due and to agree not to join the union. Some workers, who worked on indefinite term contracts were brought back on fixed-term contracts. Though employed, there is no question that the Government continues to retaliate against these workers because of their political opinion, and would not hesitate to fire them again were they to resume once again legal expression of their views.
- 252.** Trade union leaders have and continue to face criminal charges. For example, the Vice-President of the BTA, Jalila al-Salman and Roula al-Saffar, head of the Bahrain Nursing Society, stood trial before a military tribunal and were sentenced, before those sentences were vacated and the cases transferred to civilian criminal courts. The transfer to civilian courts is a positive step, though these leaders should not be facing charges in the first place. The Government has also commenced prosecutions against leaders at Gulf Air, DHL, GARMCO, BAPCO, among others, with the clear intent of undermining the union. Senior journalist Mansour Al Jamry, Editor-in-Chief of *Al Wasat* newspaper is on trial along with three other senior staff charged with publishing false information about the police crackdown, a charge that carries a one-year prison sentence.
- 253.** As regards the teachers, the complainant explains that, on 13 March, the Ministry of Education announced the temporarily closure of all schools and suspended the university academic year. When the schools reopened for staff on 20 March, teachers refused to return to work and volunteers were recruited to fill in for striking teachers. Nineteen students from the Teachers College in Bahrain were detained and 18 academics and administrators of the University of Bahrain, including the Dean of the Business School, were dismissed. Board members of the BTA were arrested on 29 March and the female General Secretary, Sana Abdul Razzaq, on 30 March. Security forces twice raided the house of BTA President Mahdi Abu Dheeb (on 20 and 29 March) and interrogated his wife and children. He was eventually arrested on 6 April.
- 254.** All public school teachers who were affiliated to the BTA decided not to go to work in support of the pro-democracy movement but also for fear for the life of the teacher union leader Mahdi Abu Dheeb. Since the declaration of a state of emergency in March, the authorities conducted pre-dawn raids on the homes of many students, teachers and teacher union leaders, detaining some for months with no trial and depriving their families of any knowledge of their whereabouts. Many other students were expelled, including 63 students on 12 June. According to BTA, more than 8,000 teachers have been affected by the crackdown, creating a climate of fear amongst educators.
- 255.** On 25 September, the National Safety Court of First Instance – a Bahraini military court – sentenced Jalila al-Salman and Mahdi 'Issa Mahdi Abu Dheeb to three and ten years' imprisonment respectively for their involvement in peaceful protests last March. An appeal was scheduled to be heard in a civilian court on 1 December. They were tried on charges

including “inciting hatred towards the regime”, “calling to overthrow and change the regime by force”, “calling on parents not to send their children to school” and “calling on teachers to stop working and participate in strikes and demonstrations”. An analysis of the statements has found no evidence of advocated violence of any kind.

- 256.** Moreover, reliable reports indicate that both Mahdi Abu Dheeb and Jalila al-Salman have been tortured in detention. On 7 June, a family member of the BTA President explained to members of EI that Mahdi Abu Dheeb had been in detention for 61 days and lost a lot of weight due to the torture and other ill-treatment. He was kept in solitary confinement in a windowless room. He did not have access to a lawyer until 7 June. Other eyewitnesses confirmed that Mahdi Abu Dheeb had been brutally tortured on a daily basis during the first three months of his detention from April to July 2011. After his arrest, he was taken to the Criminal Investigation Directorate (CID) headquarters in Adliya where he was first handcuffed, blindfolded, beaten on the head, ears, kidneys and back and insulted about his religious beliefs. He was also forced to stand for long periods of time. On the second day of his detention, he was taken from his cell and hung from the ceiling and brutally beaten with a plastic hose. Although he signed a forced confession, the beatings continued and he was threatened to be hung again. On 9 April, he was transferred to the Bahrain Defence Force Royal Medical Services. On the way to the hospital he was beaten again. After receiving treatment, a police officer warned him that he would be beaten again if he did not follow their instructions. Mahdi was taken to cell No. 2 at Al-Grain military prison where co-detainees witnessed how he continued to be tortured. He was forbidden from praying according to his religion. The torturers also threatened to rape him several times. In one month, Mahdi lost around 15 pounds, his health deteriorated and his kidneys were affected by the beating.
- 257.** On 9 May, he was taken back to the CID for interrogation by an officer. The officer refused to acknowledge the marks of torture on Mahdi’s body. Another person entered the room and threatened Mahdi to call in “specialists”, one to beat him, one to rape him and another one to torture him by electric shock. They threw cigarette ash on Mahdi’s head. After signing new forced confessions to be used by the military prosecution, Mahdi was allowed to go to the restroom where he saw his face for the first time in one month. Mahdi was never allowed to see a lawyer until at the first military court session. After he returned to the Al-Grain prison following his interrogation, he was beaten again. On 11 September, Mahdi started a hunger strike to protest his detention and the incarceration of his colleagues as well as the fact that his two letters to the military prosecutors remained unanswered. On 12 October, Mahdi was transferred to the Jaw prison which houses 450–500 inmates and is known by human rights activists for its appalling detention conditions. New inmates are reported to be mistreated heavily while in detention. Mahdi Abu Dheeb did not get treatment for diabetes and high blood pressure during his detention.
- 258.** The BTA female Vice-President Jalila al-Salman’s house in Manama was raided on 29 March by more than 40 security officers. She was reportedly taken to the CID in Manama where she remained for about a week during which she was beaten and held in solitary confinement. She was believed to have been transferred to the custody of the military and held there for two months, before being transferred again to a detention centre in Issa Town.
- 259.** In several cases, the employer has unilaterally cancelled dues deductions in apparent retaliation for trade union activity carried out earlier this year. These dues deduction arrangements had been in place for many years and were never previously breached. For example, at ASRY, workers noted that their paystubs, which had reflected the deduction of dues in April, no longer reflected dues deductions in May or afterwards. At no point had these workers resigned from the union or had the worker or union asked the employer not to deduct dues from the pay checks. The ASRY Trade Union wrote to the company and the

Ministry of Labour in June regarding the cancellation of the dues check-off; neither letter received a response. The intent of the move is obvious – to starve the union of financial resources needed to represent its members.

- 260.** Similarly, the BAS cancelled the dues check-off arrangement with the Bahrain Airport Services Trade Union. It had argued that the workers had asked to have the dues deduction cancelled. Apart from being untrue, it is not even the proper procedure. A worker would resign from the union and the union would inform the employer that the worker is no longer a member and to stop deducting dues. The union protested the employer's cancellation of the check-off system in November 2011.
- 261.** At one time, the union at GARMCO represented 750 of 780 employees. Following the events of 13 March, the trade union went to extraordinary lengths to ensure that production would continue despite the total lack of security and road-blocks. The union even proposed that its members go from three eight-hour shifts to two 12-hour shifts to avoid curfews and other logistical obstacles. A month later, however, the investigations commenced and numerous terminations and suspensions followed. On 8 May, the entire union executive board was fired after the union filed a complaint regarding the dismissals. The company then circulated a petition denouncing the union. About 130 workers signed it but several have subsequently stated that they were forced or tricked into signing the petition. The company then unilaterally decided to no longer "recognize" the union. Trade union officials have been barred from the premises and the union offices have been burglarized by company officials.
- 262.** On 9 October, the Government of Bahrain unilaterally and without notice amended the trade union law in an effort to silence the independent and democratic voice of Bahraini workers, the GFBTU. These amendments marked yet another serious attack on the fundamental rights of Bahraini workers, the passage of which was an obvious (and illegal) act of retaliation by the Government for the exercise of trade union activity. The complainant fears that the amendments will be used to establish and promote government-backed unions that will be used to mouth a defence of the government's anti-union and anti-democratic policies to the international community. The amended articles of the Trade Union Law include:

Article 8(1), which was amended to prohibit the establishment of a general labour federation, allowing instead only the establishment of a federation of "similar" trade unions.

Article 8(3) allows the Minister of Labour to determine which trade union may represent Bahraini workers in international forums and in national level bargaining. These rights belong (as they do in most countries) to the most representative trade union(s) – here the GFBTU. This is a naked attempt by the government to prohibit the GFBTU from further denouncing government-sponsored violations of trade union rights before the International Labour Organization (ILO).

Article 10, which allows for the establishment of multiple unions at the enterprise level, so long as the union is not formed on the basis of sect, religion or race. Legislation permitting multiple unions in an enterprise is fully consistent with international law. The timing of this reform raises obvious questions about the government's motivations. Similarly, trade unions absolutely should not discriminate on the bases of sect, religion or race. The GFBTU is a non-sectarian organization and no GFBTU-affiliated trade union has been formed on any of these prohibited bases. However, the complainant is concerned that the government will look for and find trade unions with a large Shia majority – which is to be expected given that the vast majority of working class Bahrainis are in fact Shia. The law could be invoked to deregister trade unions claiming that they were established along religious or sectarian lines even where there is no evidence of any such intent.

Article 17, which now includes language barring trade unionists who are held responsible for violations that led to the dissolution of a trade union organization or its executive council are prohibited from nominating themselves to the membership of the



executive council of any trade union organization within five years from the date of decision or final judicial ruling on the dissolution of the union. While a law barring the election of a trade union leader convicted of a crime related to his or her integrity, such as corruption or fraud, may be appropriate, this amendment is an obvious attempt to remove the trade union leadership that participated in the political mobilization earlier this year. As mentioned above, the trade union leaders of a number of major enterprises, including Gulf Air, GARMCO, BAPCO, and DHL have been summoned to appear before the courts on charges related to the demonstrations earlier this year. If convicted, it could lead to the dissolution of the executive council, and potentially the union. If those unions dissolve, it would strike a severe blow to the GFBTU.

- 263.** Even before the Trade Union Law was amended in 2011, the labour laws of Bahrain were well out of compliance with the principles of freedom of association and collective bargaining. The most serious shortcomings, described below, must also be addressed through a process of social dialogue.

Article 2 of the Labour Law explicitly excludes from coverage several broad categories of workers. While some excluded workers are covered by a separate labour relations regime, such as civil servants and seafarers, others workers appear to be wholly unprotected. Among this latter category are domestic servants and “persons regarded as such,” temporary workers performing ancillary services of an employer for a duration of less than one year and most agricultural workers. The children of an employer (of any age) are also excluded.

The labour laws of Bahrain have been interpreted to prohibit public sector workers from forming unions. On this basis, the Government has refused to recognize six legitimate public sector unions. While Article 10 of Legislative Decree No. 33 of 2002 (the Trade Union Law) provides that “the workers of any establishment, of any particular sector, of any particular activity or of similar or associate industries or professions may establish their own trade union subject to the provisions of the law”, according to Circular No. 1 of February 10, 2003, civil service workers are expressly prohibited from forming their own unions. Indeed, such workers may only join currently existing unions in the private sector. The relevant text of Circular 1 states: [A]s supported by Clause 10 of the Trade Union Law - 33 of 2002, it is impermissible under the law for the employees governed by the Civil Service Commission to form trade unions within ministries or government agencies that are governed by the Civil Service Administration, for that is considered in violation of the law. Their right is restricted to joining the unions that were formed by workers governed by the law for the Private Sector or the Maritime law.... In support of this opinion, all trade union organizations, both general assemblies and executive boards and labour committees that have been formed or are still in existence following their formation by workers in the government sector, are considered illegal organizations. Therefore, they are considered as if they do not exist. And it is the duty of all workers who work under the Civil Service Administration regime, if they chose to practice trade union activity in accordance with the law, to seek membership in the trade unions that were formed under the provisions of the Labour Law for the Private Sector or the Maritime law. Officials from the GFBTU have repeatedly requested the Minister of Labour to withdraw Circular No. 1 and the Government promised that Parliament would in fact consider an amendment to the Trade Union Act that would allow public sector workers to establish their own trade unions. However, in a subsequent communication dated 22 March 2007, the Government informed the GFBTU that any such amendment to the law would be postponed until the trade union movement in Bahrain had an opportunity to mature. Since then, there has been no effort on the part of the Government to extend the right of freedom of association and collective bargaining to public sector workers. Additionally, the GOB should immediately repeal Directive No. 3 of 2007, which provides that the authorities may take disciplinary action against civil service workers that have established or joined public sector unions.

**The right to strike** in Bahrain has been unduly restricted in law and in practice. Article 21(e) of the Trade Union Law provides that, “strikes shall be prohibited in vital and important facilities such as security, civil defence, airports, ports, hospitals, transportations, telecommunications, electricity and water.” This provision was subsequently amended in 2006 by Act No. 49. Section 21 of the Act amended Article 21(e) of the law, providing that strikes would be prohibited “at strategic undertakings, which may threaten national security, or disrupt the flow of daily life for citizens.” The Act also provided that the Prime Minister

would issue an order “which determined the strategic undertakings from which striking shall be prohibited.” On 20 November 2006, the Prime Minister issued Decision No. 62, which classified as “strategic undertakings” for purposes of Act No. 49 the following sectors: “security services, civil defence, airports, ports, hospitals, medical centres and pharmacies, all means of transport of persons or goods, telecommunications, electricity and water services, bakeries, educational institutions and oil and gas installations.”

Article 133 of the Labour Code provides that either party alone may request conciliation and arbitration in private sector to resolve collective labour disputes. Moreover, the government can compel conciliation and arbitration, even if neither party has requested it. In many cases, the employer has invoked these mechanisms, which can in practice last for years (although the law itself contemplates a more rapid resolution), in order to deny a union its right to strike. Article 140 provides that no union may strike once the employer submits an application for conciliation.

The Labour Code provides no substantive or procedural rights for workers with regard to **collective bargaining**, although collective bargaining does occur in a limited form in unionized workplaces. Such “agreements” are more often a compendium of single-issue agreements reached over time and are not the result of comprehensive collective bargaining on wages, hours and conditions of work as commonly understood. Unions have pressed for the adoption of a law on collective bargaining but have so far been unsuccessful. In some cases, employers (such as BAPCO) have refused to bargain collectively citing the lack of explicit language in the labour code.

- 264.** In conclusion, the complainant urges the Committee to recommend that the Government of Bahrain unconditionally reinstate all public sector workers illegally fired for participating in trade union activity. Similarly, the Government must ensure that dismissed workers in the private sector are also unconditionally reinstated. Any conditions imposed on those few workers who have been reinstated that are inconsistent with national and international law should be deemed null and void. Criminal prosecutions for activity related to trade union activity should end and those already convicted should be released immediately. The recent amendments to the Trade Union Law should also be repealed to the extent they are inconsistent with international law; new amendments bringing the labour legislation into compliance with Conventions Nos 87 and 98 should be developed through social dialogue and enacted as soon as possible. Further, the ILO should monitor the recent amendments that, while consistent with the conventions, are nevertheless suspect due to the timing of their passage and the high likelihood that they will be used to further weaken the GFBTU rather than strengthen the labour movement as a whole.
- 265.** In its communication dated 3 February 2012, the complainant indicates that the first hearing of the appeal of BTA leaders, Jalila al-Salman and Mahdi Abu Dheeb, was held on 11 December 2011 and adjourned by the Supreme Court of Appeal to 19 February. Both defendants were present. Their lawyers asked for the Bahrain Independent Commission of Inquiry’s report (BICI) to be included as evidence in the file of this case. The BICI report refers to the torture and mistreatments that have been inflicted to Mahdi Abu Dheeb and other detainees during their detention. The lawyers also asked that “confessions” allegedly obtained from both activists under torture to be dropped. The request of the lawyers of the BTA to release Mahdi on bail, given his health condition, was rejected by the court. The judge finally postponed the hearing to 19 February 2012 and ordered the annexation of the BICI report in the file of the case. This postponement is in contradiction with the right of BTA leaders to a fair and prompt trial.
- 266.** Seven other BTA board members (see full list in appendix) are also on trial and 76 teachers have been sacked for similar baseless reasons. A larger number of teachers are still suspended and most BTA board members have been sacked.

267. Jalila al-Salman, who is currently free on bail, reported to EI that there are serious fears for the health of the former President of BTA, Mahdi Abu Dheeb. His health condition is deteriorating day by day since he moved to Jaw Prison on 12 October, but the officials continue to deny him the urgent medical help he needs. The type of tortures and mistreatment suffered by Mahdi Abu Dheeb and other detainees in Bahraini prisons are documented in the BICI report released on November 23.

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

268. In its communication dated 29 February 2012, the Government provides the following partial information in reply to the complaint. The Government asserts that the Kingdom of Bahrain adheres to all international labour principles and standards contained in the ILO Conventions and Recommendations. While Bahrain has not ratified the Arab and international Conventions on trade union freedoms, it endeavours to respect these freedoms in its national legislation, notably in the Trade Union Law No. 33 of 2002. Moreover, the Government has not taken any action in respect of participants in the strikes called by the GFBTU and a group of affiliated trade unions under its umbrella. Furthermore, no legislative action has been taken against the GFBTU, which has continued to operate, to contribute at the local and the international level and to express its opinion freely.

269. The Government states that it continues to follow up on the previous recommendations made by the Committee on Freedom of Association in Cases Nos 2433 and 2552. It has coordinated with the authorities concerned to give effect to the Committee's recommendations and has sought to develop national legislation and bring it into line with international labour standards.

270. As regards the dismissal of 180 civil service employees, the Government indicates that these were revoked pursuant to the decision of His Excellency the Deputy Prime Minister and Deputy Head of the Civil Service Council. The employees concerned were reinstated in their jobs with effect from 1 January 2012, without prejudice to their rights and privileges under the law. All public sector employees who were dismissed have now been reinstated in their jobs, with the exception of a few cases that are before the courts.

271. In addition, since the formation of the tripartite labour committee in accordance with the agreement reached at the 312th Session of the ILO Governing Body in November 2011 (regarding the Article 26 complaint concerning non-observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)), the Ministry of Labour has undertaken to discuss dismissal cases in the public and private sector, without exception.

272. The Government has made active efforts to reinstate dismissed public and private sector employees in their jobs, pursuant to the directives of His Majesty the King. The report to be sent to the ILO pursuant to the Governing Body decision contains details of the reinstatement process.

273. At the time of this communication, more than 90 per cent of private sector employees who had been dismissed had either been reinstated in their former posts or re-employed, by means of the efforts of the Ministry of Labour, or that measures to reinstate them in their jobs in other companies with the same benefits as before, or on better terms, were being approved. Moreover, the reinstatement procedures for a number of other private sector employees who had been dismissed and whom companies had agreed to reinstate would soon be completed. The ILO delegation visiting Bahrain from 28 February to 2 March 2012 was briefed directly in this regard.

- 274.** As regards the arrests of teachers' association leaders, the Government indicates that the Ministry of Education reported that the BTA had violated Legislative Decree No. 21 of 1989, as amended, concerning social and cultural associations and clubs, private youth and sports organizations and private institutions, on the basis of which the Association was given legal status. The violations included engaging in politics, promoting sectarianism, jeopardizing national security and the social order and inciting teachers to neglect their professional and educational duties, including those working in kindergartens and rehabilitation institutes for persons with disabilities.
- 275.** The Ministry of Education had further indicated that it had taken legal measures stipulated in the Civil Service Act and implementing regulations to bring offenders before investigative panels composed of qualified and impartial persons while offering all safeguards established by law. A number of employees had been arrested and referred for investigation on full pay while detained. The dismissal decisions have been revoked pursuant to the directives of His Majesty the King and the orders of His Excellency the Deputy Prime Minister. All employees in respect of whom such decisions were issued returned to their jobs with effect from 1 January 2012.
- 276.** As regards the amendments to the trade union law, the Government indicates that, in order to give effect to the views expressed during the national dialogue held in July 2011, His Majesty the King issued Legislative Decree No. 35 of 2011 amending various provisions of the Trade Union Law No. 33 of 2002. These amendments are in conformity with international labour standards, notably with the Convention No. 87. The Government of Bahrain attributes great importance to these standards in its labour legislation as it believes that the national legislation needs to keep pace with the latest legislative developments in order to protect the rights of workers, who represent a large segment of Bahraini society.
- 277.** The most important amendments introduced by the aforementioned Legislative Decree are set out below:
- (a) Under the Legislative Decree, two or more trade unions representing similar professions or sectors may form a trade union federation, provided that the general assembly of the trade union has approved the establishment of a federation and membership thereof by a majority.
  - (b) The most representative union will be designated by a decision of the Minister of Labour to represent Bahrain's workers in international forums and at the national level in collective bargaining with employers. The Ministry of Labour emphasizes that such ministerial decisions are purely administrative procedures and will be based on international labour standards.
  - (c) Under article 10, as amended by the aforementioned Legislative Decree, workers in any specific sector or facility or in any particular activity or in similar or associated industries or crafts now have the right to establish one or more trade unions of their own, provided that these are not established on a sectarian, religious or ethnic basis. The law thus enables workers in a facility to establish more than one trade union in order to defend their interests and prevents a single trade union in a facility from exercising a monopoly.
  - (d) In order to ensure the proper functioning of trade unions and trade union federations and to prevent governing body members from possibly committing violations, the legislature has banned persons found to be responsible for violations leading to the dissolution of a trade union organization – whether a trade union, a trade union federation or the governing body of such an organization – from nominating themselves for membership of the governing body of any trade union organization for five years following the date on which a voluntary decision to dissolve an organization or a final court decision to dissolve the organization is issued.

- 278.** The above amendments are consistent with international and Arab labour standards, as stated previously. However, the fact that the aforementioned Legislative Decree introduces trade union pluralism at the level of facilities or federations does not mean that trade unions and federations will proliferate by force of law. It is for workers or trade unions to choose whether they want trade union unity or pluralism, as established by international and Arab labour standards which state that national legislation should provide for trade union pluralism and allow workers to choose trade union unity or pluralism. It should be noted in this regard that trade union pluralism prevents trade union monopolies and creates a kind of competition between trade unions and federations, which is of benefit to workers and has a positive impact on the defence of their interests.
- 279.** Furthermore, the amendments introduced by the Legislative Decree include various controls to ensure that trade unions remain focused on their assigned objective, in particular the restrictions relating to the establishment of trade unions or associations on a sectarian, religious or ethnic basis. This is in addition to the ban on the nomination of persons found to be responsible for the dissolution of a trade union organization or the governing body thereof for a specified period in order to ensure the proper functioning of trade union organizations, given that there is currently a legislative gap in this area. It should be noted in this regard that the Council of Representatives has approved the aforementioned Legislative Decree, which is currently under consideration by the Shura Council; the legislative authority in the Kingdom of Bahrain consists of both Councils.
- 280.** On the question of dismissals in the private sector more generally, the Government indicates that a number of companies and institutions affected economically by worker absences took disciplinary measures in respect of absent workers, thereby exercising their disciplinary authority enshrined in the applicable law and regulations and acting within the scope of their own approved internal rules and regulations registered with the Ministry of Labour. At the same time, under Bahraini law, workers and trade unionists subjected to disciplinary action are entitled to submit a labour complaint in order to verify that the law has been properly applied, that they have not been subjected to arbitrary dismissal and that normal legal measures have been taken in that regard in order to attempt to resolve disputes amicably. Cases in which that is not possible are referred to the competent courts for consideration, pursuant to article 110bis of the private sector Labour Code of 1976.
- 281.** As regards public sector dismissals, following the absence of a number of public sector employees from their jobs, the labour authorities set up investigative panels in connection with employee absences. The investigative panels sent their recommendations in respect of employees who were absent without an acceptable excuse to the Civil Service Bureau (CSB) for consideration and to determine the necessary action to be taken. According to data from the CSB, ministries and agencies transmitted lists of names of 2,075 employees in respect of whom the authorities had decided to take various forms of disciplinary action, including dismissal, to the CSB, which upon re-examination decided that it would: drop charges in 19 cases; request the labour authorities to re-examine eight cases; refer 219 cases to the Office of the Public Prosecutor; acquit 18 employees of the charges against them; mitigate the penalties handed down by the ministries in respect of the employees concerned; and only suspend 1,631 employees from work for specified periods not exceeding ten days. In order to turn the page on the past, the CSB has played a significant and positive role by encouraging disciplinary panels to comply with the aforementioned directives.
- 282.** As regards the rights of domestic workers, although no articles in the current private sector Labour Code relate directly to domestic workers, their rights are protected under other applicable national legislation and regulations. It should be noted that certain articles of the new Labour Code, currently in its final stages before the legislative authority, protect the

rights of domestic workers and those in similar employment clearly and on an equal basis with other workers.

- 283.** As regards the allegations that some companies have ceased to deal with their trade unions by suspending financial support and not recognizing them as representative of workers, the Government states that, while to date the Ministry has not received any such complaints it would take the necessary legal measures should such a complaint be submitted. The Government underscores that excellent cooperation exists between some companies and their trade unions, such as ALBA and Gulf Petrochemicals Industries.
- 284.** The Government concludes by confirming its readiness to cooperate fully with the ILO to provide any further information requested by the Committee.
- 285.** In its communication dated 15 May 2012, the Government states that 57 trade union leaders have been reinstated. However, the GFBTU submitted ten new names. While three of them have been reinstated and another four are in the process of reinstatement, the employers of the remaining three cases have submitted complaints to the court accusing them of financial misbehaviour. The Minister of Labour will exert every effort to reinstate them if the court decides they are innocent and their dismissals are related to the political events.

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

- 286.** *The Committee observes that this case concerns grave allegations of massive arrests, torture, dismissals, intimidation and harassment of trade union members and leaders following a general strike action in February and March 2011 in defence of workers' socio-economic interests. The complainant further alleges acts of interference in the GFBTU internal affairs and measures taken by the Government to amend the trade union legislation in a manner contrary to the principles of freedom of association.*
- 287.** *The Committee takes due note of the Government's statement that the Kingdom of Bahrain adheres to all international labour principles and standards contained in the ILO Conventions and Recommendations. While Bahrain has not ratified the international Conventions on trade union freedoms, the Government states that it endeavours to respect these freedoms in its national legislation, notably in the Trade Union Law No. 33 of 2002. Moreover, the Government asserts that it has not taken any action in respect of participants in the strikes called by the GFBTU and a group of affiliated trade unions under its umbrella.*
- 288.** *The Committee first wishes to express its deep concern at the numerous and serious allegations set out in the complaint. In this regard, the Committee recalls that a genuinely free and independent trade union movement can only develop where fundamental human rights are respected and in a climate free from violence and uncertainty [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 33 and 45].*
- 289.** *As regards the question of dismissals and criminal referrals of civil servants, the Committee observes that many of these matters have also been raised in relation to the article 26 complaint concerning the non-observance by Bahrain of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). The Committee welcomes the tripartite agreement which was signed within this framework (see Annex 1), whereby the parties committed to continue their efforts to ensure the full reinstatement in both public and private sectors of all the remaining workers to the maximum extent possible no later than 30 May 2012. The parties further committed to the withdrawal of all pending court cases relating to workers dismissed from public-private and major companies in the*

*interest of social peace and improving workplace relations, while the Government committed to reviewing the 64 cases where civil servants had been charged of criminal acts to ensure that the charges met national and international standards and to reinstate with full pay and allowances those found not to meet this requirement. In its latest communication, the Government indicates that 60 trade union leaders have been reinstated, four are in the process of reinstatement and three others are awaiting court decisions. The Committee requests the Government to continue to provide information on the implementation of this agreement, and the status of any remaining court cases.*

- 290.** *As regards the allegations of excessive police intervention in the general demonstrations, the Committee recalls that the authorities should resort to the use of force only in situations where law and order is seriously threatened. The intervention of the forces of order should be in due proportion to the danger to the law and order that the authorities are attempting to control and governments should take measures to ensure that the competent authorities receive adequate instructions so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations which might result in a disturbance of the peace [see **Digest**, op. cit., para. 140]. The Committee notes that the BICI report, referred to by the Government, has made specific recommendations concerning the promulgation and enforcement of police professional standards and the need for legal and sensitivity training for police officers and requests the Government to keep it informed of the training provided.*
- 291.** *The Committee notes that the Government has not replied to the allegations of intimidation and harassment of trade union leaders and members, including through an alleged campaign in the media against the GFBTU and its leadership and a communication issued on 12 June 2011 by the Joint Committee of Major Companies urging the leaders of the GFBTU to resign from their position without delay or face criminal as well as civil legal charges for their role in what they refer to as an illegal strike. The Committee expresses its deep concern at the nature of these allegations of interference which, if true, could have a significant detrimental impact on the rights of trade union leaders to exercise legitimate trade union activity. The Committee expects the Government to transmit its observations on these allegations without delay and to ensure that sufficient measures are taken to protect trade unionists from any such acts of intimidation and harassment.*
- 292.** *The Committee further underlines the allegations of arrest, detention and torture of Mahdi 'Issa Mahdi Abu Dheeb, BTA President, and Jalila al-Salman, BTA Vice-President, and their sentencing to three and ten years' imprisonment respectively by a Bahraini military court for their involvement in peaceful protests. While their cases have been appealed within the civil justice system, the Committee observes with serious concern that Mr Abu Dheeb remains in detention and that the complainant has raised grave allegations that he and Ms Jalila al-Salman have been tortured in jail.*
- 293.** *The Committee notes the information provided from the Ministry of Education that the BTA had violated Legislative Decree No. 21 of 1989, as amended, concerning social and cultural associations and clubs, private youth and sports organizations and private institutions, on the basis of which the Association was given legal status. The violations included engaging in politics, promoting sectarianism, jeopardizing national security and the social order and inciting teachers to neglect their professional and educational duties, including those working in kindergartens and rehabilitation institutes for persons with disabilities.*
- 294.** *The Committee first wishes to emphasize in respect of the allegations relating to the ill-treatment or any other punitive measures said to have been taken against workers who have taken part in strikes the importance it attaches to the right of trade unionists, like all other persons, to enjoy the guarantees afforded by due process of law in accordance with*

*the principles enunciated in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights. Where allegations of ill-treatment and torture are made, governments should carry out inquiries into complaints so that appropriate measures, including compensation for damages suffered and the sanctioning of those responsible, are taken to ensure that no detainee is subjected to such treatment [see **Digest**, op. cit., paras 57 and 56].*

- 295.** *The Committee notes the BICI report recommendations for the independent investigation of claims of torture and other forms of cruel, inhuman or degrading treatment or punishment and expects the Government to provide information without delay on the specific steps taken to investigate the allegations of torture in relation to Mr Abu Dheeb and Ms Jalila al-Salman and the outcome of these investigations and, in light of the concerns raised by the complainants over Mr Abu Dheeb's health, to ensure that he immediately receives all necessary medical attention.*
- 296.** *As regards the continuing detention of Mr Abu Dheeb, the Committee recalls that the detention of 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 [see **Digest**, op. cit., para. 64]. The Committee expects that he will be immediately released should it be found that he has been detained for the exercise of legitimate trade union activity. The Committee urges the Government to provide full particulars on the status of his and Ms Jalila al-Salman's appeals, as well as the specific charges brought against them and copies of any court judgments in their case.*
- 297.** *While taking due note of the Government's reply that it has not received any complaints of unilateral withdrawal of check-off facilities or of employer refusal to recognize established trade unions, the Committee requests it to provide information in its next report on the status of the unions at ASRY, BAS and GARMCO, which were specifically mentioned in the complaint.*
- 298.** *The Committee further notes the concerns raised by the complainant in relation to recent amendments to the Trade Union Law No. 33 of 2002. In particular, the Committee notes the allegations that:(1) it would be no longer possible to form a general labour federation; (2) the Ministry of Labour will use its discretion in appointing workers' organizations to represent workers before international forums and in national bargaining; (3) the timing of changes introducing pluralism at the workplace (article 10) and prohibiting discrimination by unions on the basis of sect, religion or race which may be misused to undermine the trade union movement; and (4) the restriction placed on trade union elections in relation to candidates that have committed an offense.*
- 299.** *The Government, for its part, states that: (1) federations can be formed if they are made of unions within a similar sector; (2) ministerial decisions designating the most representative unions are purely administrative procedures and will be based on international labour standards; (3) the amendment to article 10 enables workers in a facility to establish more than one trade union in order to defend their interests and prevents a single trade union in a facility from exercising a monopoly, while the introduction does not mean that trade unions and federations will proliferate by force of law. It is for workers or trade unions to choose whether they want trade union unity or pluralism, as established by international and Arab labour standard. In addition, these controls are necessary to ensure that trade unions remain focused on their assigned objective, in particular the restrictions relating to the establishment of trade unions or associations on a sectarian, religious or ethnic basis; and (4) in order to ensure the proper functioning of trade unions and federations and to prevent governing body members from possibly committing violations, the legislature has banned persons found to be responsible for violations leading to the dissolution of a trade union organization from nominating*



*themselves for membership of the governing body of any trade union organization for five years following the date on which a voluntary decision to dissolve an organization or a final court decision to dissolve the organization is issued.*

- 300.** *The Committee wishes first to express its deep concern at the allegation that the amendments to the Trade Union Law would mean that general labour federations that cut across particular sectors will no longer be allowed. The Committee recalls that legislation which prevents the establishment of federations and confederations bringing together the trade unions or federations of different activities in a specific locality or area or on a regional or national basis would not be in conformity with the principles of freedom of association [see **Digest**, op. cit., paras 715 and 720]. The Committee requests the Government to confirm that this amendment will have no negative impact on the abovementioned principle and that the GBFTU will continue to function legally and be fully recognized and to take steps if necessary to amend the provision, in full consultation with the GBFTU, so as to clarify that general labour federations may be formed freely.*
- 301.** *As regards the amendment to article 10 introducing trade union pluralism at the enterprise level and the ban on any union that discriminates on the basis of sect, religion or belief, the Committee first recalls that it had requested the Government to take the necessary measures to introduce trade union pluralism at the enterprise level and to amend article 10 when it examined Case No. 2433 [see 340th Report, paras 321–324]. The Committee takes due note of the concerns expressed by the complainant that the timing of this change could be aimed or used in a manner so as to undermine the GBFTU and its affiliates. The Committee recalls that situations in which the authorities interfere in the activities of a freely constituted trade union by establishing alternative workers' organizations and inciting workers using unfair means to change their membership violate the right of workers to establish and join organizations of their own choosing and expects the Government to ensure full respect for the principle that workers can in practice establish and join organizations of their own choosing in full freedom and without government interference [see **Digest**, op. cit., paras 344 and 309].*
- 302.** *As regards the ban on organizations that discriminate on the basis of sect, religion or belief, the Committee recalls that the principle of non-discrimination in respect of trade union matters, and the words "without discrimination whatsoever" mean that freedom of association should be guaranteed without discrimination of any kind based on occupation, sex, colour, race, beliefs, nationality, political opinion, etc. [see **Digest**, op. cit., para. 209]. Nevertheless, the Committee takes due note of the concerns raised by the complainant that the Government might use this amendment to ban or interfere with unions whose membership is largely Shia due to the large majority of Shia workers in many workplaces. It recalls in this respect that the free exercise of the right to establish and join unions implies the free determination of the structure and composition of unions [see **Digest**, op. cit., para. 333]. The Committee expects that the Government will ensure that this provision may only be invoked when a union's by-laws or acts are such as to consciously discriminate against certain workers on the bases mentioned and would in no way be used to dissolve an organization solely on the basis of its membership.*
- 303.** *Finally, as regards the amendment which bans persons who are held responsible for violations that led to the dissolution of a trade union or its executive body from trade union office for a period of five years following their conviction, the Committee observes the concerns raised by the complainant that this amendment is an attempt to remove the trade union leadership that participated in the political mobilization earlier this year. In particular, the complainant is concerned that, if the trade union leaders of a number of major enterprises who have been summoned to appear before the courts on charges related to the demonstrations were to be convicted, this provision could lead to the dissolution of the executive council and of the union and finally could strike a severe blow*

to the GFBTU. The Committee recalls that a law which generally prohibits access to trade union offices because of any conviction is incompatible with the principles of freedom of association, when the activity condemned is not prejudicial to the aptitude and integrity required for trade union office [see *Digest*, op. cit., para. 421]. It requests the Government to amend the legislation to ensure respect for this principle and, in the meantime, to confirm that this provision cannot be used for convictions relating to the exercise of legitimate trade union activity or the exercise of the right to peaceably demonstrate.

- 304.** *The Committee further notes the allegations relating to labour provisions that have been the subject of previous recommendations by the Committee in relation to the freedom of association rights of public servants and the right to strike. In particular, the Committee recalls its recommendations in relation to Cases Nos 2433 and 2552 wherein it requested the Government to amend the Trade Union Law to ensure that public servants may form and join the organizations of their own choosing and to respect the principles concerning the right to strike and modify the list of essential services set out in the Prime Minister's Decision No. 62 of 2006 so that it includes only essential services in the strict sense of the term [see Case No. 2433, 340th Report, para. 326 and Case No. 2552, 349th Report, para. 424]. The Committee notes the Government's indication that it continues to follow up on the previous recommendations made by the Committee on Freedom of Association in Cases Nos 2433 and 2552 and has sought to develop national legislation and bring it into line with international labour standards. The Committee urges the Government to take the necessary measures in the very near future to ensure the full implementation of its previous recommendations.*
- 305.** *The Committee further notes the concerns raised by the complainant in relation to exclusions from the labour law with respect to domestic servants and "persons regarded as such", temporary workers performing ancillary services of an employer for a duration of less than one year and most agricultural workers, as well as the children of an employer (of any age). The Committee recalls that all workers, without distinction whatsoever, including without discrimination in regard to occupation should have the right to establish and join organizations of their own choosing [see *Digest*, op. cit., para. 216]. The Committee notes the Government's statement that while domestic workers are not covered by the private sector Labour Code, their rights are protected under other applicable national legislation and regulations. The Government adds that certain articles of the new Labour Code, in its final stages before the legislative authority, protect the rights of domestic workers and those in similar employment clearly and on an equal basis with other workers. The Committee requests the Government to indicate the manner in which domestic workers will be fully ensured their freedom of association rights under the new Labour Code and to take the necessary measures to ensure that all workers, without distinction whatsoever, may freely form and join the organization of their own choosing. It requests the Government to transmit a copy of the draft which is before the legislative authority.*
- 306.** *In view of the important matters raised above, the Committee welcomes the commitment of all parties to the tripartite agreement to work together to ensure the smooth reintegration of the workers into their workplaces and a return to social peace and the expressed commitment of the ILO to provide the tripartite partners and the enterprises concerned with the necessary support through capacity building and training for a smooth reintegration and the improvement of workplace relations and social dialogue. The Committee expects that the Government will avail itself of the technical assistance and support of the ILO in this regard in the very near future and requests the Government to keep it informed of developments.*

307. Finally, the Committee welcomes the Government's commitment in the tripartite agreement to work on the possibility of ratifying 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), and requests the Government to keep it informed of the steps taken in this regard.

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

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

- (a) *The Committee welcomes the tripartite agreement whereby the parties committed to continue their efforts to ensure the full reinstatement in both public and private sectors of all the remaining workers to the maximum extent possible no later than 30 May 2012. The Committee requests the Government to continue to provide information on the implementation of this agreement and the status of any remaining court cases.*
- (b) *The Committee notes that the BICI report, referred to by the Government, has made specific recommendations concerning the promulgation and enforcement of police professional standards and the need for legal and sensitivity training for police officers and requests the Government to keep it informed of the training provided.*
- (c) *The Committee expects the Government to transmit its observations on the allegations of intimidation and harassment of trade union leaders and members without delay and to ensure that sufficient measures are taken to protect trade unionists from any such acts.*
- (d) *Noting the recommendations in the BICI report for the independent investigation of claims of torture and other forms of cruel, inhuman or degrading treatment or punishment, the Committee expects the Government to provide information without delay on the specific steps taken to investigate the allegations of torture in relation to BTA leaders Mr Abu Dheeb and Ms Jalila al-Salman and the outcome of these investigations and, in light of the concerns raised by the complainants over Mr Abu Dheeb's health, to ensure that he immediately receives all necessary medical attention.*
- (e) *The Committee expects that Mr Abu Dheeb will be immediately released should it be found that he is detained for the exercise of legitimate trade union activity. It further urges the Government to provide full particulars on the status of his and Ms Jalila al-Salman's appeals, as well as the specific charges brought against them and copies of any court judgments in their case.*
- (f) *The Committee requests the Government to provide information in its next report on the status of the unions at ASRY, BAS and GARMCO.*

- (g) *The Committee requests the Government to confirm that the amendments to the Trade Union Law will have no negative impact on the right of workers to establish and join the organization of their own choosing and for these organizations to form and join federations and confederations of their own choosing and that the GFBTU will continue to function legally and be fully recognized. It further requests the Government to take steps if necessary to amend the relevant provision, in consultation with the GFBTU, so as to clarify that general labour federations may be freely formed.*
- (h) *The Committee expects the Government to ensure full respect for the principle that workers should in practice be able to establish and join organizations of their own choosing in full freedom and without government interference.*
- (i) *The Committee requests the Government amend the legislation banning from trade union office persons held responsible for violations leading to the dissolution of a trade union or its executive body and, in the meantime, confirm that this provision cannot be used for convictions relating to the exercise of legitimate trade union activity or the exercise of the right to peaceably demonstrate.*
- (j) *The Committee urges the Government to take the necessary measures in the very near future to ensure the full implementation of its previous recommendations in Cases Nos 2433 and 2522, especially as regards the need to ensure fully the freedom of association rights of public servants and to bring the Trade Union Law and the Prime Minister's Decision No. 62 of 2006 in line with its recommendations concerning strike restrictions.*
- (k) *The Committee requests the Government to indicate the manner in which domestic workers will be fully ensured their freedom of association rights under the new Labour Code and to take the necessary measures to ensure that all workers, without distinction whatsoever, may freely form and join the organization of their own choosing. It requests the Government to transmit a copy of the draft which is before the legislative authority.*
- (l) *The Committee expects that the Government will avail itself of the technical assistance and support of the ILO in the area of capacity building and training for a smooth reintegration and the improvement of workplace relations and social dialogue in the very near future and requests the Government to keep it informed of developments.*
- (m) *The Committee welcomes the Government's commitment in the tripartite agreement to work on the possibility of ratifying 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), and requests the Government to keep it informed of the steps taken in this regard.*

## Appendix

### **Tripartite Agreement concerning the issues raised in the framework of the Complaint concerning the non-observance by Bahrain of the Discrimination (Employment and Occupation) Convention, 1958 (No.111), made by delegates to the 100th Session (2011) of the International Labour Conference under article 26 of the ILO Constitution**

It will be recalled that at the 100<sup>th</sup> Session ( June 2011) of the International Labour Conference, a Complaint was filed by a number of Workers' delegates at the Conference against the Government of Bahrain concerning the non-observance by Bahrain of the Discrimination (Employment and Occupation) Convention, 1958 (No.111), under article 26 of the ILO Constitution (The Complaint). The Complaint alleges that following the events of February 2011 in Bahrain, suspensions and various forms of sanctions, including dismissals, were imposed on over 2,000 workers from both the public and the private sectors, including trade unionists, union members and leaders, as a result of peaceful demonstrations demanding economic and social changes and expressing support for on-going democratization and reform. The Complaint alleges that these dismissals took place on grounds such as workers' opinions, belief and trade union affiliation.

The ILO Governing Body at its 312<sup>th</sup> Session in November 2011 approved the proposal of its Officers which took note of the proposal of the Government of Bahrain to:

“(a) establish a tripartite committee comprised of one member nominated by the Government, one member nominated by the General Federation of Bahrain Trade Unions and one member nominated by the Bahrain employers;  
(b) ensure that the tripartite committee has access to all relevant documents and meets weekly to address, with the assistance of independent legal advice (ILO) if requested by the Government or the workers' or employers' representatives, the issue of dismissals and reinstatements referred to in the complaint and provide minutes of its meetings to the International Labour Office;  
(c) provide two written progress reports to the Director-General, one in January and the second in February 2012, which would include the current individual employment status of each worker who has been alleged to have been inappropriately dismissed during the relevant period. Where appropriate, any additional information would be provided before the beginning of the March 2012 Governing Body session.”

The Governing Body, on the basis of the proposal of its Officers, invited the Director-General to provide any requested legal assistance or support to the Government of Bahrain or the workers' or employers' representatives in this process, and to report on the situation to the Governing Body at its next session in March 2012.

In view of the above decision of the Governing Body and in response to a request received by the GFBTU, the ILO Director General decided to send a Mission to Bahrain. The Mission, headed

by Ms. Cleopatra Doumbia-Henry, Director of the International Labour Standards<sup>1</sup>, visited the country from the 29 February to 11 March. The Government of Bahrain, the General Confederation of Bahrain Trade Unions (GBFTU) and the Bahrain Chamber of Commerce and Industry (BCCI) provided the Mission with their full support and made available to it all the information requested.

The Mission also met with the Deputy Prime Minister, His Highness Mohammed Bin Mubarak Al-Kalifa, Deputy Prime Minister His Excellency Khaled Bin Abdallah Al Khalifa, the Minister of Labour, His Excellency Jameel Humaidan and the Minister of Human Rights and Social Development, Her Excellency Dr. Fatima Al Balooshi, Minister of Health, His Excellency Sadek El Shahabi, the Chair of the Civil Service Bureau, Mr. Ahmed Al Zayed and the Chairman of the National Follow-up Committee for the implementation of the Recommendations of the Bahrain Independent Commission of Inquiry (BICI) Report, Mr. Ali Saleh el Saleh, who is also the Head of the Shura Council.

The Government of Bahrain, the GBFTU and the BCCI (The Parties) wish to confirm that they have made significant efforts to resolve all of the issues raised in the framework of the above-mentioned Complaint which the ILO Mission was able to witness. The Parties also confirm their commitment to fully implement the relevant recommendations contained in the BICI which was headed by Professor Bassiouni.

Taking into account the progress made to date, we have agreed on the following:

As a consequence of the events of February-March 2011, over 2,200 workers were dismissed from the public-private companies and the purely private companies. In the public-private companies, 1, 520 workers were dismissed while over 697 workers from the purely private companies have been dismissed.

According to the Government, 180 civil servants were dismissed, and 1,631 were suspended for a period not exceeding ten days without pay. The implementation of these suspensions is continuing. In addition, 219 were suspended with half pay and were subject to criminal referrals. Out of the 219 suspended civil servants who were subject to criminal referrals, cases have been closed in respect of 155 civil servants with 64 civil servants remaining suspended with half pay pending resolution of their criminal cases. A further 20 medical professionals have been convicted and are currently suspended without pay awaiting the outcome of their appeal. On March 10, an announcement by the Attorney General that 15 out of the 20 medical professionals would have the criminal charges dropped and their cases would be referred instead to the Medical Disciplinary Board. The lifting of the criminal charges will result in the reinstatement of the 15 medical professionals with back pay.

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<sup>1</sup> Other members of the Mission were Ms. Karen Curtis, Deputy Director; Ms. Shauna Olney, Coordinator, Equality Conventions; Mr. Walid Hamdan, Senior Workers' Specialist; Mr. Gary Rynhart, Senior Employers' Specialist.

For the GFBTU, 246 civil servants were dismissed, while 415 were suspended.

According to the Government, the total number of workers affected on the basis of the above data is over 4, 200. This number does not take into account of the numbers that were dismissed in other Governmental institutions which do not fall under the umbrella of the Civil Service Bureau. According to the GFBTU, 65 workers in Governmental institutions not covered by the Civil Service Bureau were suspended and 145 were dismissed.

At the date of signature of this Agreement, according to the Government out of the 2,050 civil servants who were the subject of a disciplinary process or penalty, including dismissal, all have been reinstated except for 64 who remain under a criminal referral and one who had a criminal conviction. According to the GFBTU 168 of the 246 civil servants who were dismissed have been reinstated with 78 still suspended; and in the non-civil service governmental sector 54 of the 65 suspended workers have been reinstated and 96 out of the 145 dismissed workers have been reinstated.

Concerning the public-private companies, out of 1,520 workers who had been dismissed, all have been reinstated or are in the process of reinstatement. The Government has committed to the reinstatement of all the workers concerned.

Concerning the purely private sector, according to the Government, out of over 697 cases of dismissals reviewed, 141 have been reinstated and 301 have been re-employed in other enterprises. According to the GFBTU, out of 734 workers dismissed, 193 have been reinstated and the Government has submitted a list of 176 workers who have been re-employed and should be verified by the GFBTU. The Government and the BCCI have undertaken to take all necessary action to find alternative employment for the remaining workers who seek placements.

The Parties agree to continue their efforts to ensure the full reinstatement in both public and private sectors of all the remaining workers to the maximum extent possible no later than 30 May. Where reinstatement is not possible, adequate compensation should be paid as well as social insurance benefits. The Parties note that majority of workers who have not yet been reinstated were working in small enterprises. The Government has committed to continue to work with the GFBTU and the BCCI for the placement of any of the remaining workers seeking new employment.

Sixty four civil servants remain under criminal referral. The Government undertakes to review the cases in respect of these referrals to ensure that the charges meet national and international standards and to reinstate with full pay and allowances those found not to meet this requirement. The Government also undertakes to ensure that all reinstated civil servants are able to reintegrate the posts occupied by them prior to their dismissal or suspension. Where this is not possible, these workers should be provided with a position of equivalent grade, pay and benefits, including transportation allowance where applicable as well as the possibility to be re-assigned to their former job as soon as it becomes available. The Government also undertakes to remove all

documents linked to the events that have been included in the personnel files of the civil servants concerned. The GFBTU calls on the Government to cease all scheduled suspensions and salary reductions of civil servants. The Government undertakes that there will be no additional suspensions of civil servants related to the events beyond those scheduled.

All public-private companies and major companies concerned where dismissals occurred undertake to reinstate all dismissed workers and will submit a plan no later than 20 March for the reintegration of the workers which should be completed by the companies no later than 1 April. All companies have committed to work towards the smooth re-integration of dismissed workers back into their jobs and to remove from their files all documents linked to the events in question. All Parties commit to the withdrawal of all pending court cases in the interest of social peace and the favoring of improved workplace relations.

Concerning workers in the public-private companies who have not yet been reinstated at the date of this Agreement, the Government commits to ensure that the number of non-reinstated workers is reduced to the minimum. Any pending cases of non-reinstatement will then be submitted to an appropriate tripartite mechanism for review. The Government commits to ensuring that following such a review, any remaining non-reinstated workers will be provided with alternative employment taking into account their previous employment status.

The Government of Bahrain, the GFBTU and the BCCI undertake to work together to ensure the smooth reintegration of the workers into their workplaces and a return to social peace. In this regard, the Government also commits to work on the possibility of ratifying 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).

The national tripartite committee that was put in place to follow-up on the November 2011 decision of the Governing Body should continue its work to ensure the full reinstatement of workers.

### **ILO technical assistance**

The Parties welcome the ILO commitment to provide the tripartite partners and the enterprises concerned with the necessary support through capacity-building and training for a smooth reintegration of the workers and to support the improvement of workplace relations and social dialogue as well as training on international labour standards. Training and capacity building on international labour standards will also be extended to the Governmental agencies concerned as well as to the Judiciary and the Parliament. This assistance will include potential further legal reforms and the enhancement of institutional capacity to ensure the effective implementation



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Convention No.111. The ILO should also continue to provide assistance to address the remaining issues and to ensure the effective implementation of this Agreement.

Done in Manama, this 11th day of March 2012



His Excellency Jameel Humaidan

Minister of Labour



Mr Salman Almahfoudh

President of the General Bahrain Federation of Trade Unions

Mr Othman Sharif

Vice-President of the Bahrain Chamber of Commerce and Industry



Othman Sharif (ILO)

CASE NO. 2765

INTERIM REPORT

**Complaint against the Government of Bangladesh  
presented by  
the Bangladesh Cha-Sramik Union (BCSU)**

*Allegations: The complainant alleges interference by the authorities in the election of officers to its Central Executive Committee, as well as the violent suppression of demonstrations organized to protest this interference*

**309.** The Committee last examined this case on its merits 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 (June 2011), paras 263–290].

**310.** The Government sent its observations in a communication dated 3 May 2012.

**311.** Bangladesh 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**

**312.** In its previous examination of the case, the Committee made the following recommendations [see 360th Report, para. 290]:

- (a) The Committee considers that the Central Executive Committee (Makhon Lal Karmaker – Ramjovan Koiry's panel) should be able to exercise its functions without delay and be recognized by the Government pending any decision by the judicial authorities. The Committee urgently requests the Government to provide a copy of any ruling handed down following the decision of the High Court and to keep it informed of any ruling handed down by the Labour Court in the abovementioned case, as well as to provide any additional information in this regard.
- (b) Considering the contradictory versions of the complainant and the report of the Deputy Director of Labour, Srimongal, with regard to the violent suppression of the demonstration to protest against interference in union elections on 20 December 2009 in various places of Moulvibazar District and during another demonstration held in the Moulvibazar District, and considering the factual discrepancies between the conclusions of the Deputy Director of Labour and the allegations and newspaper clippings provided by the complainant in this regard, the Committee requests the Government to conduct a thorough and independent investigation immediately into all the allegations of violent suppression of the demonstration and to keep it informed in this regard.

**B. The Government's reply**

**313.** In its communication dated 3 May 2012, the Government mainly reiterates its previous indications concerning the election of the Central Executive Committee of the BCSU that was held on 26 October 2008, which according to the Government has not obtained the confidence of the workers who have requested the Department of Labour to form an ad hoc

committee until further election, claiming that the BCSU Central Working Committee was autocratic and engaged in activities against the interest of the workers. The Government adds that the elected committee filed a case against the ad hoc committee in the Labour Court and that subsequently, both parties lodged writ petitions against each other in the High Court Division of the Supreme Court and Appellate Division of the Supreme Court for justice which are pending for hearing.

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

- 314.** *The Committee recalls that this case concerns allegations of interference by the authorities in the election of officers to the BCSU's Central Executive Committee, as well as the violent suppression of demonstrations organized to protest this interference. It observes that the Government's observations refer to the elections of the BCSU's Central Executive Committee and the Central Working Committee (recommendation (a)) but regrets that it does not provide any information concerning the violent suppression of demonstrations organized to protest against this interference (recommendation (b)).*
- 315.** *With regard to recommendation (a), the Committee notes the Government's indication that the elected committee filed a case against the ad hoc committee in the Labour Court and that subsequently, both parties (the elected committee and the ad hoc committee) lodged writ petitions against each other in the High Court Division of the Supreme Court and Appellate Division of the Supreme Court for Justice which are pending for hearing. In this regard, the Committee once again reiterates that it considers that the Central Executive Committee (Makhon Lal Karmaker – Ramjovan Koiry's panel) should be able to exercise its functions without delay and be recognized by the Government pending any decision by the judicial authorities and requests the Government to provide a copy of the rulings by the High Court Division of the Supreme Court and the Appellate Division of the Supreme Court as soon as they are handed down (with regard to the writ petitions filed by both parties). It once again urgently requests the Government to keep it informed of any ruling handed down by the Labour Court following the decision of the High Court in the abovementioned case.*
- 316.** *With regard to recommendation (b), noting with regret that no information was provided by the Government, the Committee must therefore reiterate its previous recommendation.*

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

- 317.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) Recalling that it has already considered that the Central Executive Committee (Makhon Lal Karmaker – Ramjovan Koiry's panel) should be able to exercise its functions without delay and be recognized by the Government pending any decision by the judicial authorities, the Committee requests the Government to provide a copy of the rulings made by the High Court Division of the Supreme Court and the Appellate Division of the Supreme Court (with regard to the writ petitions filed by both parties) as soon as they are handed down. It once again urgently requests the Government to provide a copy of any ruling handed down by the Labour Court following the decision of the High Court in the abovementioned case.*

- (b) *Considering the contradictory versions of the complainant and the report of the Deputy Director of Labour, Srimongal, with regard to the violent suppression of the demonstration to protest against interference in union elections on 20 December 2009 in various places of Moulvibazar District and during another demonstration held in the Moulvibazar District, and considering the factual discrepancies between the conclusions of the Deputy Director of Labour and the allegations and newspaper clippings provided by the complainant in this regard, the Committee once again requests the Government to conduct a thorough and independent investigation immediately into all the allegations of violent suppression of the demonstrations and to keep it informed in this regard.*

CASE NO. 2739

DEFINITIVE REPORT

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

- **Força Sindical (FS)**
- **the New Trade Union Confederation of Workers of Brazil (NCST)**
- **the General Union of Workers (UGT)**
- **the Single Confederation of Workers (CUT)**
- **the Confederation of Workers of Brazil (CTB) and**
- **the General Confederation of Workers of Brazil (CGTB)**

**supported by**

**the World Federation of Trade Unions (WFTU)**

*Allegations: The complainant organizations object to the measures adopted by the Public Labour Prosecutor's Office (MPT) and to the decisions handed down by the judiciary revoking clauses in collective agreements concerning the payment of assistance contributions by all workers, including non-unionized workers, who benefit from a collective agreement; they also allege that the Office of the Public Prosecutor of São Paulo has initiated legal proceedings to prevent trade unions from engaging in protest action*

- 318.** The Committee last examined this case at its November 2011 meeting and on that occasion presented an interim report to the Governing Body [see 362nd Report, paras 309–315].
- 319.** The Government sent its observations in communications of 15 and 16 February 2012.
- 320.** 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. Previous examination of the case

- 321.** The Committee recalls that, at its November 2011 meeting, it made the following recommendations [see 362nd Report, para. 315]:
- (a) The Committee once again requests the Government to keep it informed of the outcome of the meetings between the National Coordinating Body for the Promotion of Freedom of Association (CONALIS) of the MPT and the representatives of the union confederations to discuss various issues such as those arising from the assistance contribution, and requests the Government to keep it informed with regard to the initiative to establish a tripartite Council of Industrial Relations. The Committee reminds the Government that it may call upon ILO assistance in seeking solutions that are satisfactory to all the parties concerned and are in conformity with the principles of freedom of association.
  - (b) The Committee once again requests the Government to send its observations without delay on the allegation that the Office of the Public Prosecutor of São Paulo has initiated legal proceedings to prevent trade unions from holding strikes and engaging in protest action and, since it is a matter of concern to the country's trade union confederations, to initiate a dialogue with the most representative employers' and workers' organizations on the issue. The Committee also urges the complainant organization to provide additional information and examples with regard to its allegations.
  - (c) The Committee invites the Government to consider taking the necessary measures for the ratification of Convention No. 87.

## B. The Government's reply

- 322.** In its communication dated 16 February 2012, the Government sent a communication from the Public Labour Prosecutor's Office (MPT) relating to this case. The MPT states that the National Coordinating Body for the Promotion of Freedom of Association (CONALIS) of the MPT was established in 2009 and since then has been operating as a channel of communication with trade unions and employers' representatives. There is a CONALIS representative in all of the MPT's units. The aim of CONALIS is to strengthen trade unions and create an environment that is conducive to the exercise of freedom of association.
- 323.** The MPT reports that CONALIS held numerous meetings with the trade unions to discuss various issues, such as the collection from both unionized and non-unionized workers of the contributions provided for in collective agreements and accords. The trade unions do not agree with the measures taken by the prosecutors aimed at declaring null and void such clauses of collective agreements. Section 83(IV) of Supplementary Act No. 75 of 20 May 1993 provides that the MPT is authorized to propose through *amparo* proceedings (proceedings for the protection of constitutional rights) any measures that may be required to declare null and void a clause in a collective agreement, accord or contract that violates individual or collective freedoms or the inalienable individual rights of workers. The MPT states that the Federal Supreme Court explicitly confirmed the constitutionality of this provision. The question of the payment of assistance contributions by non-unionized workers is disputed by the MPT. The jurisprudence of the Federal Supreme Court and of the Higher Labour Court does not allow for the collection of such contributions.
- 324.** According to the MPT, it is worth noting that article 8 of the Constitution of Brazil guarantees not only "positive" freedom of association, but also "negative" freedom of association, by providing that no individual shall be obliged to join or remain a member of a union. Moreover, the jurisprudence of the Federal Supreme Court provides that the contribution to trade union confederations referred to in article 8 of the Constitution is applicable only to members of the respective trade union. The Higher Labour Court

established that the Constitution, in its articles 5(XX) and 8(V), guarantees the right to freedom of association and the right to join trade unions. Any clause of an accord, collective agreement or standard which requires non-unionized workers to pay a confederation tax, assistance contribution, promotional contribution or suchlike to a trade union organization shall be deemed to be in contravention of such freedom or right. Any provision that does not conform to this limitation shall be declared null and void, and any sums irregularly withheld shall be returned to the workers concerned.

**325.** The MPT adds that, at a meeting on 5 May 2010, after several meetings with representatives of the trade union organizations and despite the jurisprudence in support of the MPT's measures against the collection of assistance contributions from non-unionized workers, CONALIS discussed the issue and approved Guidance No. 3, which provides that negotiated assistance contributions may be collected from all workers – both unionized and non-unionized – provided that such payments are approved at a general assembly that is convened for that purpose, that is widely publicized, at which the participation of both members and non-members is guaranteed, and that is held in a place and at a time that facilitates the attendance of workers, providing that the right to object is guaranteed, and that such objection may be indicated to the union by any means of communication, and that the principles of proportionality and rationality have been observed, including with regard to the time limit set for objections concerning the amount of the contribution.

**326.** According to the MPT, the adoption of the guidance reflected the wishes of the trade union movement and took into account the need for a compromise between the institutions concerned, despite the total lack of support in the jurisprudence mentioned above. This decision was considered satisfactory by the unions, and it seemed that this would relieve the tension caused by the measures taken by the MPT in line with the jurisprudence in question. It was hoped that the MPT's guidance would give rise to new debate in the labour courts with a view to reviewing the jurisprudence on the collection of assistance contributions from non-unionized workers.

**327.** The MPT reports that a feeling of resistance started to develop among the prosecutors towards the position adopted and harsh criticism was directed towards the guidance that had been approved. The criticism related to: (a) the abusive collection of the contribution from non-unionized workers, who were not effectively guaranteed the right to object; (b) the fact that workers were required to pay a compulsory contribution, regardless of their union membership; (c) the absence of any accountability by the unions, despite the public nature of the contribution; (d) the fact that the MPT's measures to prevent abuse were undermined; and (e) the absence of any moves by the labour courts to change the law. Furthermore, the trade union movement began to use Guidance No. 3 to argue against the action of prosecutors, which generated even greater tension. This created a need for it to be reviewed, and on 16 August 2011, after extensive debate and consultation, the majority of the prosecutors decided to withdraw Guidance No. 3. Despite all the efforts made by CONALIS to find a compromise position in order to relieve the tension with the union movement in this regard, the outcome was not as expected.

**328.** The MPT reports that a number of observations can be made with regard to the events that have taken place: (1) the dialogue between the MPT and the trade union movement should be ongoing; (2) the trade union movement has already been warned about and informed of the difficulties of adopting a position with regard to assistance contributions without there being changes to legislation and jurisprudence; (3) within the context of this dialogue, it was noted that, without modifying Brazil's trade union system, it will be difficult to accept the collection of assistance contributions from workers who are not members of trade unions, without the specific permission of those workers; and (4) the modification of Brazil's trade union system would involve the ratification of Convention No. 87, the adoption of legislation establishing criteria for union representation providing benefits to

the most representative organizations, and the provision of a private trade union financing mechanism, which would allow non-unionized workers to contribute voluntarily in order to benefit from trade union action and the working conditions established through collective bargaining.

- 329.** The MPT adds that, in addition to the discussions on strengthening the union movement, the “200 Programme” was created, which provides for the adoption of measures to ensure the representation of workers in enterprises with more than 200 employees, as provided for in article 11 of the Constitution. To date, very few enterprises guarantee the representation of workers and the trade union movement has not been making much effort to give effect to this constitutional provision, which is a fundamental right of all urban and rural workers. It is hoped that the implementation of this programme will help increase union representation and improve the system until structural reforms are adopted. The representation of workers involves providing an important safeguard to prevent, among other things, anti-union practices, moral and sexual harassment and discrimination. Finally, the MPT reaffirms that it remains willing to keep the channel of communication between CONALIS and the trade union movement always open, so that they can work together to secure better working conditions and prevent abuse and actions that violate the rights enshrined in Brazil’s legal system, especially in the Constitution and the ILO Conventions.

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

- 330.** *The Committee recalls that, when it last examined this case at its November 2011 meeting, it requested the Government to keep it informed of the outcome of the meetings between CONALIS of the MPT and the representatives of the union confederations to discuss various issues such as those arising from the assistance contribution, and requested the Government to keep it informed with regard to the initiative to establish a tripartite Council of Industrial Relations.*
- 331.** *The Committee notes that the Government sent a communication from the MPT on this issue, reporting that: (1) CONALIS held numerous meetings with the trade union organizations to discuss various issues, such as the collection from both unionized and non-unionized workers of the contributions provided for in collective agreements and accords; (2) section 83(IV) of Supplementary Act No. 75 of 20 May 1993 provides that the MPT is authorized to propose through amparo proceedings any measures that may be required to declare null and void a clause in a collective contract or agreement that violates individual or collective freedoms or the inalienable individual rights of workers; (3) the Federal Supreme Court explicitly confirmed the constitutionality of the provision in question and the jurisprudence of the Federal Supreme Court and of the Higher Labour Court does not allow for the collection of such contributions; (4) article 8 of the Constitution of Brazil guarantees not only “positive” freedom of association, but also “negative” freedom of association, by providing that no individual shall be obliged to join or remain a member of a union; (5) CONALIS discussed the issue and approved Guidance No. 3, which provides that negotiated assistance contributions may be collected from all workers – both unionized and non-unionized – provided that such payments are approved at a general assembly that is convened for that purpose, that is widely publicized, at which the participation of both members and non-members is guaranteed, and that is held in a place and at a time that facilitates the attendance of workers, providing that the right to object is guaranteed, and that such objection may be indicated to the union by any means of communication, and that the principles of proportionality and rationality have been observed, including with regard to the time limit set for objections concerning the amount of the contribution; (6) Guidance No. 3 received strong criticism in the MPT and on 16 August 2011, after extensive debate and consultation with the majority of the prosecutors, a decision was made to withdraw it; (7) the dialogue between the MPT and the trade union movement should be ongoing and the trade union movement has already*

*been warned about and informed of the difficulties of adopting a position with regard to assistance contributions without there being changes to the relevant legislation and jurisprudence; (8) within the context of this dialogue, it was noted that, without modifying Brazil's trade union system, it will be difficult to accept the collection of assistance contributions from workers who are not members of trade unions, without the specific permission of those workers; and (9) the modification of Brazil's trade union system would involve the ratification of Convention No. 87, the adoption of legislation establishing criteria for union representation providing benefits to the most representative organizations, and the provision of a private trade union financing mechanism, which would allow non-unionized workers to contribute voluntarily in order to benefit from trade union action and the working conditions established through collective bargaining.*

- 332.** *First of all, the Committee takes note with interest of the initiatives taken by CONALIS of the MPT to promote and maintain a dialogue with the trade union movement on the issue of the collection of assistance contributions from non-unionized workers who benefit from a collective agreement. Taking into account that, as indicated by the MPT, the legislative provisions on that issue and the jurisprudence of the Federal Supreme Court and the Higher Labour Court that do not allow for the collection of such contributions are a source of tension in the trade union movement, the Committee trusts that the dialogue initiated by CONALIS with the trade union movement will continue and that, in that context, consideration will be given to the comments made by the Committee when it examined this case at its November 2010 meeting [see 358th Report, paras 316 and 317]. More specifically, the Committee recalls that it has on many occasions ruled on union security clauses, including those which provide for the payment of contributions by non-unionized workers as an expression of solidarity with unions that conclude a collective agreement. In dealing with this issue, the Committee has referred to the discussions that took place at the International Labour Conference when it adopted the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). On that occasion, the Committee on Industrial Relations of the International Labour Conference, taking into consideration the debate which it had held on the issue of union security clauses, finally agreed to recognize that the Convention should not be interpreted as authorizing or prohibiting union security arrangements, such matters being matters for regulation in accordance with national practice [see 281st Report of the Committee, Case No. 1579 (Peru), para. 64, quoting ILO, Record of Proceedings, ILC, 32nd Session, 1949, p. 468]. In the light of that decision, the Committee considers that problems arising out of union security clauses must be resolved at the national level, according to the practice and labour relations system of each country. In other words, both situations where union security clauses are authorized and those where these are prohibited can be considered to be in conformity with ILO principles and standards on freedom of association [see 284th Report, Case No. 1611 (the Bolivarian Republic of Venezuela), paras 337–339]. With regard to the question of salary deductions agreed to in a collective agreement that is applicable to non-unionized workers who benefit from a union's activities, the Committee recalls that it has stated in the past that, when legislation admits trade union security clauses, such as the withholding of trade union dues from the wages of non-members benefiting from the conclusion of a collective agreement, those clauses should only take effect through collective agreements [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 480]. The Committee reminds the Government once again that it may call upon ILO assistance in seeking solutions that are satisfactory to all the parties concerned and are in conformity with the principles of freedom of association.*
- 333.** *The Committee recalls that, when it examined this case at its November 2001 meeting, it requested the Government to send its observations without delay on the allegation that the Office of the Public Prosecutor of São Paulo has initiated legal proceedings to prevent trade unions from holding strikes and engaging in protest action and urged it to initiate a dialogue with the most representative employers' and workers' organizations on the issue.*



*The Committee also requested the complainant organizations to provide additional information and examples with regard to its allegations. The Committee regrets that neither the Government nor the complainant organizations have sent observations in this regard and under these circumstances will not pursue the examination of this allegation.*

## **The Committee's recommendations**

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

- (a) The Committee trusts that the dialogue initiated by CONALIS of the MPT with the trade union movement in relation to the issue of collecting assistance contributions from non-unionized members who benefit from a collective agreement will continue and that the Committee's principles on the issue will be taken into account in this regard. The Committee reminds the Government once again that it may call upon ILO assistance in seeking solutions that are satisfactory to all the parties concerned and are in conformity with the principles of freedom of association.*
- (b) The Committee once again invites the Government to consider taking the necessary measures for the ratification of Convention No. 87.*

CASE NO. 2821

DEFINITIVE REPORT

### **Complaint against the Government of Canada presented by the Confederation of National Trade Unions (CSN)**

***Allegations: The complainant organization alleges the violation of the collective bargaining rights of the 6,500 workers represented by the Union of Canadian Correctional Officers (UCCO–SACC–CSN)***

- 335.** The complaint is contained in a communication dated 6 October 2010 by the Confederation of National Trade Unions (CSN). The CSN submitted additional allegations in a communication dated 22 December 2010.
- 336.** The Federal Government sent its reply in a communication dated 30 September 2011.
- 337.** Canada has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). It has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), or the Collective Bargaining Convention, 1981 (No. 154).

**A. The complainant's allegations**

- 338.** In its communications dated 6 October and 22 December 2010, the CSN presented a complaint relating to sections 16–34 and 56–65 of the Expenditure Restraint Act (Part 10 of the Budget Implementation Act, 2009, S.C. 2009, Chapter 2, section 393, “the ERA”) and section 113 of the Public Service Labour Relations Act (S.C. 2003, Chapter 22, “the PSLRA”).
- 339.** The complainant organization alleges that, in promulgating these acts, the Government violated its freedom of association obligations to the 6,500 employees represented by the Union of Canadian Correctional Officers (UCCO–SACC–CSN), as enshrined in the ILO Constitution, the Declaration of Philadelphia and Conventions Nos 87, 98, 151 and 154. In addition, the provisions of these acts violate Canada’s freedom of association obligations under customary international law, of which the right to bargain freely with employers with respect to conditions of work is an essential element. The main provisions of these acts referred to by the complainant organization and the Government are attached to this document.
- 340.** The CSN is a trade union organization that was established in 1921, grouping together over 2,500 trade unions and representing over 300,000 workers throughout Quebec and Canada. These trade unions, including the UCCO–SACC–CSN, are affiliated to nine trade union federations based on their sector of activity. The UCCO–SACC–CSN is certified to represent over 6,500 workers covered by the PSLRA; and these are the workers concerned by this complaint. These 6,500 workers are employed in the institutions of the Correctional Service of Canada and fulfil an important role in the protection of Canadians. The UCCO–SACC–CSN is the bargaining agent for these workers, who are employed in 58 different institutions throughout Canada and whose employer for collective bargaining purposes is the Treasury Board of Canada.
- 341.** The complainant organization indicates that, on 6 October 2010, it lodged a complaint before the Quebec Superior Court to declare unconstitutional with regard to freedom of association the contentious provisions contained in this complaint. According to the complainant organization, it is entirely appropriate that the Committee examine this complaint, as it is entitled to do on the basis of its procedures and its case law, and given that the examination of the case by the Committee will be of assistance in the national consideration of the issues in question. The complainant organization emphasizes that, over the years, international law, and in particular international labour law, has become of considerable importance to Canadian courts.
- 342.** The complainant organization indicates that, following negotiations, on 26 June 2006, the Treasury Board of Canada and the UCCO–SACC–CSN signed a collective agreement covering the period 2006–10. The agreement expired on 31 May 2010. Annual increases to rates of pay were provided for in Annex A of the collective agreement, in particular increases starting from 1 June 2006, 1 June 2007, 1 June 2008 and 1 June 2009. This constitutes an important element in the working conditions agreed upon by the parties.
- 343.** However, the ERA, which entered into force on 12 March 2009, has the effect of amending the collective agreement by imposing limits on the salaries and additional remuneration payable for any 12-month period starting between the beginning of the 2006–07 fiscal year and the end of the 2010–11 fiscal year (ERA, sections 16 and 19 on collective agreements signed before 8 December 2008). The ERA retroactively invalidates any of the provisions of existing collective agreements that are incompatible with its provisions (ERA, sections 56–65). Furthermore, section 64 of the ERA requires that any employee who has received a salary or additional remuneration under a collective agreement that is in excess of the limit established by the law must repay such amounts to

the Government; the Government may recover such amounts through salary deductions. Moreover, during the restraint period, the negotiation of increases to pay or additional remuneration in excess of the limits established by the ERA, as well as any restructuring of rates of pay or increases to additional remuneration, are prohibited (ERA, sections 23–29). The “restraint period” is from 1 April 2006 to 31 March 2011 (ERA, section 2). The collective agreement expired on 31 May 2010 and UCCO–SACC–CSN will have to negotiate a new collective agreement with the Treasury Board from that time.

- 344.** The PSLRA applies to collective agreements that are entered into between the UCCO–SACC–CSN and the Treasury Board of Canada. According to the complainant organization, section 113 of the PSLRA drastically limits the UCCO–SACC–CSN’s capacity to carry out and conclude negotiations concerning whole areas of working conditions of concern to its members. First and foremost, the effect of this provision is to make it so that any condition of employment or work which may, even indirectly, require the amendment or enactment of a federal law is non-negotiable. Furthermore, under section 113 of the PSLRA, any condition of employment that has been or may be established in the future within the framework of the Public Service Employment Act (PSEA), the Public Service Superannuation Act (PSSA) or the Government Employees Compensation Act (GECA) is non-negotiable, even if such a condition of employment does not currently concern any of these acts. Therefore, any condition of employment which currently falls or in the future may fall with the remit of these acts is exempted from any form of negotiation; yet these three acts regard the fundamental working conditions of government workers.
- 345.** The PSEA outlines the principles and conditions for recruiting and appointing public service employees. It sets out the selection criteria, assessment methods, hiring priorities and the appointing process for the public service. It also contains provisions on the employer’s right to deploy employees, the effective date of appointment, the duration of employment, the rate of pay upon appointment, the duration of the probationary period and the employer’s right to terminate employment during this period. It sets out the rules governing the laying off of employees and the right to appeal appointments. It also establishes the extent to which public service employees may be involved in political activities. Many rules and regulations have been adopted under the PSEA, demonstrating its extensive scope of application, in particular with regard to: political activities; the definition of the word “promotion”; public service employment; periods of probation and periods of notice of termination of employment during probation; the student employment programme; equal access employment programmes; and part-time work in the public service. The PSSA establishes the pension scheme for federal public service employees, including correctional officers represented by the UCCO–SACC–CSN. Section 24 of the PSSA sets out certain specific rules concerning the Correctional Service of Canada. The PSSA contains provisions on all issues relating to the pension scheme, in particular with regard to who is required to contribute; pensionable service; elections; benefits; payments to survivors, children and other beneficiaries; minimum benefits; disability payments; medical examinations; transfer agreements; divestiture of service; and so on. The GECA establishes the compensation regime for workplace accidents involving federal government employees.
- 346.** Finally, the complainant organization underlines the fact that the ERA and section 113 of the PSLRA were enacted without any consultation whatsoever and without taking into account the fundamental freedom of association. With regard to the ERA, the UCCO–SACC–CSN adds that the legislator did not take any steps to discuss alternative measures with it. Without limiting the generality of the foregoing, the situation violates in particular Article 8 of Convention No. 151, which stipulates that disputes between parties must be settled through negotiation or through a procedure established to ensure the confidence of the parties involved. This was clearly not the case here; Canada adopted

retroactive legal provisions to amend collective agreements it had negotiated freely and to demand repayment from targeted employees of amounts that they had already received and which were in excess of the limits established by the abovementioned laws. By the combined effect of the ERA and section 113 of the PSLRA, the Government of Canada has violated both the spirit and the letter of Convention No. 154. Specifically, Canada has violated Article 7 of the Convention, which concerns prior consultation, as well as Article 5, paragraph 2(a), which states that all groups of workers should be able to bargain collectively over their working conditions.

- 347.** According to the complainant, the situation described above infringes freedom of association protected by the Constitution of Canada and enshrined in the decision *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 S.C.R. 391. In this decision, the Supreme Court of Canada entirely redefines the scope of freedom of association in Canada and initiated a process of harmonization of Canadian law with international law.
- 348.** According to the complainant, the situation described above in no way constitutes an acceptable restriction which can be temporarily imposed on freely conducted collective bargaining. In the complainant’s view, this conclusion is supported by many precedents concerning Canada set by the Committee on Freedom of Association.
- 349.** The complainant organization draws attention in particular to Case No. 1859, in which the Committee examined a case with aspects similar to the case in question. In that case, the complainants criticized the Government of Canada for adopting the Finance Act of 1995 (Bill C-76), which suspended the right of bargaining agents to negotiate provisions regarding job security for a period of three years. Yet this is precisely one of the effects of the Expenditure Restraint Act of 2009 with regard to the workers represented by the UCCO–SACC–CSN. This situation was condemned by the Committee, which stated: “The Committee first notes the Government’s indication that, in order to achieve the reductions necessary in the public service workforce to respond to the budget deficit concerns, it was necessary to have more flexible job security provisions concerning employees declared ‘surplus’ during the three-year period from 1995–98. In this regard, the Government has recalled its dual role as employer on the one hand, and as Government responsible for the welfare of the population as a whole, on the other. Indeed, the Committee has always taken full account of the serious financial and budgetary difficulties facing the governments, particularly during periods of prolonged and widespread economic stagnation. It considers, however, that the authorities should give preference as far as possible to collective bargaining in determining the conditions of employment of public servants. In other words, a fair and reasonable compromise should be sought between the need to preserve as far as possible the autonomy of the parties to bargaining, on the one hand, and measures which must be taken by governments to overcome their budgetary difficulties, on the other” [see 306th Report, para. 238]. In this regard, the complainant organization indicates that, in the present case, there was never any question of “prolonged and widespread economic stagnation” in Canada and that the Government simply did not undertake consultations before adopting these contentious legislative measures.
- 350.** To sum up, the complainant organization cannot but observe that the Committee’s expressed wishes with regard to collective bargaining in the public service were not respected in the least by Canada in the present case.

## **B. The Government’s reply**

- 351.** In its communication of 30 September 2011, the Government rejects the CSN’s allegations. First of all, the Government denies that the provisions of the ERA and section 113 of the PSLRA are in violation of Canadian domestic law, and in particular

section 2(d) of the Canadian Charter of Rights and Freedoms, which protects freedom of association. The Government indicates that the matter will be decided by the Quebec Superior Court in the case *Union of Canadian Correctional Officers – CSN and Pierre Mallette v. Attorney General of Canada*. Accordingly, the Government requests the Committee to wait for the conclusion of the domestic proceedings prior to examining this complaint. The issues in this matter are novel and highly complex, and are expected to involve testimony by numerous lay witnesses and seven expert witnesses (four expert witnesses presented by Canada and three expert witnesses expected to be called by the complainant). A hearing could realistically take place at the end of 2012 or in early 2013.

- 352.** Furthermore, the Government emphasizes that allegations are receivable by the Committee only if the complainant organization is directly interested in the matter, and refers in this regard to paragraph 31 of Annex I of the *Digest of decisions and principles of the Freedom of Association Committee*, fifth (revised) edition, 2006. Therefore, according to the Government, some of the allegations should not be received, as they relate to provisions of the ERA that have no direct effect on the situation of the complainant organization and the members of the bargaining unit that it represents. This applies to the allegations relating to the following sections of the ERA: 23; 26 and 29; 30–34 and 62; 64; 18, 20, 22, 25 and 28; 59–61; and 63 and 65.

### ***Expenditure Restraint Act (ERA)***

- 353.** The Government reports that the global financial crisis of 2008–09 had a sudden and significant impact on the Canadian economy and on the fiscal position of the Government of Canada. In this regard, the Government describes at length the economic situation that it had to face. In autumn 2008, the situation was rapidly declining and urgent measures were needed to support the economy while helping to restore budgetary balance and fiscal sustainability in the medium and long term. Limiting wage growth was one of the numerous measures adopted to ensure that Canada managed its way out of the crisis in a fiscally responsible manner.
- 354.** The Government notes that it acted in conformity with freedom of association by giving priority to collective bargaining as a means to address the impact of the crisis and achieve these objectives within a short time frame for action. In October 2008, Canada considered several means of controlling growth in compensation costs, namely: (i) reducing or limiting growth in the number of employees: imposing a freeze on new hiring, not replacing retiring workers, laying off employees and offering departure incentives; (ii) suspending or limiting wage growth: suspending any movement within pay ranges and suspending promotions and reclassification of positions; (iii) reducing wages, or freezing or limiting pay increases. After consideration, it was decided that imposing a temporary ceiling on wage increases for the public sector would make it possible to achieve the objectives in the least intrusive way possible, in view of the urgency of the situation. Furthermore, unlike a wage reduction or freeze, it was assessed that a limited wage increase could be achieved through collective bargaining process. Therefore, in October and November 2008, the Treasury Board secretariat contacted each of the 17 bargaining agents representing the 27 bargaining units in the core public administration, whether those units were in negotiations, awaiting arbitration or, like the UCCO–SACC–CSN unit, already had a collective agreement in place at that time. The Treasury Board also met secretariat representatives of other federal public sector employers, such as heads of Crown corporations and separate agencies, to encourage them to contact their respective bargaining agents and attempt to reach agreements within the parameters set by the Government. Collective agreements covering close to 70 per cent of the unionized employees in the core public administration were concluded by December 2008. Although discussions took place between the Government and the complainant organization, in particular with regard to potential concessions such as overtime in exchange for a reduced

pay increase in view of Canada's difficult economic situation, no agreement could be reached with the complainant organization.

- 355.** The temporary limits were later implemented through legislation, as part of the federal budget legislation passed by the Parliament of Canada on 12 March 2009. The ERA was subsequently enacted as an exceptional, temporary measure designed to achieve the urgent objectives of the Government while protecting the living standards of the workers. In order to come out of the crisis in a fiscally responsible manner, the policy objectives at the time were threefold: (1) to help reduce upward pressure on private sector wages; (2) to provide leadership by showing restraint and respect for public money; and (3) to manage public sector wage costs in an appropriate and predictable manner that would help ensure the ongoing soundness of the Government's fiscal position.
- 356.** The ERA safeguarded the living standards of workers by imposing a ceiling on wage increases rather than freezing wages or cutting jobs. The members of the UCCO-SACC-CSN benefited from a wage increase that was above the rate of inflation for the period June 2009-May 2010 (the Government points out that, according to the Canadian Consumer Price Index, the rate of inflation stood at 1.4 per cent for that same period). The ERA nevertheless reduced the wage increases of the members of the UCCO-SACC-CSN from 2 per cent to 1.5 per cent, and the ceilings imposed remained in place for part of the next round of bargaining.
- 357.** Furthermore, the Government points out that, by applying to both unionized and non-unionized workers, the ERA did not specifically target the unionized sector. In addition, the restraint measures were applied equitably across the public sector, therefore avoiding putting any particular group of employees, including those who negotiated wage increases in line with Canada's new fiscal situation in the autumn of 2008 and the winter of 2009, at a disadvantage vis-à-vis others.
- 358.** The complainant was able to pursue its activities, including collective bargaining. In fact, the right to bargain collectively provided for under the PSLRA is specifically maintained under the ERA (section 6). The Government reports that negotiations took place concerning fundamental working conditions (leave, hours of work, professional development and the performance evaluation process). It also reports that the act did not: undermine the right to strike (section 7); prevent amendments that are agreed in writing to the provisions of a collective agreement or a decision (section 8); prevent bargaining agents and employers from co-developing workplace improvements under the auspices of the National Joint Council (section 9); or undermine the entitlement of any employee to incremental increases, merit or performance increases, in-range increases, performance bonuses or similar forms of compensation (although without increases to the amounts or rates of any applicable additional remuneration) (section 10). Moreover, the Government indicates that, at the time of sending its reply, the complainant organization was negotiating a new agreement, following the expiry of the previous one in May 2010. Numerous matters were negotiated, such as leave, assignment of overtime, inmate escorts, discipline, hours of work, paid holidays, the grievance procedure and the duration of the agreement. The ERA did not affect the ability of the complainant organization to consult with the management of the Correctional Service of Canada on matters of mutual interest. For example, several national meetings between employers and unions were held during the period covered by the ERA, at which the complainant and the team from the Correctional Service of Canada discussed various issues, such as transfers, searches and a pass system. These meetings notably occurred in June, September, October, November and December 2010, as well as in February 2011.

359. The Government categorically denies the complainant's allegations that it was not consulted with regard to the adoption of the ERA. First of all, as mentioned above, the Government tried to negotiate an agreement with the complainant organization, but no agreement was reached. Second, the Budget Implementation Act, 2009, including the ERA, was the subject of a review by a parliamentary committee (the Standing Committee on Finance of the House of Commons) in February 2009. Many federal public sector bargaining agents, including the complainant, had the opportunity to freely express and promote their views directly to the legislator.

### ***Public Service Labour Relations Act (PSLRA)***

360. The Government explains that the Treasury Board of Canada is a committee of federal ministers. It is the employer for the federal core public administration. The core public administration consists of the departments and the other parts of the federal public administration named in Schedules I and IV to the Financial Administration Act, and includes the Correctional Service of Canada. The Correctional Service of Canada reports to the Minister of Public Safety. According to the Government, the members of the UCCO-SACC-CSN are persons employed by public authorities within the meaning of Convention No. 151. They are also public servants engaged in the administration of the State. As such, they are excluded from the application of Convention No. 98.
361. The Government explains first of all that section 113 recognizes a fundamental Canadian constitutional principle that only the Parliament of Canada can make legislation in the federal jurisdiction, and that an amendment to legislation must be made by the Parliament. Thus, the parties to collective bargaining cannot "contract out" of the legislative provisions in force, and neither can they bind the Parliament of Canada, which is answerable to the Canadian electorate, to amend or enact new legislation. The Government recalls that both the mandate of the Committee on Freedom of Association and the ILO Conventions contemplate that collective bargaining operates within a legislative framework. The Committee is competent to determine whether legislation or draft legislation complies with the principles of freedom of association and collective bargaining laid down in the Conventions. Article 8 of Convention No. 87 provides that: "In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land." Similarly, Canadian domestic law recognizes that labour relations operate within legislated boundaries, which often serve to protect and uphold the bargaining process or human rights protections for workers. This principle was recognized by the Supreme Court of Canada in the case of *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.* Therefore, according to the Government, the recognition in section 113 of the PSLRA that parties to collective bargaining may not "contract out" of the legislative provisions in force relating to terms or conditions of employment if doing so would require the adoption or amendment of legislation does not in itself breach freedom of association.
362. Section 113 of the PSLRA specifically excludes from the ambit of collective bargaining any term or condition of employment that has or may be established under the three following statutes of Parliament: the PSEA, which deals with staffing in the federal public service and the political activities of employees; the PSSA, which provides for the pension regime for public servants; and the GECA, which is the basis for the system governing workplace accidents and compensation in the event of workplace injuries for state employees.
363. Collective bargaining in its current statutory form was introduced in the federal public service in 1967, with the enactment of the Public Service Staff Relations Act. The enactment of this act was preceded by extensive consultations and a report (the "Heeny Report") written by the Preparatory Committee on Collective Bargaining in the Public

Service, which had been mandated in September 1963. The Heeney Report, which was completed in 1965, specifically recommended that staffing, superannuation, death benefit and accident compensation should continue to be governed under the existing regimes set up by the law. Consequently, from the inception of collective bargaining under the Public Service Staff Relations Act, deliberate limitations on bargaining in relation to the PSEA, the PSSA and the GECA have been a part of the structure of collective bargaining in the federal public service. The reform of this law, in 2003, was preceded by in-depth consultations that took place over several years, notably with several associations representing the interests of public servants, including in particular the association that at the time represented the UCCO–SACC–CSN. On that occasion, the complainant organization was able to participate in the discussions and to submit a paper to the House of Commons Standing Committee on Government Operations and Estimates concerning section 113 of the PSLRA.

- 364.** The Government emphasizes that the Committee on Freedom of Association has identified a number of terms and conditions of employment that might be the subject of collective bargaining, such as: wages, benefits and allowances, working time, annual leave, selection criteria in case of redundancy, the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in legislation, and the collection of union dues [see *Digest*, op. cit., paras 913, 914 and 916]. The Government indicates that these matters are the subject of collective bargaining in the Canadian federal public service.
- 365.** The Government also emphasizes that the scope of collective bargaining is not unlimited. Collective bargaining in the public service may be subject to special modalities of application fixed by national laws or national practice, as provided for in Article 1 of Convention No. 154. The Government recalls that the Committee has opined that matters concerning the operation and management of government business are properly excluded from collective bargaining. The Government also observes that the Committee has declined jurisdiction to look into questions concerning legislated social security programmes.
- 366.** In application of the above principles, the PSEA, the PSSA and the GECA do not lend themselves to collective bargaining under the PSLRA, for reasons of public interest specific to each statute and described at length by the Government.
- 367.** With regard to the PSSA, the Government explains that: (i) despite the fact that the plan is legislated, it is managed with significant involvement of public service bargaining agents, including the complainant; (ii) if the pension plan was negotiated and if negotiations or an arbitration award led to changes to the plan, this could have an unexpected impact on Canada's financial stability. In view of the need for a long-term approach, it would be difficult for a legislated plan to meet the demands of the round of collective bargaining; (iii) the Pension Advisory Committee provides a forum for the Government to seek input from the plan's participants and from pensioners regarding their pension plan. It is composed of 13 members: six members represent the management side of the public service, six members represent the labour side and one member is nominated to represent pensioners. The Pension Advisory Committee has considered many issues over the years, including: survivor benefits, administration costs, communication to plan members, recourse mechanisms, contribution rates, unreduced early retirement for those with 35 years of service before the age of 55, retirement and re-employment, administration, governance, pension portability, pension policies, disability, part-time service and phased retirement. The committee has formed subcommittees to examine specific issues, such as policy and research, communications, review mechanisms, governance and disability; and (iv) the complainant organization and other bargaining agents are consulted with regard to legislative amendments to the pension plan.



- 368.** With regard to the PSEA, the Government explains that: (i) this act creates an independent agency, the Public Service Commission (“the Commission”) to oversee staffing and the political activities of the employees. The Commission is not the employer of public servants and does not report to a minister. It is independent from the Government, employers and bargaining agents. This ensures that it delivers its mandate in a non-partisan manner; (ii) the bargaining of appointments and the political activities of public servants could threaten the public interest in a merit-based non-partisan public service, as well as put at risk the guiding values; (iii) the Public Service Commission Advisory Council, which was established in 1998 and consists of members representing bargaining agents, government departments, the Commission and the Chair of the Human Resources Council, provides a forum where bargaining agents and human resources personnel can meet to discuss and consult on matters of common concern related to the PSEA; (iv) section 14 of the PSEA provides that the Commission shall, on request or if it considers necessary or desirable, consult with the employer or any employee organization certified as a bargaining agent under the PSLRA, about policies respecting the manner of making and revoking appointments or with respect to the principles governing lay-offs or priorities for appointment. The general policy of the Public Service Commission Advisory Council strongly encourages departments to include union representatives and unrepresented employees in the development of their departmental policy on the appointment process; and (v) reviews of the PSEA are provided for in the law and bargaining agents are always consulted.
- 369.** With regard to the GECA, the Government explains that: (i) the act is the basis for the programme providing compensation for workplace injuries to workers in the federal public service; (ii) as it is a system of statutory and administrative recourses that is “borrowed” from the provinces, any changes to the programme would affect millions of workers. For example, federal public service workers employed in the province of Ontario see their claims being processed by the Ontario Workplace Safety and Insurance Board; (iii) this is not a term or condition of employment that is negotiable in the context of a relationship between one employer and one bargaining agent; rather, it is a social security programme that is provided for the benefit of all employees; and (iv) even though it is not a term or condition of employment, the complainant has nonetheless the full autonomy to formulate its views and advance the interests of the members of the bargaining unit in existing forums.
- 370.** The Government underlines that it attaches great importance to consultation and cooperation with bargaining agents on these matters of mutual interest, in accordance with Article 7 of Convention No. 151 and Convention No. 154 and the general principles outlined by the Committee on consultation with workers’ organizations. The Government refers in this regard to the *Digest*, op. cit., para. 1067, and to Case No. 2434 (Colombia) [see 344th Report, paras 794 and 798].
- 371.** To sum up, the Government indicates that section 113(b) of the PSLRA does not violate freedom of association. First of all, bargaining agents, including the complainant, have numerous avenues open to them to discuss matters relating to the PSSA and the PSEA. These avenues have been used successfully to promote and advance the interests of the members of the UCCO–SACC–CSN and for bargaining agents to have direct input in the crafting of these laws. Therefore, section 113 of the PSLRA is in full compliance with freedom of association. According to the Government, freedom of association contemplates that collective bargaining should occur within legislated boundaries; it does not require that every subject matter be bargained and allows for flexibility in the vehicles for consultation in the public service. Furthermore, the matters covered by the PSEA, the PSSA and the GECA are properly excluded from bargaining for reasons of public interest and are best established by the Parliament of Canada, which is answerable to the electorate. Finally, freedom of association recognizes that it is inappropriate to bargain

social security programmes such as the regime set up by the GECA (the Government refers in this regard to Annex I, paragraph 21, and paragraph 516 of the *Digest*). The scope of bargaining these laws has been the subject of extensive consultations and discussions with workers' organizations, including with the complainant.

372. The members of the UCCO–SACC–CSN have at their disposal numerous avenues and lawful means to exercise their right to freedom of association, in addition to traditional collective bargaining. For example, the complainant is a member of the National Joint Council (“the Council”). Created in 1944, the Council today includes 18 bargaining agents, the Treasury Board and a number of other federal public sector employers as official members. The Council is a forum in which participating employers and bargaining agents can share information, consult on workplace issues and develop directives which provide social benefits for public service employees. The directives are incorporated into the collective agreements of the participating members. They cover such terms and conditions of employment as travel, bilingualism bonuses, commuter assistance, isolated posts and government housing, workforce adjustments and occupational health and safety. The Council is also used to discuss public service health, dental and disability benefit plans.

### C. The Committee's conclusions

373. *The Committee notes that this complaint concerns allegations of legislative intervention in the collective bargaining process in the federal public sector with regard to: (i) the adoption of the Expenditure Restraint Act (Part 10 of the Budget Implementation Act, 2009) (the “ERA”). This law allegedly had the effect of amending the collective agreement in force for the UCCO–SACC–CSN by imposing a ceiling, on a retroactive basis, on the salaries and additional remuneration payable for any 12-month period starting between the beginning of the 2006–07 fiscal year and the end of the 2011–12 fiscal year; and (ii) the exclusion from the ambit of collective bargaining of certain working conditions under section 113 of the PSLRA (the relevant legislative provisions of the ERA and the PSLRA are contained in the appendix to this document).*
374. *The Committee notes that, on 6 October 2010, the complainant organization lodged a complaint before the Quebec Superior Court to declare the provisions referred to in this complaint, which it considers to be contentious, unconstitutional with regard to freedom of association, and that a hearing could realistically take place at the end of 2012 or in early 2013. With regard to the Federal Government's request that the full examination of the case be postponed pending the outcome of the appeal on grounds of unconstitutionality lodged by the complainant organization, the Committee wishes to recall that, although the use of internal legal procedures, whatever the outcome, is undoubtedly a factor to be taken into consideration, it has always considered that, in view of its responsibilities, its competence to examine allegations is not subject to the exhaustion of national procedures [see *Digest*, op. cit., Annex I, para. 30]. As in the examination of Case No. 2704 (Canada) [see 358th Report, para. 354], the Committee considers that its examination of the present case on the basis of long-established principles may be of assistance in the national consideration of the issues in question. It is in this spirit that the Committee will proceed with its examination of the substantive points raised in this case.*

### **Expenditure Restraint Act (ERA)**

375. *The Committee notes that the Government points out that certain allegations relating to this act should not be received by the Committee, as they concern provisions of the ERA that do not have a direct impact on the situation of the complainant organization or on the members of the bargaining unit that it represents. The Government refers in this regard to paragraph 31 of Annex I of the *Digest*, which provides that: “Allegations are receivable*

only if they are submitted by a national organization directly interested in the matter ...”. The Committee recalls that, according to paragraph 14 of Annex I, “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”. The Committee considers that, in this case, the complainant organization, having communicated more general allegations affecting its freedom of association and being directly covered by the ERA, even if not all its provisions, meets the criteria of paragraph 31 of Annex I. In order to carry out its mandate, the Committee must be able to examine in full any legislation that is referred to it by a complainant organization which has a direct interest in the matter in order to determine whether a practice should be considered to be in breach of the principles of freedom of association and collective bargaining, when the challenge to the legislation is an aspect of the complaint.

- 376.** Before examining the merits of this complaint, the Committee considers it necessary to describe the general context in which the complaint was filed. Since October 1991, the Committee has received on more than 20 occasions complaints against the Federal and Provincial Governments [see Cases Nos 1616, 1758, 1800 and 1859 against the Federal Government]. All these complaints share common ground in that they relate to reports of public service wage increases, reductions or freezes and restrictions on the right of public servants to bargain collectively in the different jurisdictions, measures that are sometimes accompanied by a ban on holding a strike.
- 377.** In the present case, the Committee notes that the Government, once again, has intervened through legislation to amend the provisions of negotiated collective agreements. In the present case, in order to justify its action, the Government basically uses the same argument that it used in previous cases, namely that the ERA was necessary in view of the difficult economic situation and that the measures taken are compatible with the principles established by the ILO.
- 378.** The Committee examined in detail the observations and arguments presented by the two parties. In particular, it carefully examined the explanations provided by the Government with regard to the country’s difficult economic and budgetary situation. There is no doubt that the Government was convinced of the need to remedy the situation by adopting legislation to restrain wage increases. The complainant, however, is convinced that the method used by the Government was not the best way to overcome the country’s economic problems. As has been mentioned in previous cases concerning the various restrictive laws of Canada, it is not the Committee’s role to express its views on the soundness of the economic arguments used by the Government to justify its position or the measures it has adopted. However, it is for the Committee to express its views on whether, in taking such action, the Government has gone beyond what the Committee has considered to be acceptable restrictions that might be placed temporarily on free collective bargaining [see *Digest*, *op. cit.*, para. 998]. The Committee however emphasizes that adequate mechanisms for dealing with exceptional economic situations can be developed within the framework of the public sector collective bargaining system.
- 379.** The Committee notes that the Government clearly wanted to give priority to collective bargaining by consulting the complainant organization, but without success. The evidence provided in the present case clearly shows that the March 2009 budget and the legislation that embodied the Government’s policy put an end to all real wage bargaining for employees of the federal public service. In similar cases concerning restrictions placed on the right to collective bargaining as a result of economic stabilization measures, the Committee has recognized that if, for compelling reasons of national economic interest and as part of its stabilization policy, a government considers that wage rates cannot be settled freely through collective bargaining, such a restriction should be imposed as an

exceptional measure and only to the extent that is necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect the living standards of workers, especially those who are likely to be the most affected [see *Digest*, op. cit., para. 1024]. The Committee notes in this case that the act imposes a ceiling on wage increases. The Committee also notes that the ERA reduced the wage increases of the workers in question from 2 per cent to 1.5 per cent, and that the ceilings imposed remained in place for part of the next round of bargaining. The Committee also notes that the act had a limited duration, allowed the complainant organization to carry out its activities, including bargaining over the normative clauses – albeit in a limited way in some respects – and that certain provisions had been taken to protect workers’ living standards (according to the Government, the members of the UCCO–SACC–CSN benefited from a wage increase that was above the rate of inflation for the period from June 2009 to May 2010). In view of all these circumstances and the Committee’s previous conclusions with regard to cases concerning legislative restrictions adopted by the Federal Government, the Committee considers that collective bargaining in the federal public sector has been seriously restricted for a period extending over five years (2006–11) and more specifically three years in the case of the complainant (since 2008, in line with legislation).

**380.** *The Committee furthermore notes that the measures taken were applied retroactively, rendering null and void any provisions in existing collective agreements which were incompatible with the new legislation, and requires any employee who has received for services already rendered a salary or additional remuneration under a collective agreement in excess of the limit established by the law to repay such amounts to the Government (the Government may recover such amounts through salary deductions). In this regard, the Committee notes that, according to the Government, none of the members of the complainant organization had been required to repay such an amount. The Committee recalls, however, that respect for the rule of law implies avoiding retroactive intervention in collective agreements through legislation. State bodies should refrain from intervening to alter the content of freely concluded collective agreements [see *Digest*, op. cit., para. 1001].*

**381.** *The Committee regrets that the Government felt compelled to resort to such retroactive measures and trusts that it will refrain in the future from having recourse to retroactive intervention in the collective bargaining process. The Committee firmly expects that the Government will allow normal collective bargaining to be fully restored in the public service. Furthermore, given that, under the legislation, these restrictions to collective bargaining on wage increases expired at the end of 2011, the Committee expects that, in the future, full, frank and meaningful consultations will be held with the UCCO–SACC–CSN in all instances where workers’ rights of freedom of association and collective bargaining are at stake.*

### **Public Service Labour Relations Act (PSLRA)**

**382.** *The Committee observes that the PSLRA is the law that is applicable to collective bargaining between the UCCO–SACC–CSN and the Treasury Board of Canada. According to the complainant organization, section 113 of the PSLRA drastically limits the capacity of its members to carry out and conclude negotiations concerning whole areas of working conditions of concern to them. First and foremost, the effect of this provision is to make it so that any condition of employment or work which may, even indirectly, require the amendment or enactment of a federal law is non-negotiable. Furthermore, under section 113(b) of the PSLRA, any condition of employment that has been or may be established in the future within the framework of the PSEA, the PSSA or the GECA is non-negotiable, even if such a condition of employment does not currently concern any of these acts. Therefore, any condition of employment which currently falls or in the future*

may fall with the remit of these acts is exempted from any form of negotiation; yet, according to the complainant organization, these three acts regard the fundamental working conditions of government workers.

- 383.** *The Committee takes note of the Government's explanation that that section 113(a) of the PSLRA recognizes a fundamental Canadian constitutional principle that only the Parliament of Canada can make legislation in the federal jurisdiction, and that an amendment to legislation must be made by the Parliament. Thus, parties to collective bargaining cannot "contract out" of all legislative requirements, and neither can they bind the Parliament of Canada, which is answerable to the Canadian electorate, to amend or enact new legislation. The Committee notes that Canadian domestic law recognizes that labour relations operate within legislated boundaries, which often serve to protect and uphold the bargaining process or human rights protections for workers, and that this principle was recognized by the Supreme Court of Canada in the case of Canada (Human Rights Commission) v. Canadian Airlines International Ltd. Therefore, according to the Government, the recognition in section 113 of the PSLRA that parties to collective bargaining may not "contract out" of the legislative provisions in force relating to terms or conditions of employment if doing so would require the adoption or amendment of legislation does not in itself breach freedom of association. In view of the above, the Committee considers that this allegation does not call for further examination.*
- 384.** *The Committee notes that section 113(b) of the PSLRA specifically excludes from the ambit of collective bargaining any term or condition of employment that has been or may be established under the three following statutes of Parliament: the PSEA, which deals with staffing in the federal public service and the political activities of employees; the PSSA, which provides for the pension regime for public servants; and the GECA, which is the basis for the system governing workplace accidents and compensation in the event of workplace injuries for state employees.*
- 385.** *The Committee notes that, from the inception of collective bargaining under the PSLRA, deliberate limitations on bargaining in relation to the PSEA, the PSSA and the GECA have been a part of the structure of collective bargaining in the federal public service. The Committee notes that it is for reasons of public interest specific to each of the acts that the Government decided to exclude the PSEA, the PSSA and the GECA from bargaining. The Committee notes that, according to the Government, the members of the UCCO-SACC-CSN are persons employed by public authorities within the meaning of Convention No. 151. They are also public servants engaged in the administration of the State. As such, they are excluded from the application of Convention No. 98.*
- 386.** *The Committee notes that, according to the Government, the scope of collective bargaining is not unlimited and that collective bargaining in the public service may be subject to special modalities of application fixed by national laws or practice, as established in Article 1 of Convention No. 154. The Government considers that this provision leaves States free to limit the scope of collective bargaining when it concerns compulsory schemes such as pensions, and to allow exceptions which have a major impact on the national budget and equality of workers, in a field as important as retirement pensions. In this respect, the Committee considers that, in accordance with the provisions of Convention No. 154, collective bargaining in the public service may be subject to special modalities of application. The Committee is aware that collective bargaining in the public sector calls for verification of the available resources in the various public bodies or undertakings and that such resources are dependent on state budgets, which does not preclude the competent budgetary authority from establishing an overall "budgetary package" within which the parties may negotiate pension clauses. It is essential, however, that workers and their organizations be able to participate fully and meaningfully in designing this overall bargaining framework, which implies in particular that they must*

have access to all the financial, budgetary and other data enabling them to assess the situation on the basis of the facts [see **Digest**, *op. cit.*, para. 1038].

- 387.** Furthermore, with regard to allegations concerning the refusal to bargain collectively on certain matters in the public sector, the Committee recalls the view of the Fact-Finding and Conciliation Commission on Freedom of Association that “there are certain matters which clearly appertain primarily or essentially to the management and operation of government business; these can reasonably be regarded as outside the scope of negotiation”. It is equally clear that certain other matters are primarily or essentially questions relating to conditions of employment and that such matters should not be regarded as falling outside the scope of collective bargaining conducted in an atmosphere of mutual good faith and trust [see **Digest**, *op. cit.*, para. 920].
- 388.** In view of the detailed information provided by the Government with regard to the mechanisms, commissions and vehicles established to enable bargaining agents to negotiate with regard to their working conditions and their involvement in the management of the plans that are established, in view of the Government’s explanations concerning the nature of the GECA, and recalling that questions concerning social security legislation fall outside its competence [see **Digest**, *op. cit.*, Annex I, para. 21], the Committee considers that these allegations do not call for further examination.
- 389.** As regards the alleged failure by the Government to hold consultations on the adoption of this legislation, in view of the consultations described in detail by the Government in this regard, the Committee considers that these allegations do not call for further examination.

### **The Committee’s recommendation**

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

*With regard to the ERA, the Committee regrets that the Government felt compelled to resort to such measures and trusts that it will refrain from doing so in the future. The Committee firmly expects that the Government will allow normal collective bargaining to be fully restored with the UCCO–SACC–CSN. Furthermore, given that, under the legislation, these restrictions to collective bargaining on wage increases expired at the end of 2011, the Committee expects that, in the future, full, frank and meaningful consultations will be held with the UCCO–SACC–CSN in all instances where workers’ rights of freedom of association and collective bargaining are at stake.*

## Appendix

### Excerpts of the Expenditure Restraint Act, S.C. 2009, c. 2, s. 393

#### *Application*

##### Employees

13. (1) This Act applies to employees who are employed in or by:
- (a) the departments and other portions of the federal public administration named in Schedules I and IV, respectively, to the Financial Administration Act and the separate agencies named in Schedule V to that Act, other than the Financial Consumer Agency of Canada and the Staff of the Non-Public Funds, Canadian Forces;
  - (b) the Crown corporations and public bodies named in Schedule 1; and
  - (c) the Senate, the House of Commons, the Library of Parliament, the office of the Senate Ethics Officer and the office of the Conflict of Interest and Ethics Commissioner.

##### Members of the Royal Canadian Mounted Police

- (2) For greater certainty, members of the Royal Canadian Mounted Police are employees.

##### Deemed employees

- (3) This Act applies to the following persons, who are deemed to be employees for the purposes of this Act:
- (a) the staff of members of the Senate and the House of Commons;
  - (b) directors of the Crown corporations and public bodies named in Schedule 1;
  - (c) officers and non-commissioned members of the Canadian Forces; and
  - (d) the Chief Electoral Officer.

#### *Restraint measures*

##### Increases to rates of pay

16. Despite any collective agreement, arbitral award or terms and conditions of employment to the contrary, but subject to the other provisions of this Act, the rates of pay for employees are to be increased, or are deemed to have been increased, as the case may be, by the following percentages for any 12-month period that begins during any of the following fiscal years:

- (a) the 2006–2007 fiscal year, 2.5 per cent;
- (b) the 2007–2008 fiscal year, 2.3 per cent;
- (c) the 2008–2009 fiscal year, 1.5 per cent;
- (d) the 2009–2010 fiscal year, 1.5 per cent; and
- (e) the 2010–2011 fiscal year, 1.5 per cent.

##### Employees represented by a bargaining agent

#### *Increases to rates of pay – collective agreements or arbitral awards after coming into force*

17. (1) The provisions of any collective agreement that is entered into, or arbitral award that is made, after the day on which this Act comes into force may not provide for increases to rates of

pay that are greater than those set out in section 16, but they may provide for increases that are lower.

#### *12-month periods*

(2) For greater certainty, any collective agreement that is entered into, or any arbitral award that is made, after the day on which this Act comes into force and that provides for increases to rates of pay for any period that begins during the restraint period must do so on the basis of a 12-month period.

#### *Increases to rates of pay – collective agreements and arbitral awards – 8 December 2008 until coming into force*

18. The provisions of any collective agreement that is entered into, or any arbitral award that is made, during the period that begins on 8 December 2008 and ends on the day on which this Act comes into force that provide, for any particular period, for increases to rates of pay that are greater than those referred to in section 16 for that particular period are of no effect or are deemed never to have had effect, as the case may be, and are deemed to be provisions that provide for the increases referred to in section 16.

#### *Increases to rates of pay – collective agreements and arbitral awards – before 8 December 2008*

19. With respect to a collective agreement that is entered into, or an arbitral award that is made, before 8 December 2008,

- (a) section 16 does not apply in respect of any period that began during the 2006–2007 or 2007–2008 fiscal year; and
- (b) for any 12-month period that begins during any of the 2008–2009, 2009–2010 and 2010–2011 fiscal years, section 16 applies only in respect of periods that begin on or after 8 December 2008 and any provisions of those agreements or awards that provide, for any particular period, for increases to rates of pay that are greater than those referred to in section 16 for that particular period are of no effect or are deemed never to have had effect, as the case may be, and are deemed to be provisions that provide for the increases referred to in section 16.

#### *Other than 12-month periods – section 18*

20. If a collective agreement or arbitral award to which section 18 applies provides for an increase to rates of pay for a period of other than 12 months that begins during any particular fiscal year in the restraint period, that increase is of no effect or is deemed never to have had effect, as the case may be, and is deemed to be an increase for that period of other than 12 months, determined on an annualized basis to the nearest 1/100 per cent, that provides for the increase referred to in section 16 for a period that begins during that particular fiscal year.

#### *Other than 12-month periods – section 19*

21. If a collective agreement or arbitral award to which section 19 applies provides for an increase to rates of pay for a period of other than 12 months that begins during any particular fiscal year that begins during the period that begins on 8 December 2008 and ends on 31 March 2011, that increase is of no effect or is deemed never to have had effect, as the case may be, and is deemed to be an increase for that period of other than 12 months, determined on an annualized basis to the nearest 1/100 per cent, that provides for the increase referred to in section 16 for a period that begins during that particular fiscal year.

#### *Lower percentages not affected*

22. If a collective agreement or arbitral award to which section 18 or 19 applies provides for an increase to the rates of pay for any particular period that is lower than the increase referred to in section 16 for that period, section 16 does not apply in respect of that increase.

#### *Restructuring prohibited*

23. Subject to sections 31 to 34,
- (a) no provision of a collective agreement that is entered into, or of an arbitral award that is made, after the day on which this Act comes into force may provide for the restructuring of rates of pay during any period that begins during the restraint period;



- (b) any provision of a collective agreement that is entered into, or of an arbitral award that is made, during the period that begins on 8 December 2008 and ends on the day on which this Act comes into force that provides for the restructuring of rates of pay during any period that begins during the restraint period is of no effect or is deemed never to have had effect, as the case may be; and
- (c) any provision of a collective agreement that is entered into, or of an arbitral award that is made, before December 8, 2008 that provides for the restructuring of rates of pay during any period that begins during the period that begins on 8 December 2008 and ends on 31 March 2011 is of no effect or is deemed never to have had effect, as the case may be.

*No increases to additional remuneration  
– after coming into force*

24. No collective agreement that is entered into, or arbitral award that is made, after the day on which this Act comes into force may provide, for any period that begins during the restraint period, for any increase to the amount or rate of any additional remuneration that applied to the employees governed by the collective agreement or the arbitral award immediately before the collective agreement, or the arbitral award, as the case may be, becomes effective.

*No increases to additional remuneration  
– 8 December 2008 until coming into force*

25. If a collective agreement that is entered into, or arbitral award that is made, at any time during the period that begins on 8 December 2008 and ends on the day on which this Act comes into force contains provisions that provide, for any period that begins during the restraint period, for an increase to the amount or rate of any additional remuneration that applied to the employees governed by the collective agreement or the arbitral award immediately before the collective agreement, or the arbitral award, as the case may be, became effective, those provisions are of no effect or are deemed never to have had effect, as the case may be.

*No increases to additional remuneration  
– before 8 December 2008*

26. If a collective agreement that is entered into, or an arbitral award that is made, before 8 December 2008 contains provisions that, for any period that begins in the period that begins on 8 December 2008 and ends on 31 March 2011, provide for an increase to the amount or rate of any additional remuneration that applied to the employees governed by the collective agreement or the arbitral award immediately before the first period that began on or after 8 December 2008, those provisions are of no effect or are deemed never to have had effect, as the case may be.

*No new additional remuneration – after  
coming into force*

27. No collective agreement that is entered into, or arbitral award that is made, after the day on which this Act comes into force may provide, for any period that begins during the restraint period, for any additional remuneration that is new in relation to the additional remuneration that applied to the employees governed by the collective agreement or the arbitral award immediately before the collective agreement or the arbitral award, as the case may be, becomes effective.

*No new additional remuneration – 8 December 2008  
to coming into force*

28. If a collective agreement that is entered into, or an arbitral award that is made, at any time during the period that begins on 8 December 2008 and ends on the day on which this Act comes into force contains a provision that provides, for any period that begins during the restraint period, for any additional remuneration to the employees governed by the collective agreement or the arbitral award that is new in relation to the additional remuneration that applied to the employees governed by the collective agreement or the arbitral award, as the case may be, immediately before it became effective, that provision is of no effect or is deemed never to have had effect, as the case may be.

*No new additional remuneration  
– before 8 December 2008*

29. If a collective agreement that is entered into, or an arbitral award that is made, before December 8, 2008 contains a provision that provides, for any period that begins in the period that begins on 8 December 2008 and ends on 31 March 2011, for any additional remuneration to the employees governed by the collective agreement or the arbitral award that is new in relation to the additional remuneration that applied to the employees governed by the collective agreement or arbitral award, as the case may be, immediately before the first period that began on or after 8 December 2008, that provision is of no effect or is deemed never to have had effect, as the case may be.

**General**

**Inconsistent provisions**

56. Any provision of any collective agreement that is entered into – or of any arbitral award that is made, or of any terms and conditions of employment that are established – after the day on which this Act comes into force that is inconsistent with this Act is of no effect.

**Compensating for restraint measures prohibited**

57. No provision of any collective agreement that is entered into – or of any arbitral award that is made, or of any terms and conditions of employment that are established – after the day on which this Act comes into force may provide for compensation for amounts that employees did not receive as a result of the restraint measures in this Act.

**Provisions compensating for restraint  
measures of no effect**

58. If a provision of a collective agreement that is entered into – or of an arbitral award that is made, or of terms and conditions of employment that are established – on or before the day on which this Act comes into force provides for compensation for amounts that employees did not receive as a result of the restraint measures in this Act, that provision is of no effect or is deemed never to have had effect, as the case may be.

**No changes to performance pay plans  
– new collective agreements, etc.**

59. No provision of any collective agreement that is entered into – or of any arbitral award that is made, or of any terms and conditions of employment that are established – after the day on which this Act comes into force may, for any period that begins during the restraint period, change the performance pay plans, including the amounts or rates, that apply to any employees governed by the agreement, award or terms and conditions of employment.

**No changes to performance pay plans  
– existing collective agreements, etc.**

60. If a provision of a collective agreement that is entered into – or of an arbitral award that is made, or of terms and conditions of employment that are established – during the period that begins on 8 December 2008 and ends on the day on which this Act comes into force changes, for any period that begins during the restraint period, the performance pay plans, including the amounts or rates, that apply to any employees governed by the agreement, award or terms and conditions of employment, the change is of no effect or is deemed never to have had effect, as the case may be.

**No changes to performance pay plans  
– existing collective agreements, etc.**

61. If a provision of a collective agreement that is entered into – or of an arbitral award that is made, or of terms and conditions of employment that are established – before 8 December 2008

changes, for any period that begins in the period that begins on 8 December 2008 and ends on 31 March 2011, the performance pay plans, including the amounts or rates, that apply to any employees governed by the agreement, award or terms and conditions of employment, the change is of no effect or is deemed never to have had effect, as the case may be.

### Royal Canadian Mounted Police

62. Despite sections 44 to 49, the Treasury Board may change the amount or rate of any allowance, or make any new allowance, applicable to members of the Royal Canadian Mounted Police if the Treasury Board is of the opinion that the change or the new allowance, as the case may be, is critical to support transformation initiatives relating to the Royal Canadian Mounted Police.

## **Administration**

### Powers and duties of Treasury Board

63. (1) The Treasury Board may exercise the powers and shall perform the duties in relation to this Act that are necessary to enable it to determine whether an employer of employees, other than employees referred to in paragraph 13(1)(c) or (3)(a), is complying with this Act.

### Information and documentation

(2) The Treasury Board may require from the employer any information and documentation that it considers necessary to enable it to determine whether the employer is complying with this Act.

### Treasury Board directive

(3) If the Treasury Board determines under this section that the employer is not complying with this Act, it may issue any directives that it considers appropriate to ensure the compliance.

### Debt due to Her Majesty

64. (1) Every amount paid – including amounts paid before the day on which this Act comes into force – to any person in excess of the amount that should have been paid as a result of this Act is a debt due to Her Majesty and may be recovered as such.

### Overpayment

(2) Any amount that is a debt due to Her Majesty as a result of subsection (1) is deemed to be an overpayment to which subsection 155(3) of the Financial Administration Act applies.

### Application

(3) For greater certainty, subsection (1) applies to, but is not limited to, the following amounts:

- (a) amounts paid under a provision that by the operation of this Act is of no effect or is deemed never to have had effect; and
- (b) amounts paid as a result of the payment of any amount referred to in paragraph (a).

### Orders

65. The Governor in Council may, on the recommendation of the Treasury Board, by order, amend Schedule 1 by adding to or deleting from it the name of any Crown corporation or public body.

**Excerpt of the Public Service Labour Relations Act,  
S.C. 2003, c. 22, s. 2**

Restriction on content of collective agreement

113. A collective agreement may not, directly or indirectly, alter or eliminate any existing term or condition of employment or establish any new term or condition of employment if:

- (a) doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition, or
- (b) the term or condition is one that has been or may be established under the *Public Service Employment Act*, the *Public Service Superannuation Act* or the *Government Employees Compensation Act*.

CASE NO. 2848

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

**Complaint against the Government of Canada  
presented by  
the Canadian Union of Postal Workers (CUPW)**

***Allegations: The complainant organization  
alleges that section 13(5) of the Canada Post  
Corporation Act infringes upon freedom of  
association and collective bargaining rights***

- 391.** The complaint is contained in a communication dated 30 March 2011 from the Canadian Union of Postal Workers (CUPW).
- 392.** The Government sent its observations in a communication dated 9 March 2012.
- 393.** 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. The complainant's allegations**

- 394.** In a communication dated 30 March 2011, the Canadian Union of Postal Workers (CUPW) indicates it is filing a complaint against the Canada Post Corporation Act (CPCA) which article 13(5) limits the right to collective bargaining in violation of ILO Convention No. 98. While recalling that the CPCA was enacted in 1981, the complainant observes that section 13(5) reads as follows: “notwithstanding any provision of Part I of the Canada Labour Code, for the purposes of the application of that Part to the Corporation and to officers and employees of the Corporation, a mail contractor is deemed not to be a dependent contractor or an employee within the meaning of those terms in subsection 3(1) of that Act”. Therefore, in the complainant's view, section 13(5) explicitly prevents contractors of Canada Post to engage in collective bargaining. It constitutes an impediment to Canada Post contractors having rights as employees or dependent contractors under the provisions of the Canada Labour Code.

- 395.** The complainant recalls that post office workers and postal unions have been raising concerns about section 13(5) of the Canada Post Act since the mid 1980s, when the Association of Rural Mail Couriers of Canada applied for standing with the Canada Labour Relations Board review of the bargaining units of the Canada Post Corporation. The Board granted the Association of Rural Route Mail Couriers of Canada standing in the review in October 1986. However, the Canada Post Corporation challenged the Board decision on the basis of the provisions of section 13(5) of the Canada Post Act. It argued that rural route mail couriers fall under section 13(5) of the Act and therefore were not employees. Therefore, they could not form a union and bargain collectively. The Canada Labour Relations Board dismissed the challenge in April 1987. However the Canada Post Corporation appealed the decision in the Federal Court of Appeals which ruled that section 13(5) prevented rural mail couriers from being covered under the Canada Labour Code. Furthermore, the Supreme Court of Canada denied the rural route mail couriers permission to appeal the decision.
- 396.** In December 1998, the Organization of Rural Route Mail Couriers, with the active support of the CUPW and a number of other organizations filed a NAFTA complaint about the provisions of section 13(5) of the Canada Post Act. The complaint was turned down.
- 397.** The complainant states that in 2003, as a result of intense lobbying by the CUPW and the Organization of Rural Route Mail Couriers, the CUPW gained voluntary recognition with Canada Post to represent Rural and Suburban Mail Carriers (RSMC). It then negotiated a collective agreement which came into effect on 1 January 2004 and granted rural and suburban mail carriers employee status. The complainant asserts that it has been organizing Combined Urban Services (CUS) and Highway Service drivers (HS). CUS drivers are Canada Post contractors who deliver letter carrier mail to relay boxes, deliver parcels and pickup mail from street letter boxes and retail postal outlets.
- 398.** The complainant filed three applications for certification on 28 April 2008 in conformity with section 24 of the Canada Labour Code. Two of the applications involve bargaining units composed of CUS workers and the third, a bargaining unit composed of HS workers. In its reply, Canada Post argued that HS workers and CUS workers are mail contractors and are therefore deemed not to be employees pursuant to subsection 13(5) of the CPCA. The complainant is of the view that section 13(5) is contrary to the freedom of association protected pursuant to section 2(d) of the Canadian Charter of Rights and Freedoms.
- 399.** Despite the fact that the Canada Post Corporation challenged the right of the Canada Labour Relations Board to determine the Charter issue, the Board ruled on January 2009 that it had jurisdiction to consider the Charter issue. The Board released its reasons on the jurisdictional issue on 15 May 2009. The Board dismissed the Corporation's application for reconsideration on 19 May 2009. The Corporation brought an application for judicial review of the Board's jurisdictional decision. The Federal Court of Appeal heard the judicial review on 19 October 2010.
- 400.** The complainant indicates that the CUPW has also been organizing workers who provide postal services in retail postal outlets (RPOs) in private locations. However, the Canada Post Corporation has challenged its applications to represent these workers on numerous grounds, including arguing that section 13(5) prohibits these workers from exercising their right to collective bargaining.
- 401.** The complainant, recalling its slogan "13(5) keeps poverty alive", asserts that since mail contractors are denied the right to collective bargaining, they have very limited possibilities to improve their wages and working conditions. It recalls that the Canadian Labour Congress reported a dramatic wages differential when it comes to wages of non-managerial employees. Union members typically make over \$5 per hour (\$5.09) more

than non-union workers. The difference is even greater for female employees who generally earn almost \$6 more than their non-unionized counterparts. The complainant indicates that since the CUPW unionized and achieved Collective Agreements for RSMC's, it made the following gains: wage increases especially for the lower paid workers; coverage by Canada Post defined benefit pension plan; a dental plan; a grievance procedure; a hearing and vision plan; and much more. The complainant is of the view that section 13(5) of the CPCA is barring Canada Post contractors from making any type of similar gains.

- 402.** Recalling the ruling of June 2007 of the Supreme Court of Canada that the freedom of association provision of the Canadian Charter of Rights and Freedoms includes the right to free collective bargaining, the complainant therefore questions how section 13(5) of the CPCA can still remain in effect.

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

- 403.** In a communication dated 9 March 2012, the Government asserts that, in its view, section 13(5) of the CPCA does not deny mail contractors the right to organize as evidenced by the fact that numerous contractors have unionized, including some with the complainant organization. Furthermore, the Act was enacted for policy reasons after consultations with stakeholders including labour stakeholders and it is consistent with Canada's international obligations under ILO Conventions, including Convention No. 98.

- 404. While recalling that** subsection 13(5) of the CPCA reads as follows: "Notwithstanding any provision of Part I of the Canada Labour Code, for the purposes of the application of that Part to the Corporation and to officers and employees of the Corporation, a mail contractor is deemed not to be a dependent contractor or an employee within the meaning of those terms in subsection 3(1) of that Act", the Government indicates that a "mail contractor" is defined under section 2 of the CPCA as "a person who has entered into a contract with the Corporation for the transmission of mail ...". It further recalls that subsection 3(1) of the *Canada Labour Code* defines the terms set out in the Code. The definition for "employee" includes dependent contractors, since "employee" means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations.

- 405.** The Government recalls the history of and the rationale for the enactment of the CPCA, and specifically subsection 13(5) of the Act. On 16 October 1981, the Government enacted Bill C-42 (the CPCA) to change the governance regime of the Canadian postal service from that of a federal government department to that of a Crown corporation, a corporate entity with the Government as a shareholder. The Canada Post became a state-owned enterprise with a universal service obligation to provide a comprehensive national postal service at fair and reasonable rates. One of the primary reasons for changing Canada Post's regime was the need to make it financially self-sustaining. The Government recalls that during the 1970s, the Post Office Department had run annual deficits, at times in excess of \$600 million.

- 406.** The universal service obligation is a treaty obligation of Canada since Article 1.1 of the Universal Postal Convention binds Canada and other member nations of the Universal Postal Union (a specialized agency of the United Nations) to the "permanent provision of quality basic postal services at all points ... for all customers, at affordable prices". The Government states that Bill C-42 also sought to provide Canada Post with the means to ensure that it could continue to carry out the universal service obligation. The financial

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mandate is one such mean, and the limited “letter mail” exclusive privilege and section 13(5) of the CPCA are other means.

- 407.** According to the Government, section 13(5) was required to maintain the transportation contracting tendering process to respect the constitutional division of powers concerning labour relations by creating a clear separation between Canada Post and mail contractors for the purposes of Part I of the Canada Labour Code. Otherwise, Canada Post would be subjected to the increased costs that would have resulted if third-party contractors sought the benefits afforded to Canada Post employees. This would have jeopardized Canada Post’s ability to meet its mandate, including financial self-sufficiency. Canada Post had been contracting-out various work, in particular mail transportation-related services, for decades prior to its establishment as a Crown corporation. This still remains the case and contracting-out is still done by way of an open and competitive tendering process.
- 408.** Before enacting Bill C-42, the Government of Canada consulted a large number of constituencies, including the complainant organization (CUPW) and other trade unions, as well as the Canadian Labour Congress. The Government asserts that the interests and positions of these constituencies were considered in the legislative process. Several stakeholders appeared before the Parliamentary Committee to present their views on Canada Post becoming a Crown corporation, and a number were also implicated in the drafting of the legislation. The Canadian Labour Congress, which represents – among others – many Canadian postal unions, was heavily involved in the drafting and finalization of Bill C-42.
- 409.** The Government indicates that the parliamentary debates leading up to the enactment of Bill C-42 included repeated mention of rural contractors who, although their job was similar to that of urban, unionized colleagues, did not have the same benefits or remuneration. According to the Government, at the time, Canada Post’s trade unions, including CUPW, largely supported Bill C-42 in whole despite section 13(5). Postal unions were in favour of the new regime since it offered freer collective bargaining without the constraints experienced under the previous regime, and they anticipated greater labour peace and stability.
- 410.** The Government recalls that Canada has not ratified Convention No. 98. Nonetheless, it asserts that Canada respects the fundamental ILO principles of freedom of association and recognizes collective bargaining as part of the over-arching principle of freedom of association. Section 13(5) of the CPCA was considered necessary to maintain the transportation contracting tendering process, to respect the constitutional division of powers concerning labour relations, and to minimize increased costs which could jeopardize Canada Post’s mandate of being financially self-sufficient. In the Government’s view, these goals, taken together, were considered reasonable at the time by labour stakeholders when consulted on Bill C-42.
- 411.** While it may be considered unusual to have such a “deeming provision” as section 13(5) override a section of a public interest statute such as the Canada Labour Code, it is by no means unique in Canada. As a public institution with a social obligation (i.e. the universal service obligation), Canada Post is not unique in the application of industry-specific employment or labour-relations clauses to suit the unique characteristics of the industry. In other public institutions, exemptions exist for dispute settlements such as no strike/lockout clauses that apply to other essential public services, such as fire and police services.
- 412.** Notwithstanding section 13(5), some mail contractors in Canada Post have organized. As acknowledged by CUPW in their submission to the CFA, in 2003 CUPW organized the RSMC and negotiated a first collective agreement for these workers. As of 1 January 2004, 6,600 rural contractors became full-time Canada Post employees. Although the rural

carriers who were the main focus of CPCA 13(5) eventually became unionized employees, there remain other mail contractors who work in third-party retail outlets such as pharmacies, or who transport the mail, who are not organized. However, the Government asserts that Canada Post and CUPW can voluntarily agree to engage in collective bargaining for such groups of workers.

- 413.** The Government observes that CUPW makes reference to section 2(d) of the Canadian Charter of Rights and Freedoms. This provision guarantees the freedom of association as a fundamental freedom, subject to reasonable limits prescribed by law. More recently, the Canadian domestic law has been clarified by a decision of the Supreme Court of Canada concerning a case in *Ontario (Attorney-General) v. Fraser, 2011 SCC 20 (Fraser)*. In this case, the Supreme Court considered the scope of section 2(d) of the Charter in the context of the “process of collective bargaining”. Specifically, the Court concluded that section 2(d) protects associational activity, but not a particular process or result, and that it does not guarantee a particular model of collective bargaining or a particular outcome.
- 414.** In conclusion, the Government considers that the complaint is without merit since there is nothing in section 13(5) of the CPCA which prevents trade unions from organizing “mail contractors” directly or from “mail contractors” forming their own associations. Furthermore, Canada Post and the CUPW have the ability to voluntarily agree to engage in collective bargaining for such groups of workers. In fact, some mail contractors are now unionized under the CUPW and collectively bargain with Canada Post. Consequently, in the Government’s view, the complaint should be dismissed.

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

- 415.** *The Committee notes that this case concerns the alleged exclusion of mail contractors of the Canada Post Corporation (hereafter, the Corporation) from access to collective bargaining through section 13(5) of the Canada Post Corporation Act (hereafter, the CPCA). The Committee observes that the Act was enacted in 1981, and that post office workers and postal unions have been raising concerns about section 13(5) since the mid 1980s.*
- 416.** *The Committee notes that according to section 13(5) of the Act, which was enacted in 1981, a mail contractor of the Corporation is deemed not to be a dependent contractor or an employee for the purposes of the application of the Canada Labour Code to the Corporation and to officers. As a consequence, according to the complainant, this section 13(5) constitutes an impediment to the corporation’s contractors having rights as employees or dependent contractors under the provisions of the Canada Labour Code and explicitly prevents them to engage in collective bargaining.*
- 417.** *The Committee observes that the issue arose in the mid 1980s when the Corporation challenged the Canada Labour Relations Board decision to grant the Association of Rural Route Mail Couriers of Canada standing in the review of the bargaining units of the Corporation arguing that rural route mail couriers fell under section 13(5) of the CPCA and therefore since they were not employees, they could not form a trade union and bargain collectively. The Federal Court of Appeals ruled that section 13(5) prevented rural mail couriers from being covered under the Canada Labour Code. The appeal to the Supreme Court was denied to the rural route mail couriers.*
- 418.** *According to the complainant’s submission, in 2003, as a result of intense lobbying, the complainant organization gained voluntary recognition with Canada Post to represent RSMCs. It then negotiated a collective agreement which came into effect on January 2004 and granted rural and suburban mail carriers employee status. The complainant had also*



been organizing CUS and HS. In April 2008, the complainant filed applications for certification under section 24 of the Canada Labour Code. However, the Corporation argued that the workers concerned are mail contractors and are therefore deemed not to be employees pursuant to subsection 13(5) of the CPCA. The complainant indicates that it had also been organizing workers who provide postal services in retail postal outlets (RPOs) in private locations and that the Corporation has challenged its applications to represent these workers on numerous grounds, including arguing that section 13(5) of the CPCA prohibits these workers from exercising their right to collective bargaining.

- 419.** *The Committee notes the fact that the Corporation challenged the right of the Canada Labour Relations Board to determine whether section 13(5) is contrary to the freedom of association protected pursuant to section 2(d) of the Canadian Charter of Rights and Freedoms. The Board ruled in January 2009 that it had jurisdiction to consider the Charter issue and released its reasons on the jurisdictional issue on 15 May 2009. Since the Board dismissed the corporation's application for reconsideration on 19 May 2009, the latter brought an application for judicial review of the Board's jurisdictional decision. The Federal Court of Appeal heard the judicial review on 19 October 2010. The Committee requests the Government and the complainant to provide information on the outcome of this hearing.*
- 420.** *The Committee notes the complainant's view that since mail contractors are denied the right to collective bargaining, they have very limited possibilities to improve their wages and working conditions. Reference was made to several gains achieved following the collective agreements for RSMCs unionized by the CUPW. The complainant is of the view that section 13(5) of the CPCA is barring all other mail contractors from making any type of similar gains.*
- 421.** *The Committee notes the explanations of the Government on the rationale for the enactment of the CPCA, and specifically subsection 13(5). The enactment of Bill C-42 (the Act) meant to change the governance regime of the Canadian postal service from that of a federal government department to that of a Crown corporation, a state-owned enterprise with a universal service obligation to provide a comprehensive national postal service at fair and reasonable rates. One of the primary reasons for changing the Corporation's regime was the need to make it financially self-sustaining. The Committee further notes the Government's view that section 13(5) of the CPCA was required to maintain the transportation contracting tendering process to respect the constitutional division of powers concerning labour relations by creating a clear separation between the Corporation and mail contractors for the purposes of Part I of the Canada Labour Code. Otherwise, Canada Post would be subjected to the increased costs that would have resulted if third-party contractors sought the benefits afforded to the Corporation's employees. This would have jeopardized the Corporation's ability to meet its mandate, including financial self-sufficiency. The Committee notes the statement that Canada Post had been contracting-out various work, in particular mail transportation-related services, for decades prior to its establishment as a Crown corporation, and is still contracting-out by way of an open and competitive tendering process.*
- 422.** *The Committee also notes the indication that a large number of constituencies, including the complainant organization (CUPW) and other trade unions, as well as the Canadian Labour Congress, were consulted before the enactment of the Bill C-42. The Government asserts that the interests and positions of these constituencies were considered throughout the legislative process during which several stakeholders appeared before the Parliamentary Committee to present their views or were closely involved in the drafting and finalization of the Bill. According to the Government, at the time, Canada Post's trade unions, including CUPW, largely supported Bill C-42 in whole despite section 13(5).*

423. *The Committee notes the Government's view that while it may be considered unusual to have a "deeming provision" such as section 13(5) overriding a section of a public interest statute such as the Canada Labour Code, it is by no means unique in Canada. As a public institution with a social obligation (i.e., the universal service obligation), the Corporation is not unique in the application of industry-specific employment or labour relations clauses to suit the unique characteristics of the industry. In other public institutions, exemptions exist for dispute settlements such as no strike/lockout clauses that apply to other essential public services, such as fire and police services.*
424. *The Committee notes the Government's statement that while Canada has not ratified Convention No. 98, it nonetheless respects the fundamental ILO principles of freedom of association and recognizes collective bargaining as part of the overarching principle of freedom of association. Notwithstanding section 13(5) of the CPCA, some mail contractors in Canada Post have organized. As acknowledged by the complainant, in 2003 it organized the Rural and Suburban Mail Carriers and negotiated a first collective agreement for these workers. The Committee further notes the Government's indication that there remain other mail contractors who work in third-party retail outlets such as pharmacies, or who transport the mail, who are not organized. In its view, the Corporation and the CUPW could voluntarily agree to engage in collective bargaining for such groups of workers. The Government asserts that there is nothing in section 13(5) of the CPCA which prevents trade unions from organizing "mail contractors" directly or from "mail contractors" forming their own associations, or which would prevent the Corporation and the CUPW from voluntarily agreeing to engage in collective bargaining for such groups of workers.*
425. *While taking due note of the explanations given by the Government on the specific circumstances and the rationale for the enactment of the Act and the purpose of its section 13(5), the Committee recalls that all workers, without distinction whatsoever, including without discrimination in regard to occupation, should have the right to establish and join organizations of their own choosing [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 216].*
426. *In this regard, the Committee recalls 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. [see **Digest**, op. cit., para. 880]. The question before the Committee is not whether the workers which the CUPW seeks to represent are actually "employees" or independent contractors, but rather whether these workers are fully guaranteed the protection of freedom of association and collective bargaining principles that the Committee has elaborated over the years. In this regard, the Committee recalls that it has consistently maintained that workers, including independent contractors, should be able to fully enjoy freedom of association rights under Conventions Nos 87 and 98 for the purpose of furthering and defending their interests, including by means of collective bargaining.*
427. *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. Moreover, both employers and trade unions should bargain in good faith and make every effort to come to an agreement, and satisfactory labour relations depend primarily on the attitude of the parties towards each other and on their mutual confidence [see **Digest**, op. cit., paras 882 and 936]. While it is not the role of the Committee to determine the manner in which collective bargaining should be promoted in the specific circumstances of the case, the Committee must observe that the exclusion of the "mail contractors" from the Canada*

*Labour Code by deeming them not to be “employees” appears to have resulted in their regularly being denied the possibility of effective union representation for the purposes of collective bargaining as can be seen by the numerous appeals made by the Canada Post Corporation when mail couriers and carriers tried to get standing for collective bargaining purposes.*

- 428.** *While the particular status of the mail contractors concerned here may call for clarification as regards the definition of bargaining units, the rules for certification, etc., as well as specific negotiations taking their status under the Act and their work requirements into account, the Committee fails to see any reason why the principles above on the basic rights of association and collective bargaining afforded to all workers should not also apply to mail contractors.*
- 429.** *The Committee takes due note of the Government’s assertion that there is nothing in section 13(5) of the CPCA which would prevent trade unions from organizing “mail contractors” directly or from “mail contractors” forming their own associations, or which would prevent the Corporation and the CUPW from voluntarily agreeing to engage in collective bargaining for such groups of workers. The Committee nevertheless observes that the issue raised by the complainant concerns the consistent reference to section 13(5) of the CPCA by the Corporation to deny registration of certain categories of mail contractors in a bargaining unit that would enable the union to begin a process of bargaining protected and promoted by the Canada Labour Code.*
- 430.** *Observing that the complainant and the Government both acknowledge that a number of mail contractors are now unionized under the CUPW and collectively bargain with the Corporation, the Committee wishes to emphasize that granting or denying the rights to organize and to bargain collectively based merely on the goodwill of the parties would remove all meaning from the fundamental nature of these rights. The Committee requests the Government to rapidly take all necessary measures, in consultation with the social partners, to ensure that all categories of mail contractors of the Corporation fully enjoy the rights to organize and to bargain collectively, as any other worker. Where needed, the Committee requests the Government to lift any obstacles – whether implicit or explicit – to the exercise of these rights and to keep it informed of any development in this respect.*

## **The Committee’s recommendations**

- 431.** *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 rapidly take all necessary measures, including legislative reforms, in consultation with the social partners, to ensure that all mail contractors of the Canada Post Corporation fully enjoy the rights to organize and to bargain collectively, as any other worker. Where needed, the Committee requests the Government to lift any obstacles – whether implicit or explicit – to the exercise of these rights and to keep it informed of any development in this respect.*
- (b) *The Committee requests the Government and the complainant to provide information on the outcome of the hearing by the Federal Court of Appeal of the judicial review of the Canada Labour Relations Board jurisdictional decision on the Charter issue in relation with section 13(5) of the Canada Post Corporation Act.*

- (c) *The Committee requests the Government to consider, in full consultation with the social partners concerned, the ratification of Convention No. 98.*

CASE NO. 2822

DEFINITIVE REPORT

**Complaint against the Government of Colombia  
presented by  
the National Trade Union of Workers of the Food  
and Fat Products Industry (SINTRAIMAGRA)**

*Allegations: The complainant alleges the violation of its collective bargaining rights following the refusal of the Alpina Productos Alimenticios SA company to negotiate with regard to a list of demands*

- 432.** The complaint is contained in a communication from the National Trade Union of Workers of the Food and Fat Products Industry (SINTRAIMAGRA) dated 22 July 2010.
- 433.** The Government sent its observations in a communication dated 10 January 2012.
- 434.** Colombia 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**

- 435.** In its communication dated 22 July 2010, SINTRAIMAGRA indicates that on 2 June 2009 it submitted a list of demands to the Alpina Productos Alimenticios SA (Alpina food products) company but, to date, the company has not convened negotiations with the trade union as required by law. Once it had been informed of the submission of the list of demands by SINTRAIMAGRA, the company signed a collective agreement on 3 June with SINTRALPINA, the primary trade union at Alpina Productos Alimenticios SA. On the following day, the company sent a letter to SINTRAIMAGRA containing several points which were not in line with the law or with international Conventions on collective bargaining, thereby failing to recognize the union's right to engage in collective bargaining.
- 436.** The complainant states that it sent an official letter, dated 8 June 2009, to the Ministry of Social Security requesting it to instruct the legal representative of the company to send a written convocation to the union to launch the direct settlement phase prescribed by law. The complainant states that, on 20 August 2009, administrative proceedings were conducted at the labour inspectorate, in which the union confirmed the facts and the company stated that the six workers who submitted the list of demands on behalf of SINTRAIMAGRA had concluded a collective agreement on 2 June 2009 on behalf of SINTRALPINA, and so they could not instigate a new collective labour dispute. The Ministry of Social Security, by a decision dated 18 September 2009 issued by the Coordinating Committee of the Prevention, Inspection, Supervision and Monitoring Group

of the Territorial Directorate of Cundinamarca, imposed a fine on the company of 2,484,500 Colombian pesos (COP), equivalent to five times the legal minimum wage, for each day of delay in starting the negotiations, counting from the sixth working day following the date of submission of the list of demands and until such time as the negotiations were launched.

- 437.** The complainant indicates that the company filed an appeal and the Ministry of Social Security, by a decision dated 7 March 2010 issued by the Coordinating Committee of the Prevention, Inspection, Supervision and Monitoring Group of the Territorial Directorate of Cundinamarca, rescinded the decision of 18 September 2009 and exonerated the company. The complainant in turn filed an appeal. Since the submission of the list of demands by the union on 2 June 2009, the Ministry of Social Security has, to date, not dealt with the request from SINTRAIMAGRA since it has not taken the relevant measures that are prescribed by law.
- 438.** The arguments of the Coordinating Committee for rescinding the administrative act which gave rise to the appeal were as follows: (1) there cannot be more than one collective labour agreement in an enterprise; (2) the aforementioned fact is the basis for the enterprise's refusal to negotiate with regard to the list of demands submitted by SINTRAIMAGRA; (3) an official letter dated 2 November 2007 from the Legal and Legislative Support Office of the Ministry of Social Security concludes that the obligation to negotiate with respect to a list of demands exists when the list is submitted in due time; (4) SINTRAIMAGRA must wait until 2012 to submit a list of demands to the enterprise since the latter already signed a collective agreement with SINTRALPINA which is valid until June 2012; and (5) the list of demands submitted by SINTRAIMAGRA was not submitted in due form, and so the enterprise is not obliged to negotiate with respect to that list of demands.
- 439.** The complainant emphasizes that the list of demands submitted by SINTRAIMAGRA was received by the company before an agreement was reached with SINTRALPINA, and the company has an obligation to negotiate with regard to the list of demands, which was submitted in due time by the trade union, since the company had not signed a collective agreement with the other union at the date when the list was submitted.
- 440.** The complainant recalls that the Constitutional Court issued ruling No. C-063 of 2008, according to which minority trade unions have the constitutional right to require the employer to engage in negotiations when it receives lists of demands from its workers:

The absolute prohibition on minority trade unions to engage in collective bargaining does not conform to the principles of reasonableness or proportionality, and not only violates the right to collective bargaining but also the right to freedom of association, the cornerstone of workers' rights. The right to collective bargaining must be enjoyed by all categories of trade unions, in conformity with ILO Convention No. 154, which obliges States parties to adopt measures to promote collective bargaining, even though it does not specify which measures and gives the competent government bodies considerable freedom of action as regards the implementation of such proposals. The unreasonable and disproportionate restriction placed on minority trade unions regarding collective bargaining has no constitutional justification.

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

- 441.** By a communication dated 10 January 2012, the Government forwards information from the company to the effect that: (1) it respects the rights of association and bargaining, as borne out by the presence of trade unions in the company for more than 30 years; and (2) the company contains several trade unions, namely the SINTRALPINA, the SINTRAIMAGRA, the Alpina Trade Union of Workers (USTA), the Trade Union of Food Workers (UTA), the Trade Union of Flour Processing Industry Workers of Santander

(USINTRAPROHASAN), and the National Union of Food and Beverage Workers (SINTIGAL).

- 442.** The company states that further to submission of the list of demands by SINTRALPINA, negotiations were initiated on 1 June 2009 between the company and SINTRALPINA with respect to the collective labour agreement for 2009–12, which was concluded on 3 June 2009 as a result of an organized and effective bargaining process, thus benefiting all members of the organization over the following three years. Moreover, according to the company, the membership of SINTRALPINA included six SINTRAIMAGRA members, simultaneous affiliation to more than one union being possible and, on 2 June 2009, SINTRAIMAGRA submitted a list of demands on behalf of six members who also belonged to SINTRALPINA at the time.
- 443.** In view of the fact that the company had signed a collective agreement with SINTRALPINA, which also benefited the members of SINTRAIMAGRA, the company informed the latter union of this situation, citing the provisions of the Labour Code, according to which it was not possible to be represented in two lists of demands or to derive benefits simultaneously from two separate collective agreements, and the company points out that, since the union did not raise any objection to the list of demands, it understood that the workers had been represented in the negotiations, an agreement had been reached, and hence the dispute had been settled. The company states that the negotiations requested by SINTRAIMAGRA were then initiated further to various legal discussions and the subsequent decision of 29 July 2010 from the Ministry of Social Security ordering negotiations to be launched. The company complied immediately with the order and launched the direct settlement procedure with SINTRAIMAGRA on 11 June 2010, completing the bargaining process on 30 August 2010, and signing the collective agreement between the company and SINTRAIMAGRA.
- 444.** The Government confirms that the letter from the company, and the actions of the Ministry aimed at safeguarding the right to collective bargaining, showed that the right of SINTRAIMAGRA to engage in collective bargaining was upheld and that the Ministry, within the scope of its power to guarantee such rights, acted in conformity with the law and took action to initiate the negotiation process with SINTRAIMAGRA, a situation which was complied with and respected by the company.

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

- 445.** *The Committee notes that, in the present case, the complainant alleges the violation of its right to engage in collective bargaining following the refusal of the Alpina Productos Alimenticios SA (Alpina food products) company to negotiate with regard to a list of demands.*
- 446.** *The Committee notes the following statements from the complainant: (1) on 2 June 2009 the complainant submitted a list of demands to the company; (2) on 3 June the company signed a collective agreement with the primary trade union SINTRALPINA; (3) the Ministry of Social Security, by a decision of 18 September 2009, imposed a fine on the company of COP2,484,500 for each day of delay in starting the negotiations; (4) the company filed an appeal and the Ministry of Social Security rescinded the decision that was challenged and exonerated the company; (5) the complainant in turn filed an appeal; and (6) the list of demands submitted by SINTRAIMAGRA was received by the company before an agreement was reached with SINTRALPINA and the company had an obligation to negotiate with regard to lists of demands submitted in due time.*

- 447.** *The Committee notes that the Government forwarded observations from the company, which emphasized the following points: (1) further to the submission of the list of demands by SINTRALPINA on 1 June 2009, negotiations were launched between the company and SINTRALPINA with respect to the collective labour agreement for 2009–12, which was concluded on 3 June 2009; (2) the membership of SINTRALPINA included six workers who were also members of SINTRAIMAGRA, simultaneous affiliation to more than one union being possible and, on 2 June 2009, SINTRAIMAGRA submitted a list of demands on behalf of six members who also belonged to SINTRALPINA at the time; (3) the company informed SINTRAIMAGRA that it was not possible to be represented in two different lists of demands and to derive benefits simultaneously from two separate collective agreements, and the trade union did not raise any objection to the list of demands; (4) the company understood that the workers had been represented in the negotiations and that an agreement had been reached, thereby settling any dispute; and (5) further to various legal discussions requested by SINTRAIMAGRA, the Ministry of Social Security ordered negotiations to be launched, the bargaining process then being completed on 30 August 2010 with the signature of a collective agreement between the company and SINTRAIMAGRA.*
- 448.** *The Committee recalls the importance of collective bargaining for maintaining the harmonious development of labour relations and welcomes the signature of a collective agreement between the company and SINTRAIMAGRA. Noting that the complainant alleged the violation of its right to engage in collective bargaining following the employer's refusal to negotiate with regard to a list of demands, and that the dispute was subsequently settled through negotiations, the Committee invites the Governing Body to decide that this case does not call for further examination.*

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

- 449.** *Noting that the complainant alleged the violation of its right to engage in collective bargaining following the employer's refusal to negotiate with regard to a list of demands, and that the dispute was subsequently settled through negotiations, the Committee invites the Governing Body to decide that this case does not call for further examination.*

CASE NO. 2823

DEFINITIVE REPORT

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

- **the National Union of Workers of the Social Security Institute (SINTRAISS) – Cundinamarca Section and**
- **the Social Security Workers’ Union (SINTRASEGURIDADSOCIAL) – Bogotá and Cundinamarca Section**

**supported by**

- **the Colombian Trade Union Association of Therapists (ASTECO)**
- **the Association of Unionized Bacteriologists (ASBAS) and**
- **the Colombian Medical Trade Union Association (ASMEDAS)**

*Allegations: The complainants allege that there have been mass anti-union dismissals at the state social enterprises in violation of the collective agreement in force, the special protection enjoyed by socially vulnerable workers and trade union immunity*

**450.** The complaint is contained in a communication from the National Union of Workers of the Social Security Institute (SINTRAISS) – Cundinamarca Section and the Social Security Workers’ Union (SINTRASEGURIDADSOCIAL) – Bogotá and Cundinamarca Section, of April 2010. In a communication dated 23 September 2010, the Colombian Trade Union Association of Therapists (ASTECO), the Association of Unionized Bacteriologists (ASBAS) and the Colombian Medical Trade Union Association (ASMEDAS) expressed support for the complaint.

**451.** The Government sent its observations in a communication of July 2011.

**452.** Colombia 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 complainants’ allegations**

**453.** In its communication of April 2010, SINTRAISS – Cundinamarca Section and SINTRASEGURIDADSOCIAL – Bogotá and Cundinamarca Section, complain that more than 13,000 workers have been dismissed from the state social enterprises. According to the complainants, these dismissals breach: (a) the guarantee of trade union immunity, given that a large number of officials were dismissed without prior authorization from the judicial authorities; (b) the special protection enjoyed by socially vulnerable workers (fathers and mothers who are heads of families with no economic alternative, persons with disabilities, and those who will soon meet the conditions for receiving an old-age or



retirement pension); and (c) the collective agreement signed between the Social Security Institute (ISS) and SINTRASEGURIDADSOCIAL (representing all the unions active at the ISS), which was in force when the enterprises were created and liquidated and when the trade union members were dismissed.

- 454.** The complainants state that, by means of Decree-Law No. 1750 of 26 June 2003, the Government divided the health sector from the ISS and created seven state social enterprises at national level: Antonio Nariño, Rafael Uribe Uribe, José Prudencio Padilla, Rita Arango Álvarez del Pino, Francisco de Paula Santander, Policarpa Salavarrieta and Luis Carlos Galán Sarmiento (this last is still in the process of being liquidated). The staff of ISS clinics and out-patient centres were automatically transferred to the new enterprises, their status changing from “public official”, with a collective agreement, job security and the rights to freedom of association and collective bargaining, to “public employee”, with no right to job security, trade union prerogatives or protection under agreements. The complainants add that, under the above Decree-Law, the state social enterprises in question replaced the ISS as the employer, with all the attendant rights and labour obligations. According to the legislation, when one employer replaces another there is a legal obligation with respect to the worker; the new entities were essentially no different in terms of providing public health services, and the workers continued to perform the same duties.
- 455.** The complainants state that, before the split, the ISS had signed a collective agreement valid from 1 November 1996 to 31 October 1999. This collective agreement was signed by SINTRAISS on behalf of all social security trade union organizations. In 2001, a comprehensive agreement was signed with SINTRASEGURIDADSOCIAL to strengthen the ISS. Among the most important commitments made by the Government were to lift the sanction imposed on the ISS by the National Health Supervisory Body that prevented it from forming new links with the Health Promotion Enterprise (EPS), to grant a loan of 1 billion Colombian pesos (COP), to maintain the ISS as a single enterprise, and to adopt measures to minimize the economic effects of the adverse allocation of patients with high-cost illnesses, who are not profitable for private health promotion enterprises, to the social security EPS. SINTRASEGURIDADSOCIAL undertook to renegotiate the collective agreement in force, and abided by its commitment. The complainants state that the following alterations were made to the collective agreement: retroactive redundancy pay was abolished, the method of paying retirement pensions was changed, the Housing Fund was frozen, and other changes were made to supplements and benefits, representing a significant financial saving to the ISS, which in 2001 succeeded in balancing its budget. With these changes, SINTRASEGURIDADSOCIAL and the ISS signed a new collective agreement, valid from 1 November 2001 to 31 October 2004, article 5 of which guarantees job security.
- 456.** Act No. 790 of 2002 prohibited the liquidation, abolition or merging of the ISS, as a guarantee of public social security and the business unity of social security activities. Nevertheless, in 2003 the Government proceeded to divide the provision of health services from the ISS by means of Decree-Law No. 1750 of 26 June 2003. The complainants state that the aforementioned collective agreement is still in force, as it was denounced by the ISS in an attempt to avoid abiding by it, and no new collective agreement has been signed to replace it.
- 457.** The complainants point out that various judicial rulings have confirmed that the agreement remains valid, in particular the ruling of the Higher Court of Bogotá District, Labour Chamber, of 29 February 2008, which confirmed the ruling of the Second Labour Court, leaving the collective agreement in force and unaltered in content and requiring it to be applied in its entirety to all public officials and public employees who worked initially for the ISS and subsequently, for the seven state social enterprises created by

Decree-Law No. 1750 of 2003. Similarly, the Constitutional Court, in its rulings C-314 and C-349 of 2004, ordered that the collective agreement in force between the ISS and its workers at the time of the split must continue to be applied to staff of the state social enterprises so as to respect the acquired rights of ISS public officials who became public employees in those enterprises. The complainants also mention various rulings (without providing copies thereof) which, according to their transcripts, support the continued validity of the collective agreement and its application to the workers who signed it. The complainants also transcribe ruling No. 209 of 27 May 2009, handed down as part of the liquidation of the state social enterprise Luis Carlos Galán Sarmiento, which states the following:

... the Chamber (Plenary of the Constitutional Court) concluded that the change of employer does not prevent the aforementioned labour agreement originally signed with the ISS from ceasing to be a source of rights for a worker at the respondent state social enterprise, at least while the agreement remains valid. Second, it is not true that the Chamber unduly granted permanent validity to the collective agreement ... On the contrary, the Chamber's argument that its application should cease is conditional upon it still being valid. *Contrario sensu*, if the agreement had lost its validity, it would not be possible to apply it.

- 458.** According to the complainants, the courts correctly interpreted the 2004 Supreme Court rulings to conclude that the collective agreement remains valid and that its provisions apply to staff of the state social enterprises.
- 459.** The complainants state that the Government has failed to comply with the above rulings of the Constitutional Court, issuing a written instruction, through the Minister of Social Protection and the President of the ISS, that no benefit contained in an agreement should be recognized for former ISS workers incorporated without their consent into the new state social enterprises. According to the complainants, the Government unilaterally interpreted the rulings of the Constitutional Court in a restrictive manner and the only reason for splitting the health sector off from the ISS was to liquidate the ISS and privatize services, which was accompanied by the incorporation of 13,000 staff into state social enterprises and the denial of rights acquired under the collective agreement. Proof that the Government was seeking solely to privatize social security and refuse to apply rights under the agreement is that, today, the ISS has been practically liquidated, neither ensuring nor providing health services, and that the seven state social enterprises were liquidated by decrees signed from 2006 onwards, with the dismissal of the 13,000 staff with no recognition of their rights under the agreement.
- 460.** The complainants add that, continuing the process of liquidation, in 2007 the National Health Supervisory Body revoked the operating licence of the EPS of the ISS and the Government created a new EPS with a private sector shareholder majority (family benefit funds), to which the insured were transferred, beginning operations on 1 August 2008.
- 461.** The complainants state that, in order to justify the liquidation of these state social enterprises, the Government alleged that they were being poorly managed, that they were not balancing their budgets, that they were not providing high-quality services, etc., ignoring the fact that the managers had been appointed by the Government itself. The liquidation orders contained a legal indemnity schedule set at less than 40 per cent of the schedule defined in the agreement. At the end of the liquidation process, trade union officials were dismissed, without prior judicial authorization, as were workers benefiting from special social protection, with payment of benefits and indemnities in accordance with the legal schedule, not the schedule contained in the agreement.
- 462.** The complainants stress that, with these actions, the Government liquidated public social security, ignoring the collective agreement in force, the trade union for the social security industry, and all the trade union organizations that had members in the ISS or the state

social enterprises. At present, the social security services are responsible only for covering the risks of disability, old age and death, paying pensions and collecting contributions, having recently transferred all their activities to the newly created Colombian Pensions Administration.

## B. The Government's reply

**463.** In a communication of July 2011, the Government confirms that, in exercise of the powers provided in law, it issued Decree-Law No. 1750 of 2003, by which the ISS, the vice-presidency of Provision of Health Services, Clinics and Out-Patient Centres were divided and seven state social enterprises were created, into the staff of which those who had worked in the above departments were automatically incorporated with continuity of employment. These enterprises formed a special category of decentralized body at national level, with legal personality, administrative autonomy and their own patrimony, attached to the Ministry of Social Protection and totally independent of the ISS. The Government underlines the fact that the Constitutional Court declared the split to be in accordance with the Constitution and the provisions of Decree-Law No. 1750 of 2003, in terms of the nature of staffing, continuity of employment, salary and benefit arrangements, service, and grounds for retirement.

**464.** The Government draws attention to sections 16 and 17 of the above Decree-Law, which expressly stipulate: "For all legal purposes, the staff of the state social enterprises created by this Decree-Law shall be public employees, except those who, though not managerial staff, are responsible for ensuring continued staffing of hospitals and provision of general services, who shall be public officials." "Public servants who, when the decree came into force, were attached to the vice-presidency of Provision of Health Services, Clinics and Out-Patient Centres of the ISS will automatically be incorporated, in continuous employment, into the staff of the state social enterprises created by this decree. ... The length of service of public servants who move from the ISS to the state social enterprises shall be calculated, for all legal purposes, to include the time they spend with those enterprises, with no break in service." The Government states that proceedings were brought in respect of these provisions before the Constitutional Court, which found Decree-Law No. 1750 of 2003 to be in keeping with the Constitution.

**465.** More specifically, the Constitutional Court stated:

... it can be deduced that the public servants assigned to the state social enterprises who acquired the status of public employee and lost that of public official, also lost the right to present lists of claims and to negotiate collective labour agreements. Consequently, belonging to a specific employment category, be it public official or public employee, does not imply an acquired right to conclude collective agreements, which is merely a capacity derived from the specific type of employment regime. The Court finds it valid to consider that, in this case, the residual right follows from the principal right, namely that, since the right to be a public employee or a public official does not exist, then the right to present collective agreements does not exist either if the employment regime has been modified. The contrary conclusion would be absurd, implying that certain types of public employees, who were previously public officials, would have the right to present collective labour agreements, unlike those who had never been public officials. This would create a third type of public employee, not provided for by the law, resulting from the transition from one employment category to another, and ultimately would impinge on the right to equality since those who had never been public officials would not have the right to improve their employment conditions through collective bargaining. It is therefore clear to the Court that the public employees working for the ESEs since 26 June 2003 cannot bargain collectively, nor can they aspire to benefit from collective agreements, as these are restricted by law to public officials.

- 466.** The Government thus confirms that, in order to guarantee the provision of timely and high-quality health services, it took the decision to liquidate the state social enterprises that provided those services in view of the significant risk they presented as a result of being financially unviable and failing to provide high-quality and efficient health services. The state social enterprises were dissolved by administrative acts between 2006 and 2008.
- 467.** With regard to the application of the collective agreement, the Government states the following: (1) the agreement reached between the ISS and SINTRASEGURIDADSOCIAL could not be applied by the state social enterprises because they were not party to it; (2) section 3 of the agreement, concerning its scope, stipulates that the agreement applies to public officials on the staff of the ISS; (3) at present, the collective agreement remains in force and continues to apply to public officials at the ISS, who number more than 1,500; (4) the Decree-Law that divided the ISS entailed a change in the legal nature of the relationship between staff and the institution; (5) this change implies that the workers ceased to be public officials and that the standards for this category of officials no longer apply to them, being replaced by the general standards applicable to public servants; (6) there is no legal provision stipulating that a collective agreement should apply outside the enterprise that signed it, nor to workers or employers in other enterprises; and (7) in the ISS there are public employees to whom the collective agreement does not apply, even though their working arrangements are the same as public employees in the executive branch of the national administration.
- 468.** Furthermore, with respect to the legal concept of a change of employer, the Government states that this does not apply where state bodies are concerned. The concept is exclusive to private law, and the need to respect it cannot be used as grounds for applying the collective agreement. Moreover, under the Labour Code, three requirements must be met for a formal change of employer to occur: (1) a change of employer; (2) continuity of workforce; and (3) continuity of business activities. In the present case, the Government underlines the fact that there was a change of employer because there was no continuity of business activities. Two completely separate, distinct and autonomous legal persons are involved. With regard to the possibility of claiming the existence of acquired rights, the Government states that, in accordance with constitutional jurisprudence, “acquired rights are those that have definitively become part of a person’s patrimony”.
- 469.** With regard to the validity of the collective agreement, the Government states that, in a 2004 ruling, the Constitutional Court established that a collective agreement must remain valid for the period for which it was concluded, i.e. until 31 December 2004. Further to the Court’s ruling, the effects of which are *erga omnes*, the Ministry of Social Protection and the presidency of the ISS issued circular No. 00052 of 2004, which expressly stated the following:
- Those public servants who were incorporated into the state social enterprises as public employees ... and who had previously been covered by the collective agreement signed between the ISS and SINTRASEGURIDADSOCIAL, shall be accorded the same benefits by each state social enterprise, on a one-off basis, as ordered by the Constitutional Court, for the period 26 June to 31 October 2004 inclusive. After that date, the said public employees shall be covered exclusively by the legal provisions relating to public employees at national level. Consequently, for public employees, the administrative act recognizing and terminating these benefits shall expressly state that, as of 1 November 2004, salaries and benefits will be determined by the legislator for public employees, who, by express legal provision pursuant to the ruling of the Constitutional Court ... , are not entitled to present lists of grievances or sign collective agreements.
- 470.** This circular is a current administrative act of a general nature. It is binding on the state social enterprises and enjoys the presumption of legality. Discussing its legality falls under the competency of the administrative courts. The relevant judicial proceedings have not

been brought before the administrative courts and the time limit for doing so has now passed, which means that the situation has been legally consolidated and is now protected by the Constitution and the interpretation given by the Constitutional Court.

- 471.** The Government highlights recent jurisprudence from the administrative courts, which have studied the issue of the applicability of the collective agreement and issued rulings setting out the proper procedures for complying with the orders of the Constitutional Court, specifically that rights acquired on the basis of the collective agreement should be respected and maintained until 31 October 2004, which the employer did, but that the validity of the agreement cannot be extended indefinitely, as claimed by the former staff members who wish it to continue to apply. In its ruling of 18 November 2010, the Cundinamarca Administrative Court expressly stated, with reference to extending the application of the collective agreement and specifically to denouncing it, that the following factors should be taken into account:

One may conclude that what this legal person desires to achieve is the renegotiation of the original agreement, which is inadmissible from every angle because, after the split of 26 June 2003, the ISS ceased to be the employer of the public officials covered by the collective agreement, as they were incorporated into the state social enterprises.

- 472.** The Government states that the judicial authorities have definitively and clearly established that the collective agreement in question continued to apply after the ISS was divided.
- 473.** Lastly, aside from the labour and pensions issue, a solution to which will be determined in law under the relevant jurisdiction and must then be adopted and applied by the state enterprises competent to assume the responsibilities established, the Government underlines the fact that the liquidation of the state social enterprises was carried out in accordance with legislation by the liquidators concerned. On this basis, deficiencies in the various processes were remedied through domestic channels to ensure that labour obligations were met, under the conditions laid down in law and in administrative acts on assuming liabilities.

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

- 474.** *The Committee observes that the complainants refer to mass anti-union dismissals at the state social enterprises – 13,000 workers – in violation of the collective agreement in force, the special protection enjoyed by socially vulnerable workers, and trade union immunity.*
- 475.** *The Committee notes that, according to the allegations made and the Government's reply, these events took place as part of a restructuring process and the subsequent liquidation of the state social enterprises that provided social security services. In the first phase, on 26 June 2003, part of the ISS was divided into seven state social enterprises (the complainants state that only the staff of ISS clinics and out-patient centres were automatically incorporated into the new enterprises). The ISS "public officials" were incorporated with a change in legal status to "public employees" (the ISS still exists and currently has more than 1,500 public officials and a number of public employees). According to the Government, the Constitutional Court considered the split to be in accordance with the Constitution. For their part, the complainants state that a collective agreement had been signed between the ISS and SINTRASEGURIDADSOCIAL, representing the various unions active at the ISS, for the period 1 November 2001 to 31 October 2004, which guaranteed job security and, they allege, has been violated.*

- 476.** *The Committee notes that, in the second phase, between 2006 and 2008, the state social enterprises were liquidated, resulting in the dismissal of 13,000 workers, including numerous trade union officials, allegedly in breach of their trade union immunity and rights relating to job security and certain labour benefits acquired under agreements. The Committee notes that, according to the complainants, the only reason for the liquidations was to privatize the sector and deny the rights acquired. The Committee further notes the Government's statement that it took the decision to liquidate the state social enterprises providing such services in view of the significant risk they presented as a result of being financially unviable and failing to provide high-quality, efficient health services. The Committee considers it necessary to underline the fact that, according to the Government, the liquidation of the state social enterprises took place in accordance with legal provisions, including the payment of labour benefits, but that, according to the complainants, the amount allowed for compensation in the liquidation orders for the enterprises was less than 40 per cent of that provided for in the collective agreement in question.*
- 477.** *The Committee points out that, with regard to the restructuring of public enterprises or institutions, it can 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.*
- 478.** *The Committee wishes to point out that, despite the fact that this case concerns the mass dismissal of 13,000 workers as a result of the liquidation of seven state social enterprises, as part of what was, according to the complainants, a privatization process, and although this action taken had serious consequences, the complainants have not provided evidence to show that anti-union discrimination occurred and, as such, within its specific mandate, the Committee cannot examine these dismissals.*
- 479.** *The Committee therefore observes that the remaining issue for consideration in this case is whether the collective agreement signed between the ISS and SINTRASEGURIDADSOCIAL (which applies to ISS public officials) applies to "public officials" transferred to the seven state social enterprises in 2003 who became "public employees" and were dismissed between 2006 and 2008, when the enterprises were liquidated, and in particular whether its provisions on benefits in the case of termination of employment should apply. The Committee understands that the complainants maintain that the dismissed workers should be covered not only by the legal compensation package offered by the authorities, but also by the provisions on compensation for dismissal contained in the collective agreement, which are more favourable than those in the liquidation orders for the state social enterprises, while the Government maintains that the collective agreement did not apply to those workers.*
- 480.** *With regard to the validity and scope of the collective agreement, the Committee notes that the arguments put forward by the complainants to support its being applied are as follows: (1) the division of the ISS and subsequent creation of seven state social enterprises constituted a change of employer, and the enterprises must therefore, in accordance with legislation, respect the provisions of the agreement; (2) the Constitutional Court, in its ruling C-314/04 (case claiming that sections 16 and 18 (partial) of Decree-Law No. 1750 of 2003 "dividing the Social Security Institute and creating the state social enterprises" are unconstitutional), underlined the fact that the collective agreement is "a source of acquired rights at least while the agreement remains valid"; and (3) in view of the principle of the continuing effect of collective agreements, the agreement applies to the "public employees" moved to the state social enterprises because they have never denounced it.*

- 481.** *The Committee takes note of the Government's statement in this regard that: (1) the dividing of the ISS and subsequent creation of the seven state social enterprises does not constitute a change of employer because in this case the requirement for "continuity of business activities" was not met and because section 3 of the agreement, concerning its scope, stipulates that the agreement applies to public officials on the staff of the ISS, and it could not therefore be applied by the state social enterprises because they were not part of the ISS; (2) according to constitutional jurisprudence, rights under agreements are not acquired rights; (3) the Decree-Law that divided the ISS in 2003 entailed a change in the legal nature of the relationship between staff and the institution; this change implies that the workers ceased to be public officials and that the standards for this category of officials no longer apply to them, being replaced by the general standards applicable to public servants, who do not have the right to bargain collectively; (4) there is no legal provision stipulating that a collective agreement should apply outside the enterprise that signed it, nor to workers or employers in other enterprises; and (5) the Government confirms that the collective agreement remains in force and applies to 1,500 public officials in the ISS, but its provisions cannot be applied to public employees (including those who were public officials before the split), as they do not have the right to present lists of grievances and therefore to bargain collectively.*
- 482.** *The Committee wishes to emphasize that questions of interpretation concerning the application of national legal standards to workers are a matter for the judicial authorities. In this regard, the Committee observes that the interpretation contained in the ruling of the Higher Court of Bogotá District, Labour Chamber, of 29 February 2008 (cited by the complainants without, however, supplying the text) upholds the collective agreement, requiring its full application to all public officials and public employees who originally worked for the ISS and subsequently for the seven state social enterprises created by Decree-Law No. 1750 of 2003, at least for the duration of its validity. Nevertheless, the Government cites a later ruling of the Cundinamarca Administrative Court of 18 November 2010 (the Government provides extracts) on the extension of the collective agreement, which states that, after the 2003 split, the ISS ceased to be the employer of the workers covered by the collective agreement because they had been incorporated into the state social enterprises.*
- 483.** *Lastly, the Committee observes that it appears, from various judicial rulings, that, when the ISS "public officials" became "public employees" in the state social enterprises, they no longer had the right to present lists of grievances and they lost their right to bargain collectively. The Committee recalls, however, that Colombia ratified the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154), in 2000 and that, in this context, and with a view to applying the Conventions it had ratified, in 2009 the Government took legislative measures to ensure that all workers (be they public sector workers, public employees or public officials) had the right to bargain. The Committee regrets the fact that, when the events in question occurred, workers were deprived of the right to bargain collectively and to seek application of the provisions of a collective agreement simply because their legal status had changed, and underlines the fact that, in various situations arising from changes of employer, it has requested the Government to ensure that changes of ownership neither deprive employees of the right to bargain collectively nor jeopardize, directly or indirectly, the situation of unionized workers and their organizations. The Committee regrets the fact that, as a result of the events that took place, workers dismissed as part of a restructuring process have been placed in a situation whereby they did not enjoy benefits that they had previously negotiated. The Committee expects that, by now, with the option of engaging in collective bargaining in the current legal framework, the interested parties have been able to negotiate an agreement to define terms and conditions of employment.*

## The Committee's recommendation

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

*Bearing in mind that Colombia has ratified the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154), and that, in this context, the Government took legislative measures in 2009 to ensure that all workers enjoy the right to bargain, the Committee expects that, by now, with the option of engaging in collective bargaining in the current legal framework, the interested parties have been able to negotiate an agreement to define terms and conditions of employment.*

CASE NO. 2835

DEFINITIVE REPORT

**Complaints against the Government of Colombia  
presented by  
the Union of Communications and Allied Professions and Transport  
(SINTRACOMUNICACIONES), Antioquia branch  
supported by  
the National Union of State Employees of Colombia (UTRADEC)**

***Allegations: Refusal to register a trade union  
and anti-union dismissals***

**485.** The complaint is contained in a communication from the Antioquia branch of the Union of Communications and Allied Professions and Transport (SINTRACOMUNICACIONES), dated 13 October 2010. The National Union of State Employees of Colombia (UTRADEC) indicated that it supported the complaint in a communication dated 1 February 2011.

**486.** The Government sent its observations in a communication dated 15 September 2011.

**487.** 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 complainant's allegations**

**488.** In its communication dated 13 October 2010, the Antioquia branch of SINTRACOMUNICACIONES indicated that this trade union was active within the National Postal Administration (ADPOSTAL) at the time it was liquidated. The trade union's subcommittee was elected on 13 September 2006 and from that time onwards its members benefited from trade union immunity. The complainant adds that when the Government ordered the liquidation of ADPOSTAL (hereinafter "the institution"), it dismissed, on 26 December 2006, the worker members of the executive board of the trade union and disregarded their trade union immunity. In other words, it failed to secure the permission of a labour judge.



- 489.** The complainant emphasizes that on 18 September 2006, the executive board of the Antioquia branch of the trade union applied to the Office for the Coordination of Labour and Employment of the Ministry of Social Protection for registration in the trade union registry, and registration was granted by virtue of a decision issued on 9 October 2006. In a decree dated 27 December 2006, the Government dismissed the employees of the institution which was then in the process of being liquidated (i.e. it abolished all 567 of the institution's official posts) and indicated that "from the moment the ruling authorizing the lifting of trade union immunity enters into force or when the term of that immunity expires, in accordance with the law or social by-laws, the posts occupied by public servants who enjoyed trade union immunity will be abolished".
- 490.** The complainant further adds that when the institution learned of the registration of the executive board of the Antioquia branch of the trade union, it lodged administrative and subsequently judicial appeals seeking to cancel the board's registration. Eventually, pursuant to a ruling of the High Court in Medellín, the administrative labour authority ordered the registration of the executive board of the Antioquia branch of SINTRACOMUNICACIONES.
- 491.** The complainant states that, in the meantime, two trade union officials received replies to their applications for compliance with their trade union immunity from the institution, in the following terms: "until the registration ruling has been confirmed, ADPOSTAL, which is in the process of being liquidated, will refrain from recognizing said immunity for as long as the appeals lodged against ruling No. 01685 of 9 October 2006 are awaiting a decision".
- 492.** On 19 December 2007, the complainant organization filed a request for reinstatement before the Labour Court of the Medellín Circuit in order to give effect to the trade union immunity provided for by the legislation. On 10 June 2008, the Court decided to order the institution to reinstate the members of the executive board and pay them the salaries and social benefits owed to them since 28 December 2006. Following an appeal, on 11 August 2008, the High Court in Medellín struck down the ruling of the lower court and found in favour of the institution on the grounds that the deadline for filing the legal request had passed. The complainant states that it appealed to the Labour Chamber of the Supreme Court to seek protection from the High Court ruling, but the Chamber decided to reject the request for protection and the Constitutional Court subsequently decided not to review the appeal for protection.

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

- 493.** In a communication dated 15 September 2011, the Government indicates that it decided, in the light of ADPOSTAL's lack of economic and financial viability, to close that institution and accordingly issued Decree No. 2853 of 25 August 2006, which initiated the liquidation process and appointed Fiduciaria La Previsora SA (FIDUPREVISORA SA) as the liquidator. On 30 December 2008, when the final report was signed, the legal existence of the institution effectively ended.
- 494.** Regarding the proceedings initiated with a view to lifting trade union immunity, the final liquidation report indicates the status of those proceedings at the time liquidation was completed. Specifically, "the liquidation instigated proceedings that enabled the separation from service of employees protected by trade union immunity. This step was taken on 25 October 2006 and the corresponding application covered 177 workers entitled to immunity in 136 proceedings, and took into account the certificates issued by the Ministry of Social Protection for the trade unions and their executive boards, although the Ministry subsequently updated the information and 61 applications by 39 workers with immunity were withdrawn as a result, because a single worker might be entitled to immunity through

multiple trade unions. ... Once the final liquidation report has been signed, and in the absence of legal authorization for the lifting of trade union immunity, that entitlement ceases to exist since the entity no longer legally exists, in accordance with the principles set forth in the Public Administration Reform Programme 10”.

**495.** The Government emphasizes that the abolition of posts and the liquidation of the institution were the result of economic and financial considerations. The affiliations of the workers were not taken into consideration, nor was the intention to undermine the right to freedom of association. The main aim was to serve the community better as well as to protect the State’s assets. Trade union immunity is a guarantee of the right to freedom of association that protects trade unions by guarding against arbitrary actions on the part of employers that affect the posts of certain employees and thus also have knock-on effects on the way they discharge their duties and achieve their goals. Once the enterprise or employer entity that guarantees trade union privileges no longer exists, then both the labour relations and the guarantee requiring the employer to respect the workers’ trade union immunity also cease to exist.

**496.** According to the Government, the Director of the Public Administration Reform Programme, in the framework of a consultation, indicated that “once liquidation has been finalized in accordance with the provisions of article 8, subparagraph 2, of Decree Law No. 254 of 2000, the posts are abolished automatically; therefore, in the event that the entity did not secure permission from the courts to dismiss a worker with immunity, it can abolish the post and pay the corresponding compensation”. The Government reiterates that the liquidated entity acted in good faith and in accordance with the law, and agreed to pay the corresponding compensation. Furthermore, notwithstanding the certainty that the dismissal of the workers with immunity was legal, the liquidated entity cannot be forced, once the liquidation process has been completed, to remain active for the sole purpose of awaiting a labour court ruling that might not be handed down for a number of years. Doing so would not only violate domestic legislation, it would also be incompatible with the constitutional principles of expeditiousness, efficiency and effectiveness that govern the actions of the authorities and government bodies of Colombia, not to mention the high costs that would be involved.

**497.** The Government therefore supports the administrative and legal measures that were taken, and adds that the Office for the Coordination of Labour, Employment and Social Security decided to rescind the decision to register because the quorum for the election of the executive board had not been met. The Government emphasizes that in the present case administrative decisions and legal decisions have been taken with respect to labour issues by the judicial branch of the State in the exercise of its duties defined under the principle of separation of powers. As such, it is independent of the executive branch, and the Government thus respects and abides by its decisions.

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

**498.** *The Committee notes that in this case the complainant alleges that there was a refusal to register the executive board of the Antioquia branch of SINTRACOMUNICACIONES (a matter that had been settled following a series of administrative and legal appeals), and that on 26 December 2006 the members of the executive board of the abovementioned trade union were dismissed at the time ADPOSTAL was liquidated even though they were entitled to trade union immunity and could not therefore be dismissed without prior court authorization.*

499. *The Committee notes that the Government indicates that (1) it decided, in the light of that institution's lack of economic and financial viability, to close that institution and initiate the corresponding liquidation procedure without making any attempt to violate trade union rights; (2) once the final liquidation report had been signed, and in the absence of legal authorization for the lifting of trade union immunity, the right (to job security) ceases to exist since the entity no longer legally exists, in accordance with the principles set forth in the Public Administration Reform Programme 10; (3) the Director of the Public Administration Reform Programme, in the framework of a consultation, indicated that "once liquidation has been finalized in accordance with the provisions of article 8, subparagraph 2, of Decree Law No. 254 of 2000, the posts are abolished automatically; therefore, in the event that the entity did not secure permission from the courts to dismiss a worker with immunity, it could abolish the post and pay the corresponding compensation"; (4) the Government reiterates that the liquidated entity acted in good faith and in accordance with the law, and, faced with mandatory and legal permanent closure, agreed to pay the corresponding compensation; (5) under these circumstances, the liquidated entity cannot be forced to remain active for the sole purpose of awaiting a labour court ruling that might not be handed down for a number of years; (6) once the enterprise or employer entity that guarantees trade union privileges no longer exists, then both the labour relations and the guarantee requiring the employer to respect the workers' trade union immunity also cease to exist; and (7) in this case, labour administrative rulings and court rulings at the highest level have been handed down and the Government declares that it respects and abides by those rulings.*

500. *In the light of the information provided, the Committee wishes to emphasize that it is not called upon to pronounce upon the question of the breaking of a contract of employment by dismissal except in cases in which the provisions on dismissal imply anti-union discrimination [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 779]. The Committee notes that, with regard to the liquidation and abolition of ADPOSTAL, all of the workers, and not merely the members of the executive board of the trade union in question, were dismissed at the end of the liquidation process. Furthermore, the issue of trade union immunity in national legislation has already been settled by the courts. In these conditions, and in the light of the Government's explanations in support of the legality of the dismissals and the relevant court rulings, the Committee will not pursue its examination of the allegations.*

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

501. *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. 2203

INTERIM REPORT

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

- **the Trade Union Confederation of Guatemala (UNSI TRAGUA) and**
- **the Guatemalan Trade Union, Indigenous and Campesino Movement (MSICG)**

*Allegations: Assaults and acts of intimidation against trade unionists in a number of enterprises and public institutions; destruction of the headquarters of the trade union at the General Property Registry; raiding and ransacking of the headquarters of the trade union at the company Industrias Acrílicas de Centroamérica SA (ACRILASA) and burning of documents; and the employers' refusal to comply with judicial orders for the reinstatement of dismissed trade union members*

- 502.** The Committee examined the substance of this case on six occasions [see 330th, 336th, 342nd, 348th, 351st and 359th Reports], the last of which was at its March 2011 meeting, when it submitted an interim report to the Governing Body [see 359th Report, paras 506–528, approved by the Governing Body at its 310th Session].
- 503.** The Trade Union Confederation of Guatemala (UNSI TRAGUA) sent information regarding the issues arising in the present case in a communication dated 1 June 2011.
- 504.** The Government sent its observations in communications dated 25 October 2011 and 27 March 2012.
- 505.** 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**

- 506.** At its March 2011 meeting, the Committee made the following interim recommendations relating to the allegations presented by the complainant organizations [see 359th Report, para. 528]:
- (a) The Committee regrets the significant obstacles and delays to the collective bargaining process between the Supreme Electoral Tribunal and UNSI TRAGUA, as well as the obstacles to the exercise of the right to strike by the trade union and requests the Government to promote collective bargaining and to keep it informed in that regard.
  - (b) The Committee asks the Government to confirm that the trade union leader Mr Fletcher Alburez has been reinstated as ruled by the court.

- (c) The Committee invites the complainants to provide information as to whether all issues relating to the allegations concerning the organization manual have now been resolved.
- (d) As to the remaining allegations, in the absence of the Government's observations, the Committee yet again reiterates its previous recommendations which are reproduced below and urges the Government to send the information or take the actions requested:
- with regard to the allegations concerning assaults, death threats and acts of intimidation against trade unionists, as well as attacks on union headquarters, the Committee deeply regrets that, despite the seriousness of the matter, the Government has not sent full observations and strongly requests the Government to refer these cases as a matter of urgency to the Special Prosecutor for Offences against Trade Unionists and to keep it informed in this regard. The Committee again invites the Government to enter into contact with UNSITRAGUA with a view to providing a detailed reply regarding the case relating to the alleged raid, in 2002, on the headquarters of the trade union at the company ACRILASA and burning of documents;
  - with regard to the allegations concerning employer interference in union elections at the General Property Registry, which was confirmed by the Labour Inspectorate, the Committee once again requests the Government to take the necessary measures without delay to sanction the entity responsible, to provide for adequate compensation for the damages suffered and to ensure that similar acts do not occur in future. The Committee requests the Government to keep it informed in this regard;
  - with regard to the allegations relating to the Municipality of El Tumbador concerning the reinstatement proceedings ordered by the judicial authority, the dismissal of union officials César Augusto León Reyes, José Marcos Cabrera, Víctor Hugo López Martínez, Cornelio Cipriano Salic Orozco, Romeo Rafael Bartolón Martínez and César Adolfo Castillo Barrios, and the request for measures to ensure that all wages owed to union leader Mr Gramajo are paid without delay, the Committee requests the Government to send information without delay on the proceedings still pending and to take the necessary measures to ensure that all wages owed to Mr Gramajo are paid without delay.

## B. Additional information from the complainant organizations

**507.** In a communication dated 1 June 2011, UNSITRAGUA provided information regarding the proceedings instituted following the strike which took place at the Supreme Electoral Tribunal. The complainant organization states that the count of the number of workers who supported the legal strike movement was completed in February 2011. On 9 February 2011, the Fifth Labour and Social Welfare Court of the Department of Guatemala upheld the application filed by the Trade Union of Workers of the Supreme Electoral Tribunal (STTSE) to have the strike movement declared legal and stated that the workers had a period of 20 days following notification of the ruling by the corresponding court in which to declare the strike. On 11 February 2011, the authorities of the Supreme Electoral Tribunal lodged an appeal for annulment against the ruling of the Fifth Labour and Social Welfare Court, which was rejected as inadmissible and untimely.

**508.** Finally, on 16 February, the authorities of the Supreme Electoral Tribunal lodged an appeal with the Third Labour and Social Welfare Chamber, which ordered compulsory arbitration. According to the complainant, the appeal was lodged after the legal time limit and follows a delay of nearly two years in the count of the number of striking workers, and it violates the right to strike since the strike, despite the claims that strike action is not permissible during electoral periods as it undermines the security of the State and its people, was declared legal by the Fifth Labour and Social Welfare Court three months prior to general elections being called by the Supreme Electoral Tribunal. UNSITRAGUA further argues that the Third Labour and Social Welfare Chamber is acting as if it were a legislative body

in its decision to deem electoral services to be essential services in which strikes are prohibited.

### C. The Government's reply

**509.** In its communication dated 25 October 2011, concerning the allegations against the Municipality of El Tumbador, the Government indicates that it requested information from the Fourth Chamber of the Labour and Social Welfare Appeals Court dealing with the abovementioned collective economic and social dispute brought by the ad hoc committee of workers of the municipality. The court issued a rectification order, stating that:

(A) In accordance with the provisions of section 67 of the Judiciary Act, judges have the authority to rectify the proceedings, at any stage in the process, when a substantive error has been made which infringes the rights of any of the parties. For the purposes of this Act, a substantive error shall be understood to exist when constitutional guarantees, legal provisions or essential formalities of the proceedings have been violated. (B) Furthermore, section 365 of the Labour Code clearly establishes that appeals must be made within three days of the ruling; and section 324 of the Labour Code provides that submissions relating to economic and labour-related disputes may be made at any time and on any day. (C) In this case, the parties (...) were notified of the ruling against which the appeal was lodged on 23 February 2005 and the appellant filed the appeal on 2 March 2005, that is to say after the deadline established by law. (D) In accordance with the above and the guarantee of due process of law, whereby every court is bound to undertake the process of investigation and analysis, all judges are legally required to comply with the relevant rules of judicial procedure so as to protect legal certainty and due process. (E) Considering that in this case a mistake was made which violated due process, it is appropriate to order that the proceedings be rectified as from the decision of 3 March 2005, which upheld the submitted appeal, and to issue a ruling that is in conformity with the law, whereby the situation should be resolved.

**510.** At the same time, the Government states that the members of the ad hoc committee of workers of the Municipality of El Tumbador did not file for protection of their constitutional rights (*amparo*) with the corresponding constitutional body.

**511.** In its communication of 27 March 2012, regarding the dismissal of the trade unionist Mr Dick Fletcher Alburez, the Government states that the Ministry of Labour and Social Welfare requested information from the Ministry of Public Health and Social Assistance. The legal adviser of this ministry stated that Mr Fletcher Alburez had been reinstated following ordinary labour reinstatement proceedings and a ministerial reinstatement order of 12 June 2007. The Government also states that he was awarded damages and 12 months' wages.

### D. The Committee's conclusions

**512.** *The Committee deeply regrets that the Government's reply remains incomplete despite the fact that the allegations refer to events which took place several years ago and include acts of violence against trade unionists, acts of discrimination and anti-union interference. While noting the recent efforts made by the Government to provide information regarding previous requests, the Committee regrets the lack of cooperation regarding the various pending issues and observes that the Government has still not provided information on establishing a tripartite commission to undertake the independent investigations suggested by the Committee on Freedom of Association. The Committee firmly urges the Government to provide information on the pending issues in the very near future.*

513. *With regard to the significant obstacles and delays to the collective bargaining process between the Supreme Electoral Tribunal and UNSITRAGUA, as well as the obstacles to the exercise of the right to strike by the trade union (recommendation (a)), the Committee notes UNSITRAGUA's statement that the count of the workers who supported the legal strike movement was completed in February 2011 and, after various appeals, the Third Labour and Social Welfare Chamber ordered compulsory arbitration. The Committee regrets that the Government has not responded to UNSITRAGUA's allegation that, as a consequence of the procedural delay, the strike was delayed until the country was in a period of elections. The Committee requests the Government to keep it informed of the outcome of the compulsory arbitration and to send it information concerning the allegation of delays to the right to strike (this right is recognized in law) contained in UNSITRAGUA's latest communication, in particular with regard to the alleged refusal by the Supreme Electoral Tribunal to uphold the workers' right to strike during the whole of the electoral period.*
514. *With regard to the dismissal of the trade unionist Mr Dick Fletcher Alburez (recommendation (b)), the Committee notes with interest that he has been reinstated to his work post following the ministerial reinstatement order of 12 June 2007 and has been awarded damages and 12 months' wages.*
515. *With regard to the allegations relating to the Municipality of El Tumbador concerning the reinstatement proceedings ordered by the judicial authority and the dismissal of union officials César Augusto León Reyes, José Marcos Cabrera, Víctor Hugo López Martínez, Cornelio Cipriano Salic Orozco, Romeo Rafael Bartolón Martínez and César Adolfo Castillo Barrios (recommendation (d)), the Committee takes note of the Government's statement that the Fourth Chamber of the Labour and Social Security Appeals Court issued a rectification order (which will lead to a new ruling by the Appeals Court as the workers – the ad hoc committee – have not brought amparo proceedings with regard to this ruling). In this respect, the Committee recalls that this case dates back to 2002 and emphasizes that justice delayed is justice denied [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 105]. The Committee deplores this excessive delay and firmly expects that proceedings to reinstate the dismissed workers will be completed in the very near future. The Committee requests the Government to keep it informed of the future ruling on this matter.*
516. *With regard to its request for measures to be taken to ensure that all wages owed to the union leader Mr Gramajo are paid without delay, the Committee notes that the Government has not provided any information on this matter. The Committee urges the Government once again to take steps to ensure that Mr Gramajo is paid all outstanding wages without delay and to keep it informed in this regard.*
517. *As to the remaining allegations, in the absence of the Government's observations, the Committee again reiterates its previous recommendations which are reproduced below and urges the Government to send the information and take the actions requested:*
- *with regard to the alleged unilateral imposition by the Supreme Electoral Court [Tribunal] of an organization manual (dealing with matters related to employees' duties, posts and salary levels), the Committee requests the complainant organizations to indicate whether all the issues regarding the organization manual have been resolved;*
  - *with regard to the allegations concerning assaults, death threats and acts of intimidation against trade unionists, as well as attacks on union headquarters, the Committee deeply regrets that, despite the seriousness of the matter, the Government has not sent full observations, and strongly requests the Government to refer these*

*cases as a matter of urgency to the Special Prosecutor for Offences against Trade Unionists and to keep it informed in this regard. The Committee again invites the Government to enter into contact with UNSITRAGUA with a view to providing a detailed reply regarding the case relating to the alleged raid in 2002 involving the burning of documents at the headquarters of the trade union at the ACRILASA company; and*

- with regard to the allegations concerning employer interference in union elections at the General Property Registry, which was confirmed by the labour inspectorate, the Committee once again requests the Government to take the necessary measures without delay to sanction the entity responsible, to provide for adequate compensation for the damages suffered and to ensure that similar acts do not occur in future. The Committee requests the Government to keep it informed in this regard.*

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

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

- (a) While noting the efforts recently made by the Government to submit information in relation to its previous requests, the Committee deeply regrets that the Government's reply remains incomplete despite the fact that the allegations refer to events which took place several years ago and include acts of violence against trade unionists, acts of discrimination and anti-union interference, and firmly urges the Government to provide information on the pending issues in the very near future.*
- (b) With regard to the significant obstacles and delays to the collective bargaining process between the Supreme Electoral Tribunal and UNSITRAGUA, as well as the obstacles to the exercise of the right to strike by the trade union, the Committee requests the Government to keep it informed of the outcome of the compulsory arbitration and to send it information concerning the allegation of delays to the right to strike contained in UNSITRAGUA's latest communication, in particular with regard to the alleged refusal by the Supreme Electoral Tribunal to uphold the workers' right to strike during the whole of the electoral period.*
- (c) With regard to the allegations relating to the Municipality of El Tumbador concerning the reinstatement proceedings ordered by the judicial authority and the dismissal of union officials César Augusto León Reyes, José Marcos Cabrera, Víctor Hugo López Martínez, Cornelio Cipriano Salic Orozco, Romeo Rafael Bartolón Martínez and César Adolfo Castillo Barrios, the Committee deplores this excessive delay and firmly expects that proceedings to reinstate the dismissed workers will be completed in the very near future. The Committee requests the Government to keep it informed of the future ruling on this matter.*
- (d) Noting that the Government has not provided any information concerning wages owed to the union leader Mr Gramajo, the Committee urges the Government once again to take steps to ensure that all outstanding wages are paid without delay and to keep it informed in this regard.*



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- (e) *With regard to the alleged unilateral imposition by the Supreme Electoral Tribunal of an organization manual (dealing with matters related to employees' duties, posts and salary levels), the Committee requests the complainant organizations to indicate whether all the issues regarding the organization manual have been resolved.*
- (f) *As to the remaining allegations, in the absence of the Government's observations, the Committee reiterates its previous recommendations which are reproduced below and urges the Government to send the information and take the actions requested:*
- with regard to the allegations concerning assaults, death threats and acts of intimidation against trade unionists, as well as attacks on union headquarters, the Committee deeply regrets that, despite the seriousness of the matter, the Government has not sent full observations, and strongly requests the Government to refer these cases as a matter of urgency to the Special Prosecutor for Offences against Trade Unionists and to keep it informed in this regard. The Committee again invites the Government to enter into contact with UNSITRAGUA with a view to providing a detailed reply regarding the case relating to the alleged raid in 2002 involving the burning of documents at the headquarters of the trade union at the ACRILASA company; and*
  - with regard to the allegations concerning employer interference in union elections at the General Property Registry, which was confirmed by the labour inspectorate, the Committee once again requests the Government to take the necessary measures without delay to sanction the entity responsible, to provide for adequate compensation for the damages suffered and to ensure that similar acts do not occur in future. The Committee requests the Government to keep it informed in this regard.*

CASE NO. 2445

INTERIM REPORT

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

- **the World Confederation of Labour (WCL) (in 2005) and**
- **the General Confederation of Workers of Guatemala (CGTG)**

*Allegations: Murders, threats and acts of violence against trade unionists and their families; anti-union dismissals and refusal by private enterprises or public institutions to comply with judicial reinstatement orders; harassment of trade unionists*

- 519.** 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 561–579, approved by the Governing Body at its 310th Session (March 2011)].
- 520.** The Government sent its observations in communications dated 13, 27 and 28 September, and 3 and 4 October 2011.
- 521.** 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**

- 522.** At its March 2011 meeting, the Committee made the following interim recommendations concerning the allegations presented by the complainant organization [see 359th Report, para. 579]:
- (a) As regards the allegation concerning death threats against members of the Trade Union Association of Itinerant Vendors of Antigua, including its general secretary, the Committee notes that the competent court was unable to initiate proceedings owing to the lack of information from the trade union. The Committee is bound to observe with regret that this situation results in impunity for those who issued the death threats and urges the Government to take steps to ensure that an independent investigation into these allegations is launched without delay and to keep it informed of its results.
  - (b) As regards the allegations concerning the attempted murder of trade unionist Marcos Álvarez Tzoc, noting the Government's indication that the ruling issued by the Constitutional Court against Mr Julio Enrique de Jesús Salazar Pivaral is not yet enforceable, the Committee requests the Government to keep it informed with respect to the enforcement of the penalty imposed by the ruling of the Court of Criminal Judgment. The Committee deplores that the Government has not supplied the information requested in relation to the attempted murder of trade union official Ms Imelda López de Sandoval and urges the Government once again to inform it as a matter of urgency of all developments in the ongoing investigations and proceedings related to this matter.
  - (c) As regards the murder of Mr Julio Rolando Raquec, the Committee regrets that the investigations have not enabled the perpetrators to be identified and urges the Government to continue to take steps towards this end and to keep it informed of any developments in the investigation in question.

- (d) As regards the necessary measures to safeguard the lives of the wife and children of the murdered trade unionist, Mr Julio Rolando Raquec, the Committee requests the Government to make all efforts to discover the whereabouts of Ms Lidia Merida Coy, the chief eyewitness to the murder of her partner Mr Julio Rolando Raquec. The Committee once again urges the Government to take steps to ensure her safety and that of her children.
- (e) As regards the alleged dismissal of trade unionists in the municipality of Río Bravo (Clermont Estate), the Committee reiterates that justice delayed is justice denied, and urges the Government once again to inform it of the outcome of these proceedings, with the strong expectation that they will be concluded without further delay.
- (f) The Committee notes that the Government has accepted technical assistance from the ILO and trusts that this will be implemented in the near future. The Committee firmly expects that the objective of this assistance will be to ensure promptly that trade union rights are exercised in a climate that is free from violence, coercion or threats, to eliminate impunity and to establish an adequate and efficient system of protection against acts of anti-union discrimination, which should include sufficiently deterrent penalties and prompt means of redress, beginning with the implementation without delay of the judicial reinstatement orders.
- (g) As regards the remaining allegations, in view of the lack of observations from the Government, the Committee repeats its previous recommendations once again and urges the Government to send the requested information or take the requested action.
- (h) The Committee calls the Governing Body's attention to the extreme seriousness and urgent nature of this case.

**523.** With regard to this last recommendation, the Committee recalls that it refers to issues that had remained outstanding at its March 2010 meeting, which are reproduced below [see 356th Report, para. 778]:

...

- (c) Recalling that freedom of association can only be exercised in conditions in which fundamental human rights, and in particular those relating to human life and personal safety, are respected, the Committee once again deplores the murder of the trade union officials Rolando Raquec and Luis Quinteros Chinchilla, and the attempt against the life of the trade unionist Marcos Alvarez Tzoc and the trade union official Imelda López de Sandoval, and once again strongly expresses its expectation that the Government will inform it as a matter of urgency of developments in the inquiries and proceedings currently under way, and urges that the necessary measures be taken so that those responsible will be severely punished.

...

- (f) The Committee once again requests the Government to communicate the outcome of the inquiries carried out by the national police and the Prosecutor General for Human Rights into the allegation concerning the selective surveillance and theft of laptop equipment belonging to José E. Pinzón, Secretary-General of the CGTG.

...

- (h) With regard to the alleged dismissal of workers at the El Tesoro Estate (municipality of Samayac) for submitting lists of claims during negotiations on a collective agreement, despite a judicial reinstatement order, the Committee again requests the trade union to which these trade unionists belong to request the competent legal authority to implement the reinstatement order.
- (i) The Committee notes with regret that the Government has not provided any information on the allegations relating to the absence of measures by the authorities to promote collective bargaining between the El Carmen Estate and the trade union. The Committee urges the Government to send the requested information without delay.

...

- (k) With regard to the alleged threats against the employees of the General Directorate of Civil Aviation who participated in a protest in front of the building against the constant abuse by the administration (according to the allegations, the General Directorate's chief maintenance officer threatened that they would be reported and subsequently dismissed, if they were five minutes late back to work, and then took photographs of them) and with regard to the intimidation by security officers against the members outside the room where the union's general assembly was to be held, the Committee regrets that the Government has not sent its observations and urges it to do so without delay.
- (l) The Committee expects that the Government will continue to receive technical assistance from the ILO and that the object of this assistance will be to ensure promptly an adequate and efficient system of protection against acts of anti-union discrimination, which should include sufficiently dissuasive sanctions and prompt means of redress, beginning with the implementation, without delay, of the judicial reinstatement orders.
- (m) The Committee urges the Government to take, without delay, all the measures in its power to ensure that the trade unionists of the municipality of Livingston who did not receive the wages and other benefits owed to them as ordered by the judicial authority, receive them immediately, and to inform it of developments with regard to the criminal proceedings initiated against the municipality.

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

**524.** In a communication dated 13 September 2011, the Government reports on measures taken to ensure that the trade unionists of the municipality of Livingston receive immediately the wages and other benefits owed to them as ordered by the judicial authority. The Government states that, according to information from the Labour and Social Welfare Court of First Instance of Izábal Department, an agreement on payments was reached in June 2008 with the following workers, voluntarily or through a conciliation body: Mr Santiago Choc Caal, Mr Wilfredo Omar Torres Juárez, Mr Oscar Omar Suchite Mendoza, Mr Francisco Melbourne Fuentes Suppal, Ms Elsa Aracely Ramírez Salvador and Mr Carlos Enrique Pérez Fajardo.

**525.** In a communication dated 27 September 2011, the Government provides information on the dismissal of trade unionists at the Clermont Estate. The Government indicates that, on 3 August 2006, a document was signed in which those involved state that they have reached an out-of-court collective agreement with their employers to resolve the labour dispute and that, on same date, the reinstatement order was honoured. The Government adds that the Labour and Social Welfare Judge of First Instance of Malacatan approved the agreement and ordered it to be archived.

**526.** In a communication dated 28 September 2011, the Government provides information on the murder of worker Mr Luis Arturo Quinteros Chinchilla. The Government states that it requested information from the Criminal Court of First Instance for Drug-Related and Environmental Offences of Santa Rosa Department on the investigations carried out. On 14 September 2005, the Office of the Attorney-General submitted a report requesting the arrest of Mr José Varuc Valle Morales for the crime of murder and Mr Alejandro Moreno Gil for benefitting from the proceeds of a crime. Subsequently, on 19 and 21 September, the trade unionists appeared before the Court voluntarily for an initial hearing, at which it instead ordered them not to leave the country, to pay caution money and to present themselves in order to demonstrate that they had not absconded.

**527.** The Office of the Attorney-General disagreed with both rulings and appealed against them on 21 and 26 September respectively. The Mixed Regional Chamber of the Appeal Court upheld the first ruling, against Mr Alejandro Moreno Gil, but not the second, because it ordered Mr José Varuc Valle Morales to be remanded in custody. As a result, Mr Valle Morales lodged an appeal for constitutional protection (*amparo*), which was denied by the

Supreme Court of Justice, prompting the Office of the Attorney-General to bring charges and begin court proceedings against both trade unionists. The Criminal Court of First Instance ruled that Mr Valle Morales should stand trial and ordered a stay of proceedings against Mr Moreno Gil. The Criminal Sentencing Court for Drug-Related and Environmental Offences of Santa Rosa Department convicted Mr Valle Morales of voluntary manslaughter on 5 April 2010, handing down a commutable prison term of five years. Mr Valle Morales is currently serving his sentence.

- 528.** In a communication dated 3 October 2011, the Government states, with regard to the attempted murder, verbal abuse and persecution of Ms Imelda López de Sandoval, that the Office of the Attorney General received a complaint in respect of events that occurred on 1 December 2004. The complainant had been involved in a traffic accident, alleged to have been caused by members of another trade union group, by the name of Unión Sindical, formed at the General Directorate of Civil Aviation, and senior managers of the Directorate. On 25 February 2010, the criminal investigation unit of the Office of the Attorney General reported that Ms López de Sandoval was not cooperating with the prosecution services, refusing to be interviewed or provide witnesses or valuable information for use in the investigation. On 2 March 2010, the Eleventh Criminal Court of First Instance for Drug-Related and Environmental Offences ordered the complaint to be rejected and the proceedings to be archived.
- 529.** In a communication dated 4 October 2011, the Government provides information on the allegations relating to the absence of measures by the authorities to promote collective bargaining between the El Carmen Estate and the trade union. When information was sought from the Judge of First Instance for Labour, Social Welfare and the Family on the current situation with regard to the case for reinstatement brought by Mr Paulino Aguilar against Petra, SA, the Judge stated that he had requested the General Commercial Register to report whether the aforementioned enterprise appeared in its records as being registered and, if so, to provide the current address of its public headquarters, as those involved had given no new address at which they could be notified of any order and required to make payments, and the proceedings had therefore stalled.

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

- 530.** *The Committee regrets that, despite the time that has elapsed since its last examination of the case, the Government has not sent observations on all the allegations pending from its examination of the case at its March 2010 and March 2011 meetings. Emphasizing that some of the alleged events are extremely serious and occurred in 2004, the Committee expects the Government to send all the information requested in the very near future.*
- 531.** *With regard to the measures taken to ensure that the trade unionists of the municipality of Livingston receive immediately the wages and other benefits owed to them as ordered by the judicial authority (recommendation (m), 356th Report, para. 778, recommendation (g), above), the Committee takes note of the Government's indication that an agreement on payments was reached with the workers in June 2008.*
- 532.** *With regard to the dismissal of trade unionists at the Clermont Estate (recommendation (e)), the Committee takes note of the Government's indication that the parties have reached an out-of-court collective agreement to resolve the labour dispute and that the order to reinstate the workers has been honoured.*
- 533.** *With regard to the murder of worker Mr Luis Arturo Quinteros Chinchilla (recommendation (c), 356th Report, para. 778, recommendation (g), above), the Committee takes note of the Government's indication that the Criminal Sentencing Court for Drug-Related and Environmental Offences of Santa Rosa Department convicted*

*Mr Valle Morales of voluntary manslaughter on 5 April 2010, handing down a commutable prison term of five years, and that Mr Valle Morales is currently serving his sentence.*

- 534.** *With regard to the attempted murder, verbal abuse and persecution of Ms Imelda López de Sandoval (recommendation (b)), the Committee takes note of the Government's indication that Ms López de Sandoval was not cooperating with the prosecution services, refusing to provide witnesses or valuable information for use in the investigation, and that, on 2 March 2010, the Eleventh Criminal Court of First Instance for Drug-Related and Environmental Offences ordered the complaint to be rejected and the proceedings to be archived.*
- 535.** *With regard to the allegations relating to the absence of measures by the authorities to promote collective bargaining between the El Carmen Estate and the trade union (recommendation (i), 356th Report, para. 778, recommendation (g), above), the Committee takes note of the Government's indication that, when information was sought from the Judge of First Instance for Labour, Social Provision and the Family on the current situation with regard to the case for reinstatement brought by Mr Paulino Aguilar against Petra, SA, the Judge stated that he had requested the General Commercial Register to report whether the aforementioned enterprise appeared in its records as being registered and, if so, to provide the current address of its public headquarters, as those involved had given no new address at which they could be notified of any order or required to make payments, and the proceedings had therefore stalled. The Committee regrets that the Government has not supplied the information requested in its previous examination of the case. The Committee urges the Government to take the necessary steps to resolve the problem and to keep it informed of any measure taken to promote collective bargaining at the El Carmen Estate.*
- 536.** *Lastly, with regard to the remaining allegations, in view of the lack of observations from the Government, the Committee once again reiterates the following recommendations:*
- *As regards the allegation concerning death threats against members of the Trade Union Association of Itinerant Vendors of Antigua, including its general secretary, the Committee notes that the competent court was unable to initiate proceedings owing to the lack of information from the trade union. The Committee is bound to observe with regret that this situation results in impunity for those who issued the death threats and requests the Government to take steps to ensure that an independent investigation into these allegations is launched without delay and to keep it informed of its results.*
  - *As regards the allegations concerning the attempted murder of trade unionist Marcos Álvarez Tzoc, noting the Government's indication that the ruling issued by the Constitutional Court against Mr Julio Enrique de Jesús Salazar Pivaral is not yet enforceable, the Committee requests the Government to keep it informed with respect to the enforcement of the penalty imposed by the ruling of the Court of Criminal Judgment.*
  - *As regards the murder of Mr Julio Rolando Raquec, the Committee regrets that the investigations have not enabled the perpetrators to be identified and urges the Government to continue to take steps towards this end and to keep it informed of any developments in the investigation in question.*

- *As regards the necessary measures to safeguard the lives of the wife and children of the murdered trade unionist, Mr Julio Rolando Raquec, the Committee requests the Government to make all efforts to discover the whereabouts of Ms Lidia Mérida Coy, the chief eyewitness to the murder of her partner Mr Julio Rolando Raquec. The Committee once again urges the Government to take steps to ensure her safety and that of her children.*
- *The Committee once again requests the Government to communicate the outcome of the inquiries carried out by the national police and the Prosecutor-General for Human Rights into the allegation concerning the selective surveillance and theft of laptop equipment belonging to Mr José E. Pinzón, Secretary-General of the CGTG.*
- *With regard to the alleged dismissal of workers at the El Tesoro Estate (municipality of Samayac) for submitting lists of claims during negotiations on a collective agreement, despite a judicial reinstatement order, the Committee again requests the trade union to which these trade unionists belong, to request the competent legal authority to implement the reinstatement order.*
- *With regard to the alleged threats against the employees of the General Directorate of Civil Aviation who participated in a protest in front of the building against the constant abuse by the administration (according to the allegations, the General Directorate's chief maintenance officer threatened that they would be reported and subsequently dismissed, if they were five minutes late back to work, and then took photographs of them), and with regard to the intimidation by security officers against the members outside the room where the union's general assembly was to be held, the Committee regrets that the Government has not sent its observations and urges it to do so without delay.*

## **The Committee's recommendations**

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

- (a) *The Committee regrets that, despite the time that has elapsed since its last examination of the case, the Government has not sent observations on all the allegations pending from its examination of the case at its March 2010 and March 2011 meetings. Emphasizing that some of the alleged events are extremely serious and occurred in 2004, the Committee expects the Government to send all the information requested in the very near future.***
- (b) *With regard to the allegations relating to the absence of measures by the authorities to promote collective bargaining between the El Carmen Estate and the trade union, the Committee regrets that the Government has not supplied the information requested in its previous examination of the case. Taking note of the Government's statement that the proceedings have stalled, the Committee requests the Government to take the necessary steps to resolve the problem and to keep it informed of any measure taken to promote collective bargaining at the El Carmen Estate.***

- (c) *Lastly, with regard to the remaining allegations, in view of the lack of observations from the Government, the Committee once again reiterates the following recommendations:*
- *As regards the allegation concerning death threats against members of the Trade Union Association of Itinerant Vendors of Antigua, including its general secretary, the Committee notes that the competent court was unable to initiate proceedings owing to the lack of information from the trade union. The Committee is bound to observe with regret that this situation results in impunity for those who issued the death threats and requests the Government to take steps to ensure that an independent investigation into these allegations is launched without delay and to keep it informed of its results.*
  - *As regards the allegations concerning the attempted murder of trade unionist Mr Marcos Álvarez Tzoc, noting the Government's indication that the ruling issued by the Constitutional Court against Mr Julio Enrique de Jesús Salazar Pivaral is not yet enforceable, the Committee requests the Government to keep it informed with respect to the enforcement of the penalty imposed by the ruling of the Court of Criminal Judgment.*
  - *As regards the murder of Mr Julio Rolando Raquec, the Committee regrets that the investigations have not enabled the perpetrators to be identified and urges the Government to continue to take steps towards this end and to keep it informed of any developments in the investigation in question.*
  - *As regards the necessary measures to safeguard the lives of the wife and children of the murdered trade unionist, Mr Julio Rolando Raquec, the Committee requests the Government to make all efforts to discover the whereabouts of Ms Lidia Mérida Coy, the chief eyewitness to the murder of her partner Mr Julio Rolando Raquec. The Committee once again urges the Government to take steps to ensure her safety and that of her children.*
  - *The Committee once again requests the Government to communicate the outcome of the inquiries carried out by the national police and the Prosecutor-General for Human Rights into the allegation concerning the selective surveillance and theft of laptop equipment belonging to Mr José E. Pinzón, Secretary-General of the CGTG.*
  - *With regard to the alleged dismissal of workers at the El Tesoro Estate (municipality of Samayac), for submitting lists of claims during negotiations on a collective agreement, despite a judicial reinstatement order, the Committee again requests the trade union to which these trade unionists belong, to request the competent legal authority to implement the reinstatement order.*



- *With regard to the alleged threats against the employees of the General Directorate of Civil Aviation who participated in a protest in front of the building against the constant abuse by the administration (according to the allegations, the General Directorate’s chief maintenance officer threatened that they would be reported and subsequently dismissed, if they were five minutes late back to work, and then took photographs of them) and with regard to the intimidation by security officers against the members outside the room where the union’s general assembly was to be held, the Committee regrets that the Government has not sent its observations and urges it to do so without delay.*

*(d) The Committee calls the Governing Body’s attention to the extreme seriousness and urgent nature of this case.*

CASE NO. 2859

DEFINITIVE REPORT

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

- **the Trade Union Confederation of Guatemala (UNSITRAGUA)**
- **the General Confederation of Workers of Guatemala (CGTG)**
- **the Unified Trade Union Confederation of Guatemala (CUSG) and**
- **the National Defence Front (FNL)**

#### ***Allegations: Killing of a trade union official***

- 538.** The complaint is contained in a communication dated 27 May 2011 from the Trade Union Confederation of Guatemala (UNSITRAGUA), the General Confederation of Workers of Guatemala (CGTG), the Unified Trade Union Confederation of Guatemala (CUSG) and the National Defence Front (FNL).
- 539.** The Government sent its observations in a communication dated 13 March 2012.
- 540.** 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**

- 541.** In their communication dated 27 May 2011, the UNSITRAGUA, the CGTG, the CUSG and the FNL allege that Mr Idar Joel Hernández Godoy, Finance Secretary of the central executive committee of the Izabal Banana Industry Workers’ Union (SITRABI), which is affiliated with the CUSG, was killed on 26 May 2011.
- 542.** According to the allegations, the trade union official was in a vehicle belonging to the union and was leaving Finca Campo Nuevo, which is owned by Bandegua, located in the municipality of Morales in the department of Izabal, for the SITRABI head office to conduct union business. The complainants state that, according to information gathered at the scene of the crime, Mr Hernández Godoy was intercepted within the precincts of the municipality of Los Amates by two persons on a motorcycle who fired several shots at

him. Several bullet holes were found in both the body of the trade union official and in his vehicle, which was written off after having collided with the back of a truck sitting at the edge of the road.

**543.** The complainants allege that this is the result of a systematic policy of abduction, harassment, exile and murder that has been operating in the country for many years and which includes violence directed at the working class in general and at trade union officials in particular.

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

**544.** In a communication dated 13 March 2012, the Government indicates that, in order to gather information on the case, it requested information from the special unit for offences committed against trade unionists within the Public Prosecution Service on the measures taken to investigate the murder of Mr Idar Joel Hernández Godoy.

**545.** The Public Prosecution Service provided details on the evidence obtained, namely: (1) an expanded version of the police report dated 26 May 2011; (2) a file containing the personal details of the deceased, as well as the details of the incident that occurred 209 kilometres along the Ruta al Atlántico, curva el Pino, Aldea Quiligua Los Amates in the department of Izabal; (3) the report of the full-time service unit on the reported threats against Mr Idar Joel Hernández Godoy, which contains a record of his murder but makes no mention of other threats; (4) the communication received from the Ministry of Labour and Social Welfare dated 24 June 2011 containing the names of the members of the executive committee and consultative council of SITRABI, which lists Mr Idar Joel Hernández Godoy as Finance Secretary; and (5) the report of the judge of first instance for labour and social welfare matters of the department of Izabal dated 14 September 2011, which states that neither the family of Mr Idar Joel Hernández Godoy nor the trade union has instituted legal proceedings or taken any other kind of action against Bandegua.

**546.** The Public Prosecution Service states that the report of the specialized criminal investigation division of the district of Puerto Barrios highlights the interviews conducted with the following people:

- (a) Edyn Yovani Díaz García, the driver of the truck with which the vehicle in which the deceased was found collided.
- (b) Nidia Anabella Hernández Nova, an employee of the company and the daughter of the deceased.
- (c) Selfa Sandoval Carranza, an employee of the company and a member of the trade union.
- (d) Marta Julia Recinos de López, a resident of the area where the incident occurred.
- (e) Santos Delma Amador Colindres, a resident of the area where the incident occurred.
- (f) Cesar Humberto Guerra López, the Labour and Disputes Secretary of the executive committee of SITRABI.

**547.** According to SITRABI, there was apparently no labour dispute under discussion at the time of Mr Godoy's death. However, the Government refers to a report from the company Tigo, dated 21 September 2011, regarding the list of incoming and outgoing calls made from the telephone of Mr Idar Joel Hernández Godoy. The Ministry of Labour and Social

Welfare does not possess accurate information regarding those calls to enable it to confirm or deny the possibility of him having received threatening calls.

548. As part of the investigation, a statement was taken from the general secretary of the SITRABI regarding financial disputes, complaints and the way in which Mr Idar Joel Hernández Godoy managed the finances of the trade union, to the effect that irregularities had been detected and attributed to him, which could have motivated the action taken against the now deceased Mr Godoy.
549. Moreover, the Prosecutor's Office of Puerto Barrios Izabal captured two individuals known for committing robberies and working as hired killers, both of whom rode a motorcycle, in order to establish their identity and to gather information on the motorcycles. At this stage of the investigation, Ms Selfa Sandoval, a supervisor at SITRABI, appeared before the authorities and was shown photos of both the detainees and the motorcycles. An examination of the photos revealed that the detainees and the motorcycles were not a match, ruling out the two suspects as the perpetrators of the crime. During the course of the investigation, two individuals were also arrested for a separate robbery in the department of Jalapa but it is assumed that they could well have been involved in the murder of Mr Godoy. The authorities confiscated two firearms from the individuals, which have been subjected to testing by ballistics experts in order to establish whether they can be linked to the murder of the trade union official. The results of the tests are currently before the National Institute of Forensic Sciences (INACIF). As for the detainees, the special unit for offences committed against trade unionists within the Public Prosecution Service stated that they had been formally charged with robbery.
550. The Government concludes by indicating that the scientific investigations will continue until the veracity of the facts has been established.

### C. The Committee's conclusions

551. *The Committee notes that in the present case the complainants allege the killing of a trade union official, Mr Idar Joel Hernández Godoy. The Committee deeply deplores the murder of this trade union official and emphasizes the seriousness of this incident. The Committee recalls that the right to life is a fundamental prerequisite for the exercise of the rights contained in Convention No. 87, and that freedom of association can only be exercised in a climate that is free from violence, pressure or threats of any kind and in which fundamental rights, particularly those relating to human life and personal safety, are fully respected and guaranteed [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 42 to 44]. The Committee further recalls that the killing, disappearance or serious injury of trade union leaders and trade unionists requires the institution of independent judicial inquiries in order to shed full light, at the earliest date, on the facts and the circumstances in which such actions occurred and in this way, to the extent possible, determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events [see **Digest**, *op. cit.*, para. 48].*
552. *In this respect, the Committee takes note of the information provided by the Government on the measures taken to investigate the murder of Mr Godoy and observes that two individuals have been arrested. The Committee requests the Government and the competent authorities to make every effort to shed light on the murder, to determine where responsibilities lie and to punish the guilty parties. The Committee requests the Government to keep it informed of the outcome of the ongoing investigation and of any developments concerning the legal proceedings instituted and firmly expects that, in the near future, the perpetrators and instigators of this murder will be identified, judged and punished by means of severe penalties that avoid further violent acts against unionists.*

*553. Lastly, given that the allegation concerns murder, the Committee will pursue its examination thereof within the framework of Case No. 2609.*

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

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

- (a) Deeply deploring the murder of the trade union official, Mr Idar Joel Hernández Godoy, the Committee requests the Government and the competent authorities to make every effort to shed light on the murder, to determine where responsibilities lie and to punish the guilty parties. The Committee requests the Government to keep it informed of the outcome of the ongoing investigation and of any developments concerning the legal proceedings instituted and firmly expects that, in the near future, the perpetrators and instigators of this murder will be identified, judged and punished by means of severe penalties that avoid further violent acts against trade unionists.*
- (b) Given that the allegation concerns murder, the Committee will pursue its examination thereof within the framework of Case No. 2609.*
- (c) The Committee draws the special attention of the Governing Body to the extreme seriousness and urgent nature of the matters dealt with in this case.*

CASE NO. 2899

DEFINITIVE REPORT

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

- the Unitary Confederation of Workers of Honduras (CUTH)**
- the Workers' Confederation of Honduras (CTH) and**
- the General Confederation of Workers (CGT)**

*Allegations: The complainants raise objections to Decree No. 230-2010 of 5 November, which contains the National Hourly Employment Programme (PRONEH), considered to be in violation of Conventions Nos 87 and 98*

**555.** The complaint is contained in a communication dated 22 August 2011 from the Unitary Confederation of Workers of Honduras (CUTH), the Workers' Confederation of Honduras (CTH) and the General Confederation of Workers (CGT).

**556.** The Government sent its observations in a communication dated 22 November 2011.

**557.** Honduras 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

- 558.** In their communication dated 22 August 2011, the CUTH, the CTH and the CGT raise objections to Decree No. 230-2010 of 5 November, which contains the National Hourly Employment Programme (PRONEH), which they consider to be in violation of ILO Conventions Nos 87, 95, 98, 106, 111 and 122 (the Committee will limit itself to examining the alleged violations of Conventions Nos 87 and 98). The complainants add that agreement No. STSS-002-2011 was published on 21 January 2011, and that it contains the regulations of PRONEH, issued by the Ministry, pursuant to the provisions of article 19 of Decree No. 230-2010, which requires the Ministry to work together with a member of the workers' organizations and a member of the employers' organizations, designated by the Economic and Social Council, to regulate the application of the abovementioned Decree within 30 days of its publication. The complainants state that no invitation was sent to the workers' organizations and allege that the Decree, which directly affects workers, was adopted without consultation by the Government with trade unions, and is intended not to promote employment but to further deregulate the labour market, increase job insecurity and violate international labour Conventions, the Constitution and the Labour Code. According to the complainants, the Temporary Hourly Employment Act was adopted in order to legalize temporary work and outsourcing. The complainants point out that the labour market is saturated with temporary workers and those doing outsourced work, and the Act is not needed to hire workers on a temporary basis (the complainants provided the figures for temporary workers in the private and public sectors).
- 559.** The complainants state that, as Decree No. 230-2010 and the corresponding regulations have been adopted without consultation, the workers' confederations are preparing an appeal against both documents on the grounds that they are unconstitutional and impossible to implement. The appeal is to be submitted to the Constitutional Chamber of the Supreme Court of Justice. The complainants allege that workers' organizations were not consulted with regard to the adoption of the Decree and regulations, and only the employers' interests were taken into consideration. They add that the second paragraph of article 7 of the Decree, which states that "it is understood that workers hired under the terms of the Programme are entitled to the fundamental rights set forth in the Labour Code and the eight fundamental ILO Conventions signed and ratified by the State of Honduras, including Conventions Nos 87 and 98, which guarantee the right to organize and collective bargaining, in compliance with the provisions of domestic labour law", is merely declaratory and perverse since the Decree turns professional activities of the permanent nature exercised by many workers into a temporary activity and, worse still, into hourly employment. They also consider that this paragraph is contradictory since it states that rights and guarantees must be compatible with domestic labour law yet domestic law denies temporary workers the right to organize.
- 560.** The complainants consider that the principal violation lies in the attempt to use a decree to convert labour activities that are permanent per se into temporary hourly work, thereby increasing the number of workers who are denied the right to freedom of association and collective bargaining. According to the complainants, the Decree contains no genuine and effective provisions on the exercise of the right to freedom of association and collective bargaining, and it makes trade union organization and collective bargaining impossible, in practice, for temporary workers, let alone workers hired by the hour or on a non-permanent basis. The complainants state that the option of hiring workers by the hour, and the concomitant job insecurity, can only have adverse effects on freedom of association and make it easier to commit acts of anti-union discrimination. In practice, most enterprises resort to temporary labour with no regulation and no guarantees of fundamental rights.

**B. The Government's reply**

- 561.** In its communication of 22 November 2011, the Government states that, in their explanation of the violations, the trade union confederations state that they are preparing an appeal on grounds of unconstitutionality because they consider that the Constitution and Conventions Nos 87, 95, 98, 106 and 122 are being violated. According to the allegations, Honduran workers would allegedly be left without protection as a result of the violation of their right to job security, greater job insecurity, and the loss of collective bargaining and trade union rights. However, to date, nobody has lodged an appeal against the National Hourly Employment Programme Act (Decree No. 230-2010), nor is there any record, in the Inspectorate, of any complaint relating to the violation of the labour rights of workers under the Programme.
- 562.** As regards the alleged violation of job security, PRONEH rules out any possibility of violating this right, firstly because it prohibits the dismissal of permanent workers for the purpose of replacing them with workers hired under and covered by the Hourly Employment Programme, and secondly because employers will be allowed to hire temporary workers in numbers equal to 40 per cent of the workforce, but this percentage is calculated on the basis of the overall workforce of permanent staff, meaning that if a permanent staff member is dismissed, the number of permitted temporary employees will be reduced accordingly. With regard to the alleged violations of trade union and collective bargaining rights, it should be noted that article 7, paragraph 2, of Decree No. 230-2010 stipulates that “it is understood that workers hired under the terms of the Programme are entitled to the fundamental rights set forth in the Labour Code and the eight fundamental ILO Conventions, including Conventions Nos 87 and 98, which guarantee the right to organize and collective bargaining, in compliance with the provisions of domestic law”.
- 563.** With regard to the allegation that workers' organizations were not consulted before PRONEH was adopted, the Government states that, before adopting the Act, the Honduran Congress held public information meetings for the sectors concerned, and the Ministry of Labour and Social Security (STSS), acting through the Economic and Social Council, subsequently invited workers' and employers' representatives to draw up the Act's regulations, but only the employers' representatives attended. The Honduran Congress organized a series of meetings and awareness-raising events with the various sectors before adopting the Act (these facts have been checked against graphical records). During monitoring of the implementation of the Programme, concerned sectors have also been invited but the only persons who participated as observers on behalf of workers were Mr Alfredo Ponce and Mr Roberto Sevilla from the CTH. The aim was to monitor and check the Programme and determine whether or not it was necessary for the Programme's legal technical unit to propose changes to enhance the implementation of Decree No. 230-2010.
- 564.** With regard to the allegation that PRONEH has failed to promote employment and that one of its purposes is to legalize temporary work, the Government states that PRONEH was devised within the framework of the Government's plan for 2010–14 as a temporary strategic programme for reducing and eradicating poverty. Its main objectives include increasing work opportunities and thereby enable the people to live with dignity, preserve existing jobs and avert an increase in the rates of unemployment and underemployment. It is not the purpose of the Programme to legalize temporary work. Indeed, article 5, points 1 and 4, read as follows : “(1) production or service units shall not hire workers under the terms of the Programme to perform duties considered, in accordance with the Labour Code, to be temporary or seasonal”, for the simple reason that those workers are regulated and protected by the Labour Code (article 347 of the Labour Code); “(4) production or service units performing duties that may be specific to their trade but are not ongoing because they are dependent on production contracts involving predetermined volumes with

specific due dates for occasional customers, meaning that when the delivery is made or the due date is reached the work to be done comes to an end, as well as those tasks that increase seasonally or during certain periods of the year or at certain dates and thus require a temporary increase in the workforce, may avail themselves of the Programme and hire employees under the terms thereof"; this provision makes it possible for employers to create jobs by hiring staff to meet seasonal demand. Staff hired under the hourly employment regime have the advantage of benefiting from all labour benefits, such as the guaranteed payment of thirteenth and fourteenth months' wages and leave for each hour worked, paid for in the form of non-routine compensation, which is the equivalent of adding an extra 20 per cent onto the agreed base salary, which shall not be lower than the minimum wage (see the paragraph on non-routine compensation in article 6).

- 565.** Any enterprise wishing to hire staff under the terms of PRONEH must register with the Directorate-General for Employment of the STSS, draw up an individual written contract along the lines of the model developed by the Ministry of Labour and Social Security (in order to ensure that the labour rights of workers are protected), register the signed contracts with the Directorate-General for Employment (article 15, paragraphs 1 and 2 of the Act), comply with domestic and international labour legislation in the areas of child labour and the worst forms thereof (article 5(3) of the Act), hire workers from vulnerable groups in compliance with the legally established percentages (article 4, paragraphs 6 and 7 of the Act), register the workers on the monitoring or registration list with the Honduran Social Security Institute (article 8, paragraph 1, of the Act), give preference to persons covered by the Programme when filling vacant permanent staff posts (article 5(2)), sign agreements with the Honduran Social Security Institute to provide workers covered by the Programme with social security services or, where appropriate, sign agreements with private clinics, company medical systems and insurance companies (article 9 of the Act), extend to workers covered by the Programme the same benefits as those of permanent staff in terms of health plans, insurance policies and other social security benefits, in areas where the Honduran Social Security Institute does not have a presence (article 8, paragraph 2, of the Act), and provide the Directorate-General for Employment and the General Labour Inspectorate with the information they need to assess the Programme (article 12 of the Act and article 14 of the Regulations).
- 566.** The Government reports that, nationwide, 311 enterprises using the Programme are currently registered with the STSS. The number of PRONEH contract registration transactions has increased, leading to better control and monitoring of the rights of workers hired under the Programme; the results are such that no complaints have yet been lodged with the STSS via the Inspectorate. This demonstrates that no exploitation is taking place.
- 567.** The vast majority of the PRONEH contracts are for half days (four or five hours) or full days (six, seven or eight hours), depending on the tasks performed by the employee in the workplace. Hiring an employee for a full day's work ensures that he or she will earn more than the 2011 minimum wage and increases his or her chances of becoming a permanent employee. Finally, the Government states that it should be noted that, nearly one year after PRONEH was adopted, it has generated 272,626,471.90 lempiras (HNL) in earned wages, and the control, registration and monitoring work done by the STSS has generated real data on the economic impact of the Programme and its contribution to the gradual decrease in the unemployment and poverty rates in Honduras. If current trends continue, Decree No. 230-2010 will have generated around HNL500 million or more by the end of 2014.

### C. The Committee's conclusions

- 568.** *The Committee observes that in this case the complainant organizations raise objections to Decree No. 230-2010 of 5 November, which contains PRONEH, which the complainants consider to be in violation of ILO Conventions Nos 87 and 98, and state that the workers' confederations are planning to appeal against both documents on the grounds that they are unconstitutional and impossible to implement. The appeal is to be submitted to the Constitutional Chamber of the Supreme Court of Justice. The complainants allege that workers' organizations were not consulted with regard to the Decree and regulations, the Decree converts permanent labour activities into temporary hourly ones, thereby increasing the number of workers excluded from the exercise of freedom of association and collective bargaining, and article 7, paragraph 2, of the Decree stipulates that "it is understood that workers hired under the terms of the Programme are entitled to the fundamental rights set forth in the Labour Code and the eight fundamental ILO Conventions signed and ratified by the State of Honduras, including Conventions Nos 87 and 98, which guarantee the right to organize and collective bargaining, in compliance with the provisions of domestic labour law", is merely a declaratory paragraph and is contradictory since the Labour Code (domestic labour law) denies temporary workers the right to organize.*
- 569.** *The Committee takes note that the Government states that: (1) to date, nobody has lodged an appeal against the National Hourly Employment Programme Decree, nor is there any record, in the Inspectorate, of any complaint relating to the violation of the labour rights of workers under the Programme; (2) regarding job security, the Act prohibits the dismissal of permanent workers for the purpose of replacing them with workers covered by the Programme; (3) regarding violations of collective bargaining and trade union rights, article 7 of the Decree has been quoted (see the previous paragraph); (4) regarding the failure to consult workers' organizations before adopting the Act, and contrary to the allegations, the Honduran Congress held public information meetings for the sectors concerned before the Act was adopted, the STSS, acting through the Economic and Social Council, subsequently invited workers' and employers' representatives to draw up the regulations, but only the employers' representatives attended, and during the monitoring of the implementation of the Programme, concerned sectors were invited but representatives of the CTH were the only ones who participated; (5) any enterprise wishing to hire staff under the terms of the Programme must register with the Directorate-General for Employment of the STSS and further register the contracts it signs; (6) 311 enterprises using the Programme are registered and the number of contract registration transactions has increased, leading to better control and monitoring of the rights of workers; and (7) to date, nobody has lodged an appeal with the Inspectorate, proving that there have not been mass dismissals.*
- 570.** *The Committee observes firstly that Decree No. 230-2010 of 5 November, which contains PRONEH, does not regulate trade union affairs and therefore does not contain provisions that are incompatible per se with the principles of freedom of association (far from it, article 7 states that it is understood that workers hired under the terms of the Decree are entitled to the fundamental rights enshrined in ILO Conventions, with particular reference to Conventions Nos 87 and 98).*
- 571.** *With regard to the alleged lack of consultation in the process of adopting the abovementioned Decree and regulations, the Committee takes note of the contradictory arguments advanced by the complainants and the Government regarding the prior consultation that took place and the participation of the worker party therein (the complainants state that they were not consulted and the Government states that the sectors concerned were consulted but the worker party, with few exceptions, failed to attend the*



meeting organized through the Economic and Social Council for the purpose of drafting the regulations).

- 572.** *With regard to the concern expressed by the complainants about the impact of the Decree on the trade union rights of workers, the Committee wishes to refer to the findings of the General Survey of the Committee of Experts on the fundamental Conventions on labour rights in the light of the ILO Declaration on Social Justice for a Fair Globalization, paragraph 935, in which it is indicated that: “the Committee observes that one of the main concerns expressed by trade union organizations is the adverse impact of insecure forms of employment on trade union rights and the protection of workers’ rights, especially in the case of repeatedly renewed short-term temporary contracts; outsourcing, which is used even by some governments in their own public services to perform legally mandated ongoing tasks; and the non-renewal of contracts for anti-union reasons. Some of these modalities often deprive workers of access to freedom of association and collective bargaining, especially when they conceal a genuine and ongoing labour relationship. Some forms of job insecurity can also deter workers from joining trade unions. The Committee wishes to emphasize the importance of examining, within a tripartite framework, the impact of these forms of employment on the exercise of trade union rights in all member States.” The Committee underlines that such dialogue could take place if necessary.*
- 573.** *Finally, with regard to the allegation that domestic legislation excludes temporary workers from trade union organizations (the complainants cite the Labour Code in so far as it refers to the requirement that a person must be regularly employed before being able to join a trade union’s executive board, and the definition of a trade union as a permanent organization of workers), the Committee observes, firstly, that the Government refers to article 7 of the Decree, which mentions the need to comply with fundamental Conventions (with particular reference to Conventions Nos 87 and 98), and states that no complaints have been lodged with the Inspectorate, and secondly, that the complainants have failed to supply examples of specific cases in which the implementation of the Decree has led to violations of the collective bargaining and trade union rights of temporary workers. That being so, the Committee, welcoming the reference in Decree No. 230-2010 to the protection of the fundamental trade union rights of temporary workers, and noting that no judicial appeal has been lodged against the Decree, the Committee will not pursue the examination of this case.*

### **The Committee’s recommendation**

- 574.** *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. 2508

INTERIM REPORT

**Complaint against the Government of the Islamic Republic of Iran  
presented by**

- **the International Trade Union Confederation (ITUC) and**
- **the International Transport Workers' Confederation**

*Allegations: The complainants allege that the authorities and the employer committed several and continued acts of repression against the local trade union at the bus company, including: harassment of trade unionists and activists; violent attacks on the union's founding meeting; the violent disbanding, on two occasions, of the union general assembly; arrest and detention of large numbers of trade union members and leaders under false pretences (disturbing public order, illegal trade union activities); the mass arrest and detention of workers (more than 1,000) for planning a one-day strike. The complainant organizations also allege that the authorities have arrested Mr Mansour Osanloo, Chairperson of the union executive committee, on very serious charges (including contacts with Iranian oppositions groups abroad and instigating armed revolt against authorities), and that he had been detained for over six months as of the time of the filing of the complaint and is being denied due legal process*

**575.** The Committee last examined this case in June 2011, when it presented an interim report to the Governing Body [see 360th Report, paras 782–807, approved by the Governing Body at its 311th Session].

**576.** The Government sent its observations in communications dated 14 March and 22 May 2012.

**577.** The Islamic Republic of Iran has not ratified either the Freedom of Association and the 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**

**578.** In its previous examination of the case, the Committee made the following recommendations [see 360th Report, para. 807]:

- (a) The Committee acknowledges the continuing efforts by the Minister of Labour and Social Affairs to obtain the granting of a pardon for Mr Osanloo. It notes that the Head of the Judiciary has accepted the Minister's request for such a pardon which, according to the Government, is presently under consideration. The Committee deeply deplores that more than five years have elapsed since his conviction and despite the Committee's regular call for his release, he remains in prison. The Committee deeply regrets that one year has now elapsed since the Ministry's laudable initiative to obtain Mr Osanloo's pardon and urges the competent authorities to take the necessary steps for his immediate release from prison and the dropping of any remaining charge. The Committee expects that the Government will take all necessary measures to provide proper medical attention to Mr Osanloo and considers that the ongoing allegations in relation to the state of his health further attest to the need to ensure his immediate release. Recalling, moreover, that it had previously concluded that Mr Osanloo's detention from 22 December 2005 to 9 August 2006 and the treatment received during this period constituted not only interference with his trade union activities, but an extremely grave violation of his civil liberties as well, the Committee once again expects the Government to carry out the necessary independent investigation in this regard, having the confidence of all parties concerned, as a matter of urgency.
- (b) The Committee expresses the firm hope that the call from the Ministry of Labour and Social Affairs for a special sitting of the Parole and Pardon Committee to examine the possibility of granting Mr Madadi amnesty will lead to his imminent release from prison and the dropping of any remaining charge. The Committee however deeply deplores the fact that he would have served much more than the two-year prison term for which he was initially sentenced by the Revolutionary Court in October 2007, this in spite of the Committee's systematic recommendation for its release. The Committee expects that Mr Madadi will have his rights restored and that he will be compensated for the damage suffered. Furthermore, the Committee deeply regrets that the Government has once again failed to provide any indications concerning the allegations of ill-treatment to which Mr Madadi had been subjected while in detention, and once again urges the Government to institute without delay an independent investigation into this serious matter and to keep it informed in this regard.
- (c) The Committee must firmly insist that the legislation be brought into conformity with freedom of association principles, particularly those concerning trade union multiplicity, in the very near future and once again urges the Government to indicate any progress made in adopting amendments to the Labour Law so as to allow for trade union pluralism and expects the Government to deploy all efforts as a matter of urgency, including through the de facto recognition of the SVATH without delay pending the introduction of the legislative reforms.
- (d) The Committee calls on the Government once again as a matter of urgency to fully recognize the right of public protest and expression as an integral corollary of freedom of association. The Committee expects that the Government will avail itself of the technical assistance of the Office to ensure that the principles in the code of practice for managing and redeveloping trade union demonstrations, as well as the rules and regulations governing the holding of demonstrations and assemblies, guarantee freedom of association rights, including the right of workers' organizations to carry out peaceful demonstrations without fear of arrest, detention or indictment by the authorities for engaging in such activity.
- (e) The Committee requests the Government to transmit a detailed report of the findings of the SGIO and the Headquarters for the Protection of Human Rights into the allegations of workplace harassment during the period of the union's founding, from March to June 2005, as soon as they are produced. It once again requests the Government, in the light of the information revealed by these investigations, to take the necessary measures to ensure that all employees at the company are effectively protected against any form of discrimination related to their trade union membership or their trade union activities.
- (f) The Committee once again requests the Government to immediately institute a full and independent judicial inquiry into the attacks on union meetings in May and June 2005, in order to clarify the facts, determine responsibilities, prosecute and punish those responsible and thus prevent the repetition of such acts. It further requests the

Government to keep it informed of developments in this regard and provide a copy of the court's judgment in the action initiated by the union concerning these attacks once it is handed down.

- (g) The Committee takes due note of the Government's indication of its repeated requests for technical assistance and training and expects that the ILO will respond positively once the necessary conditions are met to enable a mission to meet with all parties concerned in the various cases against the Government of the Islamic Republic of Iran, including with those who continue to be detained contrary to the Committee's repeated recommendations.
- (h) The Committee, noting that four years have elapsed since its first examination of this case, and noting furthermore the seriousness of the matters contained therein – in particular the yet unresolved grave violations of civil liberties against numerous trade unions leaders and members – calls the Governing Body's special attention to the extremely grave situation relating to the trade union climate in the Islamic Republic of Iran.

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

**579.** In its communication dated 14 March 2012, the Government, as regards Mr Osanloo indicates that it spared no efforts to seek his release. Due to the incessant efforts of the Minister of Labour, who benevolently intervened for his freedom and personally received the members of the Tehran Vahed Bus Company (SVATH) and other detained workers of the union in his office, the former was eventually and unconditionally released in June 2011. At present, he is completely free and no limitation, whatsoever, either legally or socially has been imposed on him. The Government reiterates that Mr Osanloo, even in prison has constantly received appropriate medical services and medication for his illnesses including his heart problem which was the direct result of an open heart surgery he had undertaken years prior to his first detention. The Government also reiterates that it would spare no efforts to constructively engage with the Committee's supervisory mechanism to seek the freedom or mitigating the sanctions of other workers who may still be in prison on the ground of their alleged trade union activities.

**580.** As regards Mr Ebrahim Madadi, the Government indicates that the Minister personally conducted various correspondences through which he has reflected the recommendations of the Committee to judicial authorities and requested them to drop the remaining charges against him and certain other workers and expedite their effort to grant them amnesty. For example, in his letter No. M/V/8628 dated 18 December 2012, the Minister addressed the Head of Justice Department of Tehran Province and through letter No. M/V/8625 dated 18 December 2012, he addressed the General Prosecutor of Tehran. His letter No. M/V/9519 dated 8 January 2012 meant to advise the Head of Justice Department of Tehran Province and his latest correspondence No. M/90/01/2041 dated 1 January 2012 sought direct interventions of the Minister of Justice. According to the Government, the short span of time in which the above correspondences were forwarded shows the determination of the minister in fulfilling his objectives for the freedom of the detained workers. In his latest correspondence dated 6 February 2012, the Minister addressed the Chief of the Judiciary Body (the Government indicates that this is not very common in view of the protocol of correspondence), and while recalling the request of the Minister of Justice through which he had formally urged the Public and Revolution Prosecutor to expedite the processing of the request for workers' amnesty, he also urged him to instruct the Parole and Pardon Committee to adopt necessary measures for enlisting the respective workers and arrange for their release at the soonest. The Government further indicates that he has to abide by the principles of the division of power and recalls that it has no say in granting amnesty to the above said workers. Nonetheless, the Government is very hopeful to be able to advise the Committee on the situation of Mr Ebrahim Madadi and other

workers at the soonest. In its communication dated 22 May 2012, the Government confirms that Mr Madadi has now been released.

- 581.** As regards recommendation (c), the Government indicates that the Law of the Fifth Development Plan of the Islamic Republic of Iran (2011-2015), and particularly articles 25 and 73 thereof, legally requires it to take the 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. 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 on Freedom of Association. The Government adds that the draft proposal of the new Labour Code, among other things, provides for the recognition of the principles of freedom of association and multiplicity of workers' organizations.
- 582.** As regards recommendation (d), the Government indicates that the Code of Practice on the Administration of Labour Demonstrations and Assemblies was finally approved by the National Security Council on 14 November 2011 and has been communicated on 3 March 2012 to all general directors of labour department throughout the country. The Code encapsulates seven articles and, among other things, recognizes the right and freedom of workers for holding assemblies and demonstrations and industrial actions, as also provided for in the Constitution. Article 2 of the Code requires police and disciplinary forces to ensure protection of assemblies and demonstrations of workers. To coordinate necessary arrangements with other relevant bodies, the organizers of the industrial actions are, however, required to submit a written request specifying the time, place and purpose of their action. Their request for any such action should be submitted to the Office of the General Governor of the respective city at least seven days prior to the action. The Code also obliges the operating police forces to strictly abide by the rules and regulations stipulated in the Police Code of Conducts in respect of dealing with peaceful demonstrations and assemblies as well as deployment of appropriate anti-riots equipment. The Security Council of each province, city and town, where assemblies or demonstrations are held shall rule, if the assembly is peaceful or not. Article 6 of the Code reiterates the need for training of the operating police forces dealing with the workers' protests, demonstrations, etc., by the respective international organizations, if any, and requires the Ministry of Cooperatives, Labour and Social Welfare as the focal point for arranging any such training. Finally, the Code calls for the need of hearing offences of the trade unions by special courts which are trained and familiar with the fundamental principles and rights at work. The Government would warmly welcome opportunity for training from the Committee.
- 583.** As regards recommendation (e), the Government reiterates that, neither the mandate holders of the then Ministry of Labour, nor other government officers, had a role in the occurrence of the SVATH clash in 2005 and its ensuing casualties and were not in any manner implicated, either directly or indirectly in subsequent legal contentions between the parties. The Government indicates that the qualified officers of the Labour Inspection Department with their colleagues in labour dispute resolution officers and judges of the Labour Disputes Courts shall hear any legitimate case of conflict referred to them on their merits and ensure the rule of law and justice among them.
- 584.** As regards the imposition of conditions and postponing rendering technical assistance to delegating a mission to meet with all parties concerned in the various cases against the Government of the Islamic Republic of Iran (recommendation (g)), the Government believes that such a request is harbinger of the unconstructive attitude adopted against both

the Government and social partners of the Islamic Republic of Iran for the last five years and that no conditions should be imposed prior to providing such technical assistance.

**585.** As regard recommendation (h), the Government indicates that all arrested persons were subjected to normal and fair judicial procedure in accordance with the principles of protection of the fundamental rights and other civil rights enshrined in the Constitution of the Islamic Republic of Iran, its Civil Code and the Citizenry Charter. The Government adds that the Judiciary tends to try its best to manage and resolve the labour disputes and conflicts preferably in the interest of the workers. The problematic situation in many enterprises, which seem to have far adversely aggravated due to the unjustified and politically motivated sanction and imposition of unfair and inhuman embargoes since the Government's latest submission, has, in the meantime urged the Government to boost its efforts for ensuring sustainability of enterprises and providing for an enabling working environment. The protection of the rights of the workers in its entirety, including their right to organize and collective bargaining therefore would remain an uncompromising priority for the Government. In seeking any solution for the troubled enterprises, the Government continues to seek the good will and genuine engagement of its social partners and particularly constructive collaboration of the workers' most representative and legitimate organizations at the respective workplaces. The Government adds that it has made every possible effort to encourage the authorities of the Judicial Branch to reduce as much as possible the sentences of the workers involved in the case before the Committee.

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

**586.** *The Committee recalls that the present case it has been examining for more than four years concerns acts of harassment against members of the SVATH union, including: demotions, transfers and suspensions without pay of union members; acts of violence against trade unionists; and numerous instances of arrest and detention of trade union leaders and members.*

**587.** *With respect to Mr Mansour Osanloo, President of the SVATH, the Committee welcomes the Government's indication that he was unconditionally released in June 2011 and that at present, he is completely free and no limitation, whatsoever, either legally or socially has been imposed on him. The Committee however deeply regrets that Mr Osanloo spent more than five years in prison, despite its regular call for his release.*

**588.** *With respect to Mr Ebrahim Madadi, Vice-President of the SVATH, the Committee takes due note of the information provided by the Government indicating that the Minister of Cooperatives, Labour and Social Affairs has spared no efforts to obtain his immediate release. The Committee welcomes the latest information that Mr Madadi was released from prison on 19 April 2012. The Committee however deeply deplores the fact that he will have served much more than the two-year prison term for which he was initially sentenced by the Revolutionary Court in October 2007, this in spite of the Committee's systematic recommendation for his release. The Committee expects that Mr Madadi will have his rights restored and that he will be compensated for the damage suffered. Furthermore, the Committee deeply regrets that the Government has once again failed to provide any indications concerning the allegations of ill-treatment to which Mr Madadi had been subjected while in detention, and once again urges the Government to institute without delay an independent investigation into this serious matter and to keep it informed in this regard.*

**589.** *In its previous comments, the Committee had noted the proposed amendments to article 131 of the Labour Law which appeared to permit trade union pluralism, including at the workplace and at national levels. The Committee notes however with deep regret that these amendments have not yet been adopted, nor has any recent draft been*

transmitted to the Committee for its consideration. 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 on Freedom of Association, the Committee requests the Government to specify which social partners were consulted on the draft amendments and to provide a copy of the newly drafted Labour Bill. It once again urges the Government to indicate any progress made in adopting amendments to the Labour Law so as to allow for trade union pluralism and expects the Government to give this matter the highest priority and to ensure the de facto recognition of the SVATH without further delay pending the introduction of the legislative reforms. The Committee once again takes due note of the Government's indication of its requests for technical assistance and training and expects that the Government will not place any restrictions on missions aimed at improving respect for the fundamental principles of freedom of association and that they will be able to meet with all parties concerned in the cases against the Government of the Islamic Republic of Iran, including with those who continue to be detained contrary to the Committee's repeated recommendations.

**590.** *The Committee notes the Government's indication that the Code of Practice on the Administration of Labour Demonstrations and Assemblies was finally approved by the National Security Council on 14 November 2011 and has been communicated on 3 March 2012 to all general directors of labour department throughout the country. According to the Government, the Code encapsulates seven articles and, among other things, recognizes the right and freedom of workers for holding assemblies and demonstrations and industrial actions, as also provided for in the Constitution. The Committee requests the Government to provide a copy of the Code of Practice.*

**591.** *While noting that the Government has once again failed to provide specific information with regard to the following recommendations, the Committee further recalls them, as summarized below, and urges the Government to provide full information on their implementation:*

- *The Committee requests the Government to transmit a detailed report of the findings of the State General Inspection Organization (SGIO) and the Headquarters for the Protection of Human Rights into the allegations of workplace harassment during the period of the union's founding, from March to June 2005, as soon as they are produced. It once again requests the Government, in the light of the information revealed by these investigations, to take the necessary measures to ensure that all employees at the company are effectively protected against any form of discrimination related to their trade union membership or their trade union activities.*
- *The Committee once again requests the Government to immediately institute a full and independent judicial inquiry into the attacks on union meetings in May and June 2005, in order to clarify the facts, determine responsibilities, prosecute and punish those responsible and thus prevent the repetition of such acts. The Committee requests the Government to keep it informed of developments in this regard, as well as to provide a copy of the court's judgment in the action initiated by the union concerning these attacks once it is handed down.*

**592.** *Finally the Committee, noting the Government's indication that the protection of the rights of workers in their entirety including their right to organize and collective bargaining remains an uncompromising priority, but nevertheless observing that five years have elapsed since its first examination of this case, and noting furthermore the seriousness of the matters contained therein – in particular the yet unresolved grave violations of civil liberties against numerous trade unions leaders and members – once again calls the*

*Governing Body's special attention to the extremely grave situation relating to the trade union climate in the Islamic Republic of Iran.*

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

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

- (a) With respect to Mr Mansour Osanloo, President of the SVATH, the Committee welcomes the Government's indication that he was unconditionally released in June 2011 and that at present, he is completely free and no limitation, whatsoever, either legally or socially has been imposed on him. The Committee however deeply regrets that Mr Osanloo spent more than five years in prison, despite its regular call for his release.*
- (b) The Committee welcomes the information that Mr Madadi was released from prison on 19 April 2012. The Committee however deeply deplores the fact that he will have served much more than the two-year prison term for which he was initially sentenced by the Revolutionary Court in October 2007, this in spite of the Committee's systematic recommendation for his release. The Committee expects that Mr Madadi will have his rights restored and that he will be compensated for the damage suffered. Furthermore, the Committee deeply regrets that the Government has once again failed to provide any indications concerning the allegations of ill-treatment to which Mr Madadi had been subjected while in detention, and once again urges the Government to institute without delay an independent investigation into this serious matter and to keep it informed in this regard.*
- (c) 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 on Freedom of Association, the Committee requests the Government to specify which social partners were consulted on the draft amendments and to provide a copy of the newly drafted Labour Bill. It once again urges the Government to indicate any progress made in adopting amendments to the Labour Law so as to allow for trade union pluralism and expects the Government to give this matter the highest priority and to ensure the de facto recognition of the SVATH without further delay pending the introduction of the legislative reforms.*
- (d) The Committee requests the Government to provide a copy of the Code of Practice on the Administration of Labour Demonstrations and Assemblies.*
- (e) While noting that the Government has once again failed to provide specific information with regard to the following recommendations, the Committee further recalls them, as summarized below, and urges the Government to provide full information on their implementation:*



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- *The Committee requests the Government to transmit a detailed report of the findings of the SGIO and the Headquarters for the Protection of Human Rights into the allegations of workplace harassment during the period of the union’s founding, from March to June 2005, as soon as they are produced. It once again requests the Government, in the light of the information revealed by these investigations, to take the necessary measures to ensure that all employees at the company are effectively protected against any form of discrimination related to their trade union membership or their trade union activities.*
  - *The Committee once again requests the Government to immediately institute a full and independent judicial inquiry into the attacks on union meetings in May and June 2005, in order to clarify the facts, determine responsibilities, prosecute and punish those responsible and thus prevent the repetition of such acts. The Committee requests the Government to keep it informed of developments in this regard, as well as to provide a copy of the court’s judgment in the action initiated by the union concerning these attacks once it is handed down.*
- (f) *The Committee once again takes due note of the Government’s indication of its requests for technical assistance and training and expects that the Government will not place any restrictions on missions aimed at improving respect for the fundamental principles of freedom of association and that they will be able to meet with all parties concerned in the cases against the Government of the Islamic Republic of Iran, including with those who continue to be detained contrary to the Committee’s repeated recommendations.*
- (g) *The Committee, noting the Government’s indication that the protection of the rights of workers in their entirety including their right to organize and collective bargaining remains an uncompromising priority, but nevertheless observing that five years have elapsed since its first examination of this case, and noting furthermore the seriousness of the matters contained therein – in particular the yet unresolved grave violations of civil liberties against numerous trade unions leaders and members – once again calls the Governing Body’s special attention to the extremely grave situation relating to the trade union climate in the Islamic Republic of Iran.*

CASE NO. 2844

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

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

- the Japan Airlines Flight Crew Union (JFU) and
- the Japan Airlines Cabin Crew Union (CCU)

**supported by**

- the National Confederation of Trade Unions (ZENROREN)
- the National Trade Union Council (ZENROKYO)
- the International Federation of Airline Pilots' Associations (IFALPA) and
- the International Transport Workers' Federation (ITF)

*Allegations: The complainant organizations allege that the dismissal of workers by Japan Airlines International was carried out in such a way as to discriminate against workers who are members of certain trade unions. They further allege that the Enterprise Turnaround Initiative Corporation intervened in the strike voting procedures*

**594.** The complaint is contained in communications dated 23 March, 12 May, 14 July and 8 August 2011 from the Japan Airlines Flight Crew Union (JFU) and the Japan Airlines Cabin Crew Union (CCU). The National Confederation of Trade Unions (ZENROREN) and the National Trade Union Council (ZENROKYO) supported the complaint in a communication dated 23 March 2011. The International Federation of Airline Pilots' Associations (IFALPA) supported the complaint in a communication dated 12 May 2011. The International Transport Workers' Federation (ITF) supported the complaint in a communication dated 23 May 2011.

**595.** The Government sent its observations in a communication dated 21 October 2011.

**596.** 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. The complainants' allegations**

**597.** In their communication of 23 March 2011, the JFU and the CCU indicate that Japan Airlines International (hereafter the company) is a consolidated subsidiary of a holding company, Japan Airlines System (hereafter the JALS) and together with seven other affiliate subsidiaries it has operated air transport business, mainly utilizing its regular flight networks as the largest air carrier in Japan. The complainants state that, due to the Government's distorted aviation policies, airports in Japan have remained expensive and the company has been forced to operate in loss-making routes necessitated by excessive local airport facilities. In addition, the management has adopted lax business strategies and the company was forced to buy an excessive number of aircrafts due to strong pressures to correct bilateral trade imbalance. All these factors had combined to deteriorate the financial situation of the company. The sharp drop in air travel, the surge in fuel costs and

fuel surcharges and the global financial downturn made the financing of the company even more difficult. On September 2009, the Minister of Land, Infrastructure, Transport and Tourism set up the JALS Rehabilitation Task Force (hereafter the Task Force) as a private advisory body with the aim of revitalizing the company. On October 2009, the Task Force submitted a conclusion of its examination to the Minister that the company should be rehabilitated under the programme of Enterprise Turnaround Initiative Corporation (hereafter the ETIC).

- 598.** Subsequently, on 19 January 2010, the company, together with another JALS affiliate subsidiary, filed for bankruptcy protection under the Corporate Rehabilitation Law. The Tokyo District Court approved the start of the rehabilitation process on the same day and appointed a bankruptcy administrator, as well as the ETIC, as bankruptcy administrators. The ETIC is a court-appointed rehabilitation administration organization and a joint-stock corporation, established on October 2009, whose purpose is, in collaboration with financial institutions, to provide support for the revitalization of businesses that have turnaround potential but are carrying excessive debts. The ETIC is described by the complainants as an impartial and neutral organization that aims to revitalize local economies by supporting indebted businesses. It is also described as an organization that has strong public characteristics and its support measures are taken from the perspective of protecting public good. The paid-in capital totalling ¥20 billion was half contributed by the Government of Japan and the other half came from private sector financial institutions.
- 599.** The complainants add that, in January 2010, the ETIC decided to support the company, and two other affiliate companies, subject to the following prerequisites: that the Government provides necessary support continuously, the company and the two other affiliate companies ask for the understanding and cooperation of business partners, both home and abroad, and concerned nations about the fact that the companies' continued payments of commercial claims and lease liabilities are secured and the frequent flyer miles held by customers, and discount certificates issued to shareholders, are honoured so that business operations will continue; and the Government draws up concrete and comprehensive aviation policies expeditiously so that Japan's aviation industry continues to be competitive in the global market. Based on this, on the same day, the Japanese Government officially announced that it would take the necessary measures to ensure the continuation of the operation and turnaround of the corporations, including continuously providing sufficient financial support until the companies have been revitalized, and calling for the understanding and cooperation of foreign governments. Considering the above process, the complainants' view is that the company and the two other affiliate companies became public entities under the direct control of national authorities, namely the Government, the ETIC and the court upon the start of the rehabilitation process.
- 600.** On August 2010, the administrator and the ETIC, as bankruptcy administrators, submitted their rehabilitation plan with the names of the concerned to the Tokyo District Court. Following the plan, the administrators, in close cooperation with the management of the company, started to take drastic structural reform of the company and encourage the employees to take early retirement and stopped renewing labour contracts of fixed-term employees in March 2010. It started the second round of early retirement offers targeting cockpit crew in July 2010, stopped providing training to pilot trainees and encouraged trainees without licences to transfer to ground-based positions or to take special early retirement packages.
- 601.** In the aforementioned rehabilitation plan, the ETIC mentioned that, at the time of the submission of the rehabilitation plan, it had the ability of raising up to ¥3 trillion in government-guaranteed funds and it expected that the organization would be the driving force in viable and drastic turnaround initiatives of the company and that, with its characteristics as a public organization, appropriate cooperation and coordination with the

Government would be achieved. The ETIC has established a committee that comprises members, including outside academics, and makes support decisions according to the criteria based on the notification of competent ministers.

- 602.** The rehabilitation plan set out that the number of employees would be cut from 48,781 at the end of the fiscal year 2009 to 32,600 by the end of the fiscal year 2010 in the Japan Airlines group companies including the three rehabilitated corporations. At the briefing for employees held on 3 September 2010, the company announced that its goal was to cut a total of 1,520 employees (370 cockpit crew members, 570 cabin attendants, 480 machinists and 100 ground staff members). Since September 2010, the administrator, the ETIC and the company offered two separate early retirement schemes to cockpit and cabin crew. By 22 October 2010, the closing date of applications for the second round of offers, 1,545 employees (257 cockpit crew members, 649 cabin attendants, 524 machinists and 115 ground staff members) had applied for the Voluntary Retirement Programme, which well exceeded the redundancy goal of 1,520 workers originally set by the company.
- 603.** Nevertheless, on 15 November 2010, the administrator, the ETIC and the company announced that they would need to shed another 200 employees (110 cockpit crew members and 90 cabin attendants) and it would dismiss a total of 250 workers (200 workers mentioned above plus another 50 taking leave of absence). The administrator, the ETIC and the company, on 9 December 2010, notified the CCU and the JFU that they would dismiss 202 crew members (108 cabin attendants, including 34 on leave, and 74 aged 53 and over, as well as 94 cockpit crew members (those aged 55 and over for pilots and those aged 48 and over for co-pilots) including 4 on leave) on 31 December 2010.
- 604.** The company sent a dismissal letter to the 250 workers telling them that their employment would be terminated on 31 December 2010. In the meantime, the company continuously encouraged the targeted workers to take the voluntary redundancy scheme during the period 10–27 December 2010. Eventually 81 pilots and 84 cabin attendants were dismissed as of 31 December 2010. Dissatisfied with the dismissal, 74 cockpit crew members and 72 cabin attendants formed a group of plaintiffs and brought the case to the Tokyo District Court on 19 January 2011 to challenge their dismissal. In the complainants view, the dismissal enforced by the administrator, the ETIC and the company was fraught with serious issues, which infringe standards set by ILO Conventions.
- 605.** The company set the criteria for dismissal, targeting employees in descending order of age until the job reduction targets had been reached. There are two trade unions that represent cabin crew employed by the company, the CCU and the Japan Airlines Friendship & Improvement Organization (JALFIO). Among the 64 cabin attendants dismissed on the basis of age, 57 are CCU members, including six incumbents. Among the dismissed workers are Executive Committee (EC) members of the CCU and many ex-EC members. The complainants consider that the dismissals constitute a company's attempt to undermine the CCU under the guise of setting age as the criteria for dismissal. The CCU has demanded that age requirements for the voluntary retirement scheme should be abolished as it is not only unfair but also for the reason that without any age requirements, more voluntary retirees are expected to apply and there would be higher probability of attaining the payroll reduction targets. However, the administrator, the ETIC and the company refused to consider the proposal, claiming that their goal was to rejuvenate the company and make it a more strongly built one with an employee structure resistant to any possible emergencies in the future. The criteria for dismissal set by the administrator, the ETIC and the company discriminate against workers who are members of certain trade unions in determining who will be kept on the payroll, and therefore it clearly prevents workers from exercising freely the right to organize as enshrined in Convention No. 87.

- 606.** In spite of the fact that the company forcibly announced its decision to dismiss workers on December 2010, no sincere negotiations have taken place to date between the company, the JFU and the CCU in order to discuss the necessity of dismissal for the purpose of the corporate reorganization, sincere fulfilment of duty by the employer to make efforts to avoid dismissal, and the setting up of the objective and reasonable criteria for dismissal, including an appropriate disclosure of information and introduction of mutually agreeable counter proposals. Therefore, issues raised by the JFU and the CCU, as well as points of conflict between the two unions and the company have remained completely unsolved. The complainants' report that the company's operating revenue of ¥109.6 billion in the first half of the fiscal year 2010, and operating profit of ¥114.8 billion (¥146 billion for the consolidated Japan Airlines group) in the period of April–November 2010, well exceeded the company's rehabilitation plan profit target for the fiscal year 2010 (¥64.1 billion). Under the circumstances, the complainants consider that sufficient consultation and negotiations with trade unions were all the more essential in considering the very necessity of the dismissal. However, despite repeated requests by the JFU and the CCU, the administrator, the ETIC and the company refused to disclose detailed financial information that could lead to such discussions with the trade unions.
- 607.** According to the complainants, the dismissal by the administrator, the ETIC and the company is controversial in that it constitutes discriminatory treatment of employees on the basis of age as well as illustrates the employers' failure to ensure that there is the fullest possible opportunity for each cockpit and cabin crew to use his/her skills and endowments. Despite the fact that the administrator, the ETIC and the company should have negotiated with workers in order to avoid potential conflicts, the employers have categorically refused to have any sincere collective bargaining with employees. This is in breach of Convention No. 98. According to the complainants, the ETIC said that if the original job reduction target was not reached after selecting employees for dismissal based on criteria pertaining to sick leave, absence from work and performance evaluation, more employees were to be selected from each job and position in descending order of age until the reduction target was reached. This clearly constitutes discriminatory treatment of employees on the basis of age.
- 608.** The complainants assert that the lack of dialogue has had the consequence that the fullest possible opportunities have not been guaranteed for cockpit and cabin crew to utilize their skills and endowments. The administrator, the ETIC and the company announced that as of 31 December 2010, cockpit and cabin crew were to be dismissed for reorganization. However, prior to that, no consideration was made in order to guarantee the employment opportunity where cockpit and cabin crew would be well suited to use their special skills (such as temporary layoff or work sharing among employees) under the pretext of optimizing personnel size. Cockpit and cabin crew aboard airplanes perform duties in which their work experiences are an important consideration in fulfilling their job of ensuring safety and providing services. However, the administrator, the ETIC and the company failed to take measures to guarantee employment opportunities for them to use their skills and endowments, nurtured over many years of their work experiences.
- 609.** Furthermore, the company managed to reduce costs by nearly ¥700 million after a total of 1,860 employees applied for and took unpaid leave of absence on a monthly basis in the period between February 2009 and January 2010. As one of the measures to avoid dismissals, the CCU made a proposal to implement another round of this measure, but the administrator, the ETIC and the company refused to consider the proposal.
- 610.** The complainants denounce some remarks made by an official from the ETIC during negotiations with the JFU and the CCU on November 2010. These remarks were as follows:

- if union members voted in favour of a strike, and the right to strike was subsequently exercised, flights would be suspended, thereby increasing the risk of undermining the corporate value;
- if the risk for the union members to exercise the right to strike still existed after the approval of the rehabilitation programme scheduled on 30 November 2010, the ETIC would not be able to dare to risk taxpayers' money;
- if the workers voted in favour of a strike, the ETIC would not carry out the planned public capital injection of ¥350 billion into the company, unless the strike was called off.

**611.** In the first place, the ETIC was to give the company a pay-in of ¥350 billion in exchange for ¥175 million worth of new shares, which was part of the rehabilitation programme based on paragraph 1, article 31, of the Enterprise Turnaround Initiative Corporation Law, subject to the company's creditors approving the proposed rehabilitation programme submitted by the bankruptcy administrator under the bankruptcy protection proceedings pending in Tokyo's District Court, as well as the permission from Tokyo's District Court to go ahead with its rehabilitation programme. In making this decision, in accordance with the said law, the ETIC sought the opinions of the Prime Minister; the Minister of Public Management, Home Affairs, Posts and Telecommunications; the Finance Minister; the Minister of Health, Labour and Welfare; the Minister of Economy, Trade and Industry, and none of them raised an objection to the injection of public capital into the company. In the complainants' view, the ETIC publicly notified stakeholders including the creditors that the ETIC was going to inject the abovementioned capital once its rehabilitation programme had been approved. Hence, it has never been envisioned that, after the approval of the rehabilitation programme, the voting for the strike by the trade unions representing workers at the company in an effort to demand the withdrawal of the dismissal would constitute a legitimate reason not to carry out the financing. In fact, on 1 December 2010, the ETIC carried out the public injection of ¥350 billion as scheduled.

**612.** The ETIC is the bankruptcy administration organization of the company, and therefore as prescribed in article 72 of the Corporate Reorganization Act, the ETIC exclusively possesses "the right to manage the business and property of the company undergoing the rehabilitation", and thus the ETIC should be in the position of an employer. Therefore, the ETIC and its staff in charge are required to abide by trade union laws as an employer and remarks as such made during the November 2010 negotiations were intended to unfairly intervene in the strike voting procedures of the trade unions by hinting at not carrying out the planned public capital injection of ¥350 billion.

**613.** The complainants recall that the right to strike is one of the basic human rights of workers guaranteed in article 28 of the Constitution of Japan. Whether to exercise the strike right or not should be solely left with the decision of union members based on their free will. Furthermore, ILO Convention No. 98, ratified by Japan, specifies that workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration. The complainants, considering that this interference by the ETIC constitutes unfair labour practices, have filed a complaint with the Tokyo Metropolitan Labour Relations Commission.

**614.** The complainants allege that the company and the bankruptcy administrators dismissed 81 cockpit crew members and 84 cabin attendants as of 31 December 2010. Among those dismissed, 74 cockpit crew members and 72 cabin attendants filed a lawsuit challenging their dismissal with the Tokyo District Court on 19 January 2011. The complainants denounce the fact that the President of the company, Mr Kazuo Inamori, admitted that the

dismissal was not necessary when he stated “the financial situation of the company is getting better day by day. It may not be impossible for the company to survive without firing the 160 people but it was not possible for the company to scrap the rehabilitation plan we promised financial institutions, creditors and the court that we would pursue only one year ago.”

**615.** The complainants add that the plaintiffs of the abovementioned lawsuit include a considerable number of officials and Council members of the complainants, the JFU and the CCU as well as officials of various industry-wide trade union organizations (such as KOHKUREN, the Japan Federation of Civil Aviation Workers’ Unions for Air Safety and ALPA-Japan) to which the JFU and the CCU are affiliated.

**616.** According to the complainants, among the 74 dismissed cockpit crew members, 12 were holding office as officials of their own unions and/or industrial organizations that the JFU is affiliated to. One of those was an official of the JFU. Twenty-five among the 74 dismissed had in the past held responsible positions in their respective unions and/or industrial organizations that their respective unions are affiliated to. With regard to cabin crew, 72 plaintiffs include all of the three key officials (chair and two vice-chairs) of the CCU as well as three of the 13 EC members. Among a total of 70 Council members, 17 were dismissed. In addition, another 20 among the dismissed had experiences in serving as officials of the CCU. In conclusion, as of the date of dismissal, among the 72 cabin attendant plaintiffs, 23 were either officials of the CCU and/or industrial organizations which the CCU is affiliated to.

**617.** The complainants request the Committee to recommend that:

- the Government takes necessary measures to instruct the bankruptcy administrator, the ETIC and the company to retract their decision to dismiss workers, since the criteria used in practice discriminates against workers on the basis of trade unions they belong to and also includes a large number of current and former officers of unions and/or industrial organizations that their respective unions are affiliated to;
- the Government takes necessary measures to prompt the administrator, the ETIC and the company to have sincere negotiations with the trade unions, based on the fact that the employer failed to hold full consultation with the JFU and the CCU in good faith on issues such as the necessity of dismissal, the employer’s faithful execution of obligation to avoid dismissal and the establishment of objective and reasonable criteria for dismissal including the disclosure of proper information and the presentation of agreeable alternative offers to the unions;
- the Government takes necessary measures to urge the administrator, the ETIC and the company to rectify existing unfair labour practices.

**618.** In a communication of 8 August 2011, the complainant provided the relief order issued by the Tokyo Metropolitan Labour Relations Commission concerning the complaint on unfair labour practices by the ETIC. The relief order instructs the company to post an apology on the grounds that the words and deeds of the company on 16 November 2011 against the unions to restrict the unions’ right to strike was judged by the Tokyo Metropolitan Labour Relations Commission as an unfair labour practice. The relief order regards the ETIC and the bankruptcy administrators to be responsible for the employment of the employees in terms of labour and management relations as it decides the working conditions of the employees. The remarks in question, that if the strike is staged, the ETIC will stop the investment of ¥350 billion that was most indispensable for the rehabilitation of the company, were made with the intention to pressure the unions to voluntarily refrain from voting for a strike, which should be utterly internal union matters to be decided by the

unions. Furthermore, the relief order noted that the remarks were made by Director Iizuka who played a central role in the corporate rehabilitation process during the period when the strike ballot was being conducted. Consequently, these remarks certainly worked to threaten union members and the process of union operation and therefore constituted interference in violation of article 7(3) of Japan's Trade Union Law that forbids employers to commit acts to control or interfere with the management of a trade union by workers.

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

- 619.** The Government submits its observations in a communication dated 21 October 2011. It recalls that the Labour Union Law prohibits as unfair labour practices disadvantageous treatment such as dismissals due to being a member of a trade union, refusal of collective bargaining without due reason, controlling or interfering with the management of a labour union and giving financial assistance, and disadvantageous treatment due to filing a complaint with the Labour Relations Commission, etc. In cases in which an employer carries out those actions, labour unions or members of labour unions concerned can file a complaint with a Labour Relations Commission, which comprises members representing employers, workers and the public interest and has the authority to issue a remedial order after consideration. Concerning remedial orders issued by the Prefectural Labour Relations Commission, employers can appeal for review to the Central Labour Relations Commission or file an action for rescission of the remedial order with a court. Furthermore, trade unions can directly file a lawsuit with a court not through examination of the Labour Relations Commission.
- 620.** Concerning the complaint for remedy for unfair labour practices filed with the Tokyo Prefectural Labour Relations Commission by the JFU and the CCU on December 2010, the Government states that it is aware that, on 5 July 2011, the Labour Relations Commission ruled the alleged actions by JALS as unfair labour practices and, on 3 August 2011, the Commission issued a remedial order which commended the company to distribute and post a written apology to the two trade unions. The company filed an action for rescission of the remedial order with the Tokyo District Court on September 2011, and the case is pending in the court.
- 621.** With regard to the allegations on dismissal, the Government recalls that in Japan, article 16 of the Labour Contract Act provides that a dismissal shall, if it lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, be treated as an abuse of rights and be invalid. A worker who claims that his/her dismissal infringes article 16 of the Act can file a lawsuit requesting confirmation by the court of the existence of a legally binding contract between the worker and the employer. Concerning a dismissal as unfair labour practice, workers can also file a complaint for remedy with the Labour Relations Commission, in addition to the judicial settlement.
- 622.** With regard to the situation of 148 workers (two persons were added on 6 May 2011) dismissed by the company, including members of both the JFU and the CCU, who filed a lawsuit against the company with the Tokyo District Court, on January 2011, to request confirmation by the court of the existence of legally binding contracts between themselves and the company, the Government states that the case is pending in the court.
- 623.** The Government states that the Constitution of Japan explicitly divides governing authority into legislative power, judicial power and administrative power, exclusively entrusting judicial power with the courts and administrative power with the Cabinet (Government). Therefore, the Government is not in a position to indicate its view or judgment concerning an actual lawsuit which is still pending in the court. It considers that the cases will be fairly and independently examined and judged in the court based on the



arguments and proof brought by the parties concerned. Once it is ruled on, both parties will be bound by the judgment.

- 624.** The Government specifies the position of the ETIC and of the company pursuant to the decision to start the corporate rehabilitation process. The decision of enterprise supported by the ETIC is not made by the Government, since the ETIC is a corporation independent from the Government. Although the Government can state an opinion on the decision of support by the ETIC, the ETIC is not bound to the opinion of the Government; and, in the end, the opinion of the ETIC Committee becomes the decision of the ETIC (the decision of support by the ETIC shall be made by the ETIC Committee composed of the directors of the ETIC, following the support criteria provided by the competent ministers based on article 24, section 1 of the Act of the ETIC. The criteria only indicate objective standards such as profitability, etc., and the ETIC Committee is responsible for making a decision of support for each individual case).
- 625.** Concerning the allegations from the complainants that “it is appropriate to consider that the company and the two other affiliate companies became public entities under the direct control of national authorities, namely the Government, the ETIC and the court upon the start of the rehabilitation process”, the Government explains that there is no evidence that the Government had placed the company under its control, so it is not appropriate to consider that the company became a public entity. The Government asserts that in January 2010, the corporate rehabilitation process of the company started, accompanied by the decision of support for the company by the ETIC. During the process, the company was put under the control of the court, not of the Government. Incidentally, the corporate rehabilitation process of the company came to an end, and now, the company is not controlled under the court any longer.
- 626.** The Government also provided the observations received from the employer’s side, in particular from the company to explain the reasons why it believes that the dismissal does not violate principles of freedom of association set out by ILO Conventions, and why it will not retract the redundancy decision.
- 627.** With regard to the dismissal, the company acknowledges that 146 people among the redundant employees filed, on 19 January 2011, with the Tokyo District Court a petition seeking for an order to reinstate the position is currently pending before the court.
- 628.** The company further asserts that while it is true that the ETIC is an organization with “public characteristics” and that its support measures should be taken “from the perspective of protecting public good” as stated by the complainants, the ETIC’s support is not necessarily provided in accordance with the Government’s policies. The ETIC is first of all a company independent of the Government. The ETIC’s decision to support or not to support is made with objective criteria, and there is no room for arbitrary thoughts to be applied by the ETIC Committee in examining whether or not the subject company satisfies the given criteria. The ETIC Committee is authorized by the Board of Directors of the ETIC to play an important role in making final decisions in relation to a business turnaround plan. Such decision-making by the ETIC Committee is operated fairly and independently, without any interference by the Government, its agencies or bodies.
- 629.** The company explains that it has never been under the control of the Government, as alleged by the complainants. The corporate reorganization procedure is a legal measure to turn around companies, in which the company and two other affiliates of the Japan Airlines group have been placed under the court supervision and the ETIC plays as a corporate trustee or sponsor.

- 630.** The ETIC gave a high regard to the company's role to operate a public transportation, and decided, even though the company was under extremely difficult financial conditions, to support the company by means of the corporate reorganization procedure. The most challenging problem with the ETIC making the decision to provide the support was that the company was placed under the corporate reorganization procedure, so the role of public transportation was to be sustained and no flight was to be grounded. Although the ETIC was willing to support the company without any flight being grounded and with the credit trading and aircraft lease rights being sustained, it was almost impossible to obtain the understanding of the traders and to wipe away all concerns. Under such circumstances, if the court order of the commencement of the corporate reorganization procedure was rendered and followed by news of the company's bankruptcy, unwelcoming events were predictable to occur, for example that an aircraft in an overseas airport may encounter difficulties for its refuelling. To avoid such events occurring, explanations to the world by the company as a mere private enterprise were considered unconvincing; hence, the undertaking by the Government was essential. That made the ETIC ask the Government to release a statement that it would support the company to obtain sufficient funds. The "Government statement" was released for such purpose. The statement, however, merely stated that the Government would provide necessary support to the reorganization of the company, and did not at all state that the Government would have direct control over the latter. However, the Government statement worked well to avoid any unwelcoming events from occurring overseas in the wake of the court order of the commencement of the corporate reorganization procedure, and the company was able to operate every flight for international routes as well as domestic routes.
- 631.** The company considers that the redundancy is lawful since it satisfied the conditions provided by legal precedents, in which validity of redundancy in Japan was the issue, which are: (i) necessity to reduce the number of the employees; (ii) necessity to resort to redundancy as a means to reduce the number of the employees (whether or not efforts were made by other means to avoid the redundancy); (iii) reasonableness in selecting employees to be made redundant; and (iv) reasonable process. The company reports that consultations were engaged with the trade unions on measures to avoid the redundancy or to postpone it. However, it was not possible to reach any agreement. The company asserts that the redundant employees in the present case were selected by an objective criterion for redundancy, not by any discriminatory criteria against workers who were union members, as alleged by the complainants.
- 632.** The company explains that the reason why the members of the CCU who were made redundant by the age criterion amounted to 57, was because more members of the other trade union affected by the redundancy, namely JALFIO, had actually applied for the Voluntary Retirement Programme proposed by the company, which was more advantageous than usual retirement. Concerning the cabin attendants, there were 159 CCU members and 93 JALFIO members of 53 years of age and above on the record who were to be made redundant by the age criterion. However, 98 CCU members and 76 JALFIO members applied for the Voluntary Retirement Programme. Consequently, a higher percentage of JALFIO member cabin attendants than CCU member cabin attendants applied for the Voluntary Retirement Programme, which made fewer JALFIO member cabin attendants redundant by the age criterion than those of CCU member cabin attendants. That was the reason why 57 CCU member cabin attendants were made redundant, without any discrimination against the union members. The company explains that more than 2,600 JALFIO members in total, in all job areas, applied for the Special Early Retirement Program and the Voluntary Retirement Programme.
- 633.** With regard to the alleged lack of sincere negotiations, the company asserts that it informed the redundancy criteria to each union, and negotiations and consultations with each trade union (including the JFU and the CCU) subsequently took place. Although

some unions made the remark that they were not in the position to discuss on the redundancy criteria, the company continued negotiating and consulting, until the implementation of the redundancy (with some unions, negotiations were maintained even after the implementation of the redundancy). During the negotiation sessions with the JFU and the CCU, the company explained the necessity of the redundancy, possible measures to avoid the redundancy, presented the target reduction number and the redundancy criteria, and negotiated on them, with the JFU 30 times during the period from 27 September 2010 to the end of December 2010 and with the CCU 27 times during the same period. During the negotiations with each union, some unions offered suggestions on the redundancy criteria and the new job-finding programme, which constructively brought amendments to the redundancy criteria and the creation of, or the additions to, the new job-finding programme. The negotiations and consultations with the unions were fruitful. Therefore, in the company's view, the redundancy was implemented after consultations and sincere negotiations with each union.

- 634.** The company further explains why it considers the age criterion for the redundancy as valid and lawful. The redundant employees were first decided based on objective records to show the degree of contribution, i.e. sick leave, suspended period from flight duty ("flight duty suspended period") (for flight crew only), temporary retirement period, conditional period on flight duty ("conditional flight duty period") (for flight crew only) and "personnel and performance evaluation", and only where the aimed number of redundancy is not achieved by such measures, the older age employees were made redundant, that is, the age criterion was applied. The age criterion does not allow any arbitrary treatment by the employer and would ensure fairness in choosing the employees to be redundant, while there seemed no other reasonable criterion acceptable by the employees. That brought the decision to adopt the age criterion. The company further explains, that in the light of future contribution and keeping the younger generations as the future driving force for the reorganization of the company, the age criterion seemed reasonable to adopt.
- 635.** The company recalls that the JFU and the CCU filed on 8 December 2010 a petition seeking remedies with the Tokyo Metropolitan Labour Relations Commission against acts that the trade unions describe as "unfair labour practices by the Enterprise Turnaround Initiative Corporation (ETIC)". The order of remedies was rendered on 3 August 2011. However, the company believed that there were no unfair labour practices by the ETIC, and appealed on 1 September 2011 to the Tokyo District Court requesting the remedies be set aside. The company confirms that the case is currently pending before the court.
- 636.** In the view of the company, the remarks from the ETIC official made to the JFU and the CCU were made from a fund provider's (sponsor) perspective. These remarks, therefore, should not be considered as an act from the employer under section 7 of the Japanese Labour Union Act which prohibits employers' from exercising unfair interference on the employees' union activities. Although the remarks were made by the employer, they were a mere expression of the ETIC's view, not an act of control and interference. The company asserts that for the employees and the employers to express views to each other is essential to build a healthy relationship, and for the employer to inform on the actual status of business or management policy to the employees and ask for understanding and cooperation on the part of the employees, to express opinions, criticism, objection against the management policy of trade unions, or to ask trade unions to avoid exercising the right to dispute. In the company's view, these acts do not themselves constitute unfair interference.
- 637.** The ETIC, having considered the seriously difficult situation of the company, was concerned with the significant risk that where it provided funds, inconveniences might occur by the exercise by the unions of the rights to dispute, which might lead the company

to bankruptcy again. The ETIC decided to convey orally to the JFU and the CCU the concerns as the prospective fund provider, and to inform the situation the company was in, at the working-level negotiation where the employer and the employees officially discuss. The remarks were a candid view of the prospective fund provider on the exercise of the right of dispute and informed on the situation of the company, but not an expression of hatred or slander toward the unions' activities or a forcible interference beyond reasonable extent on the internal decision-making processes of the trade unions. The views of the ETIC were expressed at the working-level negotiations with the trade unions, but not by the measures or manners that would be unfair and unlawful interference on the freedom of association, for example, contacting union members individually by trying to influence them, or forcing employees to listen to the views of the employer.

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

- 638.** *The Committee notes that this case concerns allegations that the dismissal of workers by Japan Airlines International (hereafter the company) was carried out in such a way as to discriminate against workers who are members of certain trade unions. The Committee also notes the alleged intervention of the ETIC in the strike voting procedures of trade unions.*
- 639.** *The Committee notes from both the complainants and the Government the rationale of the rehabilitation process of the company under the programme of the ETIC. The Committee notes in particular that in January 2010, the company, together with another JALS affiliate subsidiary, filed for bankruptcy protection under the Corporate Rehabilitation Law. The Tokyo District Court approved the start of the rehabilitation process on the same day and appointed a bankruptcy administrator as well as the ETIC as bankruptcy administrators. The Committee observes that the ETIC is described as a court-appointed rehabilitation administration organization and a joint-stock corporation which purpose is, with collaboration with financial institutions, to provide support for the revitalization of businesses that have turnaround potential but are carrying excessive debts. The complainants also describe the ETIC as an impartial and neutral organization that aims to revitalize local economies by supporting indebted businesses. The paid-in capital totalling ¥20 billion is half contributed by the Government and the other half came from private sector financial institutions.*
- 640.** *The Committee notes that in January 2010, the ETIC decided to support the company subject to the following prerequisites: the Government provides necessary support continuously; the company asks for the understanding and cooperation of business partners both home and abroad; lease liabilities are secured and the frequent flyer miles held by customers and discount certificates issued to shareholders are honoured so that business operation will continue; and the Government draws up concrete and comprehensive aviation policies expeditiously so that Japan's aviation industry continues to be competitive in the global market. Based on this, the Japanese Government officially announced that it would take necessary measures to ensure the continuation of operation and the turnaround of the corporations, including continuously providing sufficient financial support until the companies have been revitalized and calling for the understanding and cooperation of foreign governments. In August 2010, the administrator and the ETIC, as bankruptcy administrators, submitted their rehabilitation plan with the names of the concerned to the Tokyo District Court. Following the plan, the administrators, in close cooperation with the management of the company, started to take drastic structural reform and encourage the employees to take early retirement and stopped renewing labour contracts of fixed-term employees. It started the second round of early retirement offers targeting cockpit crew, stopped providing training to pilot trainees and encouraged trainees without licences to transfer to ground-based positions or to take special early retirement packages.*

- 641.** *The Committee observes that the ETIC has established a committee that comprises members including outside academics and makes support decisions according to the criteria based on the notification of competent ministers. The Rehabilitation Plan set out the number of employees that would be cut – from 48,781 at the end of the fiscal year 2009 to 32,600 by the end of the fiscal year 2010 in the Japan Airlines group companies, including the three rehabilitated corporations. In September 2010, the company’s goal was to cut a total of 1,520 employees (370 cockpit crew members, 570 cabin attendants, 480 machinists and 100 ground staff members). Since September 2010, the administrator, the ETIC and the company offered two separate early retirement schemes to cockpit and cabin crew. By October 2010, the closing date of applications for the second round of offer, 1,545 employees had applied for the Voluntary Retirement Programme, which exceeded the redundancy goal of 1,520 workers originally set by the company. However, in November 2010, the administrator, the ETIC and the company announced that they would need to shed another 200 employees (110 cockpit crew members and 90 cabin attendants) and it would dismiss a total of 250 workers (200 workers mentioned above plus another 50 taking leave of absence). In December 2010, the administrator, the ETIC and the company notified the CCU and the JFU that they would dismiss 202 crew members (108 cabin attendants including 34 on leave and 74 aged 53 and over, as well as 94 cockpit crew members (those aged 55 and over for pilots and those aged 48 and over for co-pilots) including 4 on leave) on 31 December 2010.*
- 642.** *The Committee notes that, according to the complainants, the dismissal enforced by the administrator, the ETIC and the company was fraught with serious issues infringing standards set by ILO Conventions. The company set the criteria for dismissal, targeting employees in descending order of age until the job reduction targets had been reached. The Committee notes the fact that there are two trade unions that represent cabin crew employed by the company, the CCU and the JALFIO. The complainants question the fact that among 64 cabin attendants dismissed on the basis of age, 57 are CCU members, including six incumbents. Among the dismissed workers are EC members of the CCU and many ex-EC members. The complainants consider that the dismissals constitute the company’s attempt to undermine the CCU under the guise of setting age as the criteria for dismissal, and therefore consider that this clearly prevents workers from exercising freely the right to organize as enshrined in Convention No. 87. Furthermore, among the dismissed cockpit crew members, several were allegedly holding office as officials of their own unions and/or industrial organizations that the JFU is affiliated to. Many among the dismissed had in the past held responsible positions in their respective unions. With regard to cabin crew, the dismissed include all of the three key officials (Chair and two Vice-Chairs) of the CCU as well as members of the EC.*
- 643.** *The Committee also takes note of the company’s assertion that the reason why the members of the CCU who were made redundant by the age criterion amounted to 57, was because more members of the JALFIO had applied for the Voluntary Retirement Programme proposed by the company, which was more advantageous than usual retirement and had the targeted number of redundancy by job category. The Committee takes note of the detailed statistics provided by the company concerning the cabin attendants (either CCU members or JALFIO members) who were to be made redundant by the age criterion or who applied for the Voluntary Retirement Programme. More JALFIO member cabin attendants than CCU member cabin attendants applied for the Voluntary Retirement Programme, which, according to the company, gave rise to fewer JALFIO member cabin attendants being made redundant by the age criterion than those of CCU member cabin attendants. According to the company, that was the reason why up to 57 CCU member cabin attendants were made redundant without any discrimination against the union members.*

644. *The Committee notes that, in this case, collective dismissals appear to have affected a large number of employees, including union leaders and unionized workers of several trade unions, including the CCU, the JFU and the JALFIO. In this regard, the Committee recalls that it has emphasized the advisability of giving priority to the workers' representatives with regard to their retention in employment in case of reduction of the workforce, to ensure their effective protection [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 833]. The Committee requests the Government to ensure that, during the process of workforce reduction, measures are taken in consultation with the parties concerned, for the functioning of the union and the continuing representation of workers. However, in view of the information available, the Committee is not in a position to conclude, as alleged in the complaint, that the age criterion was employed with anti-union intention. Noting that 148 workers dismissed by the company, including members of both the JFU and the CCU, filed a lawsuit against the company before the Tokyo District Court in January 2011 to request confirmation by the court of the existence of legally binding contracts between themselves and the company, the Committee requests the Government to provide information on the outcome of the pending cases in court.*
645. *The Committee further notes that the complainants denounced the alleged absence of sincere negotiations between the company and the trade unions in order to discuss the necessity of dismissal for the purpose of the corporate reorganization. According to the complainant, issues raised as well as points of conflict between the two unions and the company have remained completely unresolved. The complainants consider that sufficient consultation and negotiations with trade unions were all the more essential in considering the very necessity of the dismissal. However, despite repeated requests by the JFU and the CCU, the administrator, the ETIC and the company allegedly refused to disclose detailed financial information that might lead to such discussions with the trade unions.*
646. *The Committee notes the company's statement that it informed the redundancy criteria to each union, and negotiations and consultations with each trade union (including the complainants) subsequently took place. Although some unions made the remark that they were not in the position to discuss on the redundancy criteria, the company continued negotiating and consulting, until the implementation of the redundancy period from 27 September 2010 to the end of December 2010. The company alleges that it negotiated with the JFU 30 times and with the CCU 27 times during that period. It also argues that during the negotiations, some unions offered suggestions on the redundancy criteria and the new job-finding programme, which constructively brought amendments to the redundancy criteria and the creation of, or the additions to, the new job-finding programme. The negotiations and consultations with the unions were fruitful. Therefore, according to the company the redundancy was implemented after consultations and sincere negotiations with each union.*
647. *The Committee observes that discrepancies exist as to the interpretation of the facts between the allegations and the company's reply on the issue of consultation with the trade unions. In this regard, the Committee wishes to emphasize that it is not within its purview to pronounce itself on allegations relating to restructuring programmes, even when these involve collective dismissals, unless they have given rise to acts of anti-union discrimination or interference. However, the Committee stresses the importance of engaging into full and frank consultation with trade unions when elaborating such programmes, since they have a fundamental role to play in ensuring that programmes of this nature have the least possible negative impact on workers. The Committee hopes that the Government will ensure full respect for this principle.*

648. *With regard to the order of remedies rendered on 3 August 2011 by the Tokyo Metropolitan Labour Relations Commission on “unfair labour practices by the Enterprise Turnaround Initiative Corporation (ETIC)”, the Committee requests the Government to provide information on the outcome of the appeal lodged by the company on 1 September 2011 to the Tokyo District Court requesting the remedies being set aside.*

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

649. *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 that during the process of workforce reduction, measures are taken in consultation with the parties concerned, for the functioning of the union and the continuing representation of the workers.*
- (b) *Noting that 148 workers dismissed by the company filed a lawsuit against the company before the Tokyo District Court, in January 2011, to request confirmation by the court of the existence of legally binding contracts between themselves and the company, the Committee requests the Government to provide information on the outcome of the pending cases in court.*
- (c) *The Committee stresses the importance of engaging in full and frank consultation with trade unions when elaborating restructuring programmes, since they have a fundamental role to play in ensuring that programmes of this nature have the least possible negative impact on workers. The Committee hopes that the Government will ensure full respect for this principle.*
- (d) *With regard to the order of remedies rendered on 3 August 2011 by the Tokyo Metropolitan Labour Relations Commission on “unfair labour practices by the Enterprise Turnaround Initiative Corporation (ETIC)”, the Committee requests the Government to provide information on the outcome of the appeal lodged by the company on 1 September 2011 to the Tokyo District Court requesting the remedies be set aside.*

CASE NO. 2907

INTERIM REPORT

**Complaint against the Government of Lithuania**

**presented by**

**the Trade Union of Lithuanian Food Producers**

**supported by**

- **the International Trade Union Confederation (ITUC) and**
- **the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF)**

*Allegations: The complainant organization alleges violations of the right to strike in law and in practice in the enterprise Svyturys-Utenos Alus UAB*

**650.** The complaint is contained in communications from the Trade Union of Lithuanian Food Producers dated 21 October 2011 and 24 April 2012. In communications dated 8 November and 14 November 2011, respectively, the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF), and the International Trade Union Confederation (ITUC), associated themselves with the complaint.

**651.** The Government submitted its observations in a communication dated 14 February 2012.

**652.** Lithuania 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**

**653.** In its communications dated 21 October 2011 and 24 April 2012, the complainant indicates that, on 20 October 2008, the enterprise Svyturys-Utenos Alus UAB, which belongs to the Carlsberg Group, entered into a collective agreement with the joint representation of the in-house trade unions. The terms and conditions, as well as the procedure of bargaining over the revision of wages, were set out in the provisions of the collective agreement. Under the abovementioned provisions, bargaining over the annual revision of wages is supposed to start on the first week of February and the revised wages are set from 1 April. In other words, during the negotiations, revised wages are fixed by way of bargaining where the parties are entitled to present their demands related to pay rise, but not according to some prefixed formula or some specific figures.

**654.** In the minutes of the meeting of 25 January between the employer and the joint representation of the trade unions, it was recorded that "the employer's representatives informed the other party that the revision of wages was not on the employer's agenda". The minutes of the meeting between the employer and the joint representation of the trade unions that took place on 23 February 2011 indicates that "having considered the information from outside and the company's financial figures, which were worse than in the year 2009, the employer's representatives informed the unions again that the revision of wages had not been intended by the employer". The employer repeated even twice that bargaining over wages in 2011 would not take place. Thus, after the bargaining process was over, with the parties failing to reach an agreement, a process of collective dispute was



initiated. On 21 March 2011, the joint representation of the trade unions submitted their demands for higher wage levels to the employer. Only after entering the stage of collective dispute, the employer started making proposals. On 15 April 2011, in the meeting of the joint representation of the trade unions with the employer's administration, only one proposal was made – to reintroduce the sports programme for one year. The employer reiterated again that the levels of wages would not be revised. Under the initiative of the joint representation of the trade unions, the resolution of the collective dispute was continued at the Conciliation Commission.

- 655.** On 17 May 2011, at the Conciliation Commission, the employer put forward a proposal to increase wages by 0.5 per cent or to have the provision of the collective agreement concerning “indexation of wages” interpreted by the court. On 31 May 2011, at the Conciliation Commission, the employer put forward two proposals: either provides the workforce with health insurance; or increase wages by 1.8 per cent. The trade unions suggested only increasing wages by 7.3 per cent. The Conciliation Commission discontinued its work by drawing up a protocol of disagreement.
- 656.** On 9–10 June 2011, a secret ballot on strike action was held in the towns of Utena and Klaipeda. The result of the ballot showed that 58 per cent of the workforce at the production unit were in favour of a strike. Therefore, on 15 June 2011, the employer was notified in writing about a strike which was supposed to start on 23 June 2011.
- 657.** Having received the notice about the strike, the employer applied to the County Court of Klaipeda seeking to have the strike recognized as unlawful and to obtain an injunction against the declaration, organization and conducting of the strike planned by the joint representation of the trade unions until a court decision over its lawfulness was adopted. On 20 June 2011, the Court made a decision to suspend the declared strike for 30 days. The joint representation of the trade unions brought an appeal before the Klaipeda Regional Court over the decision to suspend the strike. On 22 July 2011, the Klaipeda Regional Court upheld the decision to suspend the strike made by the Klaipeda County Court. As the time limit for the suspension of the strike expired on that very day (22 July 2011), the Klaipeda Regional Court adopted a new decision to prolong the suspension of the strike until the case over the lawfulness of the strike had been heard in court. Both decisions made by the Klaipeda Courts are valid and cannot be appealed. In other words, the Klaipeda Regional Court has formed a court precedent in Lithuania over the restriction or suspension of strikes and held that courts have the right to suspend a strike declared at any company for an unlimited period of time or, if the strike is already in progress, to order to stop it.
- 658.** The complainant further indicates that article 81(4) of the Labour Code of the Republic of Lithuania does provide for the possibility for the court to suspend the beginning of the intended strike for a 30-day period, or to delay the strike that is in progress for the abovementioned period, but only “if there is a direct threat that the intended strike will affect the provision of minimum conditions (services) required to meet the essential (vital) needs of the society and this may endanger the human life, health and personal safety.” Thus, according to the complainant, by suspending the strike declared by the joint representation of the trade unions for 30 days on the grounds of this provision, the courts admitted that the production of beer was of vital importance to the public and the strike could put the satisfaction of such an essential need in danger. The complainant further indicates that the Court of First Instance failed to take into consideration the fact that article 77(5) of the Labour Code, which provides that after taking the decision to take strike action (including a warning strike) in railway and public transport, civil aviation, communications and energy enterprises, health care and pharmaceutical institutions, food, water, sewage and waste disposal enterprises, oil refineries, enterprises with continuous production cycles and other enterprises’ cessation of work which would result in grave and

hazardous consequences for the community or human life and health, the employer must be given a written notice of the strike at least 14 days in advance; and that article 80(2) of the Labour Code provides that, during the strike in the enterprises, institutions and organizations specified in article 77(5) of the Code, minimum conditions (services) necessary to meet the immediate (vital) needs of the society must be ensured. In other words, in article 77(5) of the Code, the legislature lists enterprises which provide the essential services necessary to meet public needs. Breweries or food producers are not recognized by the legislature as being among such service providers. Consequently, by adopting the decision to suspend the strike declared by the defendant in the brewery, the courts manifestly violated the provisions of article 81(4) of the Labour Code and perversely limited the legitimate right to strike enshrined in the Constitution.

- 659.** The dispute over the increase of wages and the conciliation procedure lasted for four months. According to the complainant, the employer openly, without even hiding its real intentions by the claim submitted to the court, sought to have the strike suspended until autumn when the beer “high season” would be over. The lengthy negotiations and conciliation procedures over wage levels and the suspension of the strike has been the employer’s aim to render the strike ineffective or even impossible. The complainant further adds that, in Lithuanian jurisprudence, breweries have been recognized as providing essential/vital services to the public. Therefore, one more argument of the Lithuanian courts to apply restrictions on the strike on the employer, and suspend the employees’ strike before it started, was that the enterprise provided essential services.
- 660.** Subsequently, on 5 August 2011, the Klaipeda Regional Court rendered a decision over the lawfulness of the strike (the decision was attached to the complaint). It ruled that the strike was unlawful and that it was prohibited to declare a strike during the term of validity of the collective agreement since the agreement was complied with. The complainant appealed the decision of the Klaipeda Regional Court (5 August 2011) to the Supreme Court. On 6 March 2012, the Supreme Court of the Republic of Lithuania adopted a judgment by which the strike in the enterprise was declared illegal (the decision was attached to the complaint). In addition, the Supreme Court held that the fact that no mutual agreement had been reached between the parties during the negotiations did not render the collective agreement invalid and did not constitute a violation or non-performance of the agreement. Therefore, under article 78(3) of the Labour Code, the strike was prohibited (it is prohibited to declare a strike during the validity of the collective agreement if the agreement has been complied with).
- 661.** However, according to the complainant, collective labour disputes (conflicts of interest) arise not because of the application of subjective/individual rights, but rather it is a problem of different interests of the parties to collective labour relations. Thus, by taking part in the negotiations over pay review and the conciliation procedures over the collective labour dispute, the employer recognized by its actions that the employees had the right to negotiate wage levels annually (that was confirmed by the court of both instances), and in case of failure to agree, initiate a labour dispute which may result in a strike. Apart from the reasoning put forward in the previous decisions, the complainant indicates that the Supreme Court stated additionally in its decision that if the employer had conducted collective bargaining in good faith, i.e. without unreasonable delay and seeking to come to an agreement (in this case the employer had offered to meet 10 per cent of the workers’ demand submitted) and failing to reach a mutual agreement, the employees are deprived of the right to strike. According to the complainant, under such an interpretation of Convention No. 154 by the Supreme Court, the very fact that the negotiations did take place in good faith deprives the workers of the right to strike although no agreement was reached during the negotiations.

## B. The Government's reply

- 662.** In a communication dated 17 February 2012, the Government indicates that, pursuant to article 51 of the Constitution, while defending their economic and social interests, employees shall have the right to strike. The limitations of this constitutional right to strike, as well as the conditions and procedure for its implementation, are established in Chapter 10 of the Regulation of Collective Labour Disputes of the Labour Code. According to article 76 of the Labour Code, strike means a temporary cessation of work by the employees, or group of employees, of one or several enterprises if a collective dispute is not settled or a decision adopted by the Conciliation Commission, the Labour Arbitration or third party, which is acceptable to the employees, is not executed or is improperly executed; when it was not possible to settle a collective labour dispute via a mediation officer, or when the agreement reached through mediation was not fulfilled.
- 663.** The Government further indicates that article 78 of the Labour Code stipulates that it shall be prohibited to declare a strike during the term of validity of the collective agreement if the agreement is complied with. In the court judgment of 5 August 2011, the Klaipeda Regional Court indicated that the collective agreement of 20 October 2008, which was concluded for a period of three years, i.e. until 20 October 2011, is still valid and shall be fulfilled (Collective Agreement, paragraph 1.5, t.1, b.I.16). The failure by the parties to reach a collective agreement concerning wages neither renders the collective agreement invalid nor implies its violation and non-compliance with the agreement. In view of that, the judicial panel ruled that the strike announced by trade unions on 15 June 2011 was unlawful.
- 664.** The Government adds that, pursuant to articles 109 and 114 of the Constitution and articles 2 and 3 of the Law on Courts, while administering justice, the judge and courts shall be independent. In view of the above, the Ministry of Social Security and Labour has no right to comment or try to influence court decisions.

## C. The Committee's conclusions

- 665.** *The Committee recalls that, in the present case, the complainant alleges violations of the right to strike in the brewery industry in law and in practice.*
- 666.** *The Committee notes that, according to the complainant, on 20 October 2008, the complainant and the enterprise Svyturys-Utenos Alus UAB entered into a collective agreement for a period of three years (2008–11). The terms and conditions, as well as the procedure of bargaining over the revision of wages, were set out in the provisions of the collective agreement. Under the abovementioned provisions, bargaining over the annual revision of wages is supposed to start on the first week of February and the revised wages are set from 1 April. After the bargaining process was over, with the parties failing to reach an agreement, a process of collective dispute was initiated. Under the initiative of the joint representation of the trade unions, the resolution of the collective dispute was continued at the Conciliation Commission. After four months of negotiations, the Conciliation Commission discontinued its work by drawing up a protocol of disagreement. On 15 June 2011, the employer was notified in writing about a strike which was supposed to start on 23 June 2011. Having received the notice about the strike, the employer applied to the County Court of Klaipeda, seeking to have the strike recognized as unlawful and to obtain an injunction against the declaration, organization and conducting of the strike planned by the joint representation of the trade unions, until a court decision over its lawfulness was adopted. On 20 June 2011, the Court made a decision to suspend the declared strike for 30 days. The joint representation of the trade unions brought an appeal before the Klaipeda Regional Court over the decision to suspend the strike. On 22 July 2011, the Klaipeda Regional Court upheld the decision to suspend the strike made by the*

*Klaipeda County Court. As the time limit for the suspension of the strike expired on that very day (22 July 2011), the Klaipeda Regional Court adopted a new decision to prolong the suspension of the strike until the case over the lawfulness of the strike had been fully heard in court.*

- 667.** *The Committee notes that, according to the complainant, the final decision of the Klaipeda Regional Court to prolong the legal suspension of the strike, and the final decision of the Klaipeda Regional Court to uphold the first decision of the Klaipeda County Court decision to suspend a strike at the employer for an unreasonable period of time (this decision was provided by the complainant), forms a precedent and constitutes a breach of the application of ILO Conventions. According to the complainant, as a consequence, courts now have the right to suspend a strike declared at any company for an unlimited period of time or, if the strike is already in progress to order to stop it. Furthermore, the Court, de facto, recognized the brewery sector as an essential service.*
- 668.** *The Committee further notes that, according to the complainant, the suspension of the strike for 30 days is based essentially on the assertion by the Government that the production of beer is an essential service and a strike could harm such an essential need (article 81(4), read with articles 77(5) and 80(2), of the Labour Code). The Labour Code of Lithuania already lists the enterprises which provide essential services for public needs and it does not cover breweries. The complainant further adds that, according to the Lithuanian jurisprudence, breweries have been recognized as providing essential/vital services to the public. Therefore, one more argument of the Lithuanian courts to apply restrictions on the strike in the enterprise, and suspend the employees' strike before it started, was that the enterprise provided essential services. Consequently, by adopting the decision to suspend the strike declared by the defendant in the brewery, the courts manifestly violated the provisions of the country's own Labour Code and significantly limited the legitimate right to strike enshrined in the Lithuanian Constitution. The complainant further alleges that the employer, without even hiding its real intentions by the claim submitted to the court, sought to have the strike suspended until the autumn when, as the employer allegedly maintained itself, the beer "high season" would be over.*
- 669.** *The Committee notes that, according to the Government, on 5 August 2011, the Klaipeda Regional Court declared the strike unlawful since the collective agreement of 20 October 2008, which has been concluded for a period of three years, i.e. until October 2011, was still valid and should be fulfilled (Collective Agreement, paragraph 1.5, t.1, b.I.16). The failure by the parties to reach a collective agreement concerning wages neither renders the collective agreement invalid nor implies its violation and non-compliance with the agreement. In view of that, the judicial panel ruled that the strike announced by trade unions on 15 June 2011, was unlawful under article 78(3) of the Labour Code which stipulates that it shall be prohibited to declare a strike during the term of validity of the collective agreement if the agreement is complied with. The Committee notes that the complainant appealed the decision of the Klaipeda Regional Court to the Supreme Court. On 6 March 2012, the Supreme Court upheld the decision of the Klaipeda Regional Court and ruled that the strike in the enterprise was unlawful (the decision was attached to the complaint).*
- 670.** *The Committee must recall that it does not consider beer production to be an essential service in the strict sense of the term. To determine situations in which a strike could be prohibited, the criterion which has to be established is the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 581]. Noting that the complainant indicates that the courts have, here, and in the past, considered breweries as an essential service, the Committee*

requests the Government to indicate whether this has indeed been the case and, if so, to ensure respect for the abovementioned principle.

- 671.** *The Committee notes, however, from the translation of the decision of the Klaipeda Regional Court (attached to the complaint) that the strike declared by the complainant was unlawful for the following reasons:*

*The strike is ultima ratio which can be applied in extreme cases when the parties fail to settle the collective dispute peacefully. The right of employees to strike is enshrined in the Constitution of the Republic of Lithuania; however, according to the Constitution, this right of employees is not absolute – its restrictions, terms and procedure of implementation are stipulated by laws. The Labour Code is such a law, articles 76–85 of Chapter X of the Regulations of Collective Labour Disputes whereof directly regulate the strike, its legal basis and declaration of a strike, restrictions of strikes, the body leading a strike and course of strike, lawfulness of strike and other legal relations in connection to the right to strike. Referring to article 76 of the Labour Code, a strike shall mean a temporary suspension of work by the employees, or a group of employees, of one or several enterprises, or a particular sector in the event of a collective dispute not being settled, or in the event of a failure to perform, or improper performance of, the decision adopted by the Conciliation Commission, Labour Arbitration or third party, which is acceptable to the employees or, in the event of failure, to implement the agreement reached during the mediation process. Hence, a strike as a way of solving collective labour disputes may only be used if the grounds established in the law are met and other possibilities of disputes solving set out in laws are exploited. The collective agreement of 20 October 2008 is concluded for three years, i.e. until 20 October 2011, it is effective and must be complied with (clause 1.5 of the Collective Agreement, volume 1, case page 16). A failure to reach a common agreement on wages between the parties by way of negotiations shall not make the collective agreement ineffective and shall not imply the breach or non-compliance therewith. According to article 78, paragraph 3, of the Labour Code, it shall be prohibited to call a strike during the term of validity of the collective agreement if this agreement is complied with. Due to the circumstances specified above, the judicial panel concludes that the strike declared by the trade union on 15 June 2011 is unlawful (article 78, paragraph 3, of the Labour Code).*

- 672.** *The Committee notes that the same reasoning was followed by the Supreme Court. In its reasoning, the Court indicates:*

*Under the given circumstances the Judicial Panel of the Court of Cassation [Klaipeda Regional Court] holds that there are no grounds to draw a conclusions that the provisions of the Collective Agreement signed by the parties had been breached since the employer had not violated his assumed obligation to revise workers' wages once per year and take part in negotiations over that in good faith. The court of appeal instance rightly established that the collective agreement had been adhered to ... The arguments of the Cassation Appeal concerning the violation of the Collective Agreement has been based on the improper interpretation of the provisions of the Collective Agreement, i.e., by the submission that by Clause 3.3.4 of the Remuneration Regulations, the employer committed himself to raise wages every year by no less than the inflation rate. After the Court of Cassation having properly interpreted the provision of the Collective Agreement concluded by the parties and established that there is no unconditional duty of the employer to increase wages every year provided by the Agreement, having found no proof of bad faith on the plaintiff's side during the bargaining over revision of wages, there are no grounds to conclude that the Collective Agreement had been violated.*

- 673.** *The Committee observes that the Court established that the strike was unlawful because it is prohibited to call a strike during the term of validity of a collective agreement if the agreement is complied with under article 78(2) of the Labour Code. According to the judicial panel, the dispute between the parties concerns the interpretation of the collective agreement, not its application. In this regard, the Committee wishes to recall that the solution to a legal conflict, as a result of a difference in interpretation of a legal text, should be left to the competent courts. The prohibition of strikes in such a situation does*

*not constitute a breach of freedom of association. If strikes are prohibited while a collective agreement is in force, this restriction must be compensated for by the right to have recourse to impartial and rapid mechanisms, within which individual or collective complaints about the interpretation or application of collective agreements can be examined; this type of mechanism not only allows the inevitable difficulties which may occur regarding the interpretation or application of collective agreements to be resolved while the agreements are in force, but also has the advantage of preparing the ground for future rounds of negotiations, given that it allows problems which have arisen during the period of validity of the collective agreement in question to be identified [see **Digest**, *op. cit.*, paras 532 and 533]. Given that the collective agreement was not provided to the Committee, the Committee considers that it is not in a position to determine whether the issue in question was a matter of rights dispute (as decided by the Court) or of an interest dispute (as contended by the complainant) nor whether specific machinery had been provided in the agreement for such a dispute and whether it had been used. The Committee therefore requests the complainant organization to provide a copy, in English if possible, of the relevant collective agreement.*

**674.** *Noting that, according to the Court, the duration of the collective agreement was from 20 October 2008 to 20 October 2011, the Committee trusts that the union and the employer have since engaged in good faith negotiations in full conformity with the national legislation and the principles of freedom of association and requests the Government to keep it informed of developments in this regard.*

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

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

- (a) Noting that the complainant indicates that the courts have, here, and in the past, considered breweries as an essential service, the Committee requests the Government to indicate whether this has indeed been the case and, if so, to ensure respect for the principles set out in its conclusions.*
- (b) The Committee requests the complainant organization to provide a copy, in English if possible, of the relevant collective agreement.*
- (c) Noting that, according to the Court, the duration of the collective agreement was from 20 October 2008 to 20 October 2011, the Committee trusts that the union and the employer have since engaged in good faith negotiations, in full conformity with the national legislation and the principles of freedom of association and requests the Government, to keep it informed of developments in this regard.*

CASE NO. 2887

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

**Complaint against the Government of Mauritius  
presented by  
the Mauritius Employers' Federation (MEF)  
supported by  
the International Organisation of Employers (IOE)**

*Allegations: The complainant organization alleges that the reference of 21 issues which could not be resolved during the collective bargaining process to the National Relations Board by the Minister of Labour, Industrial Relations and Employment for a partial review constitutes a clear violation of Article 4 of Convention No. 98*

- 676.** The complaint is contained in communications from the Mauritius Employers' Federation (MEF) dated 15 July and 1 September 2011. In a communication dated 26 July 2011, the International Organisation of Employers (IOE) associated itself with the complaint.
- 677.** The Government sent its observations in a communication dated 10 February 2012.
- 678.** Mauritius 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**

- 679.** In its communications dated 15 July and 1 September 2011, the complainant indicates that the MEF is the national employer's organization of Mauritius representing all sectors of the Mauritian economy. The Mauritius Sugar Producers' Association (MSPA) is a key constituent of the MEF and one of the main trade unions representing the interests of employers within the sugar industry. The complainant further indicates that the complaint is lodged on behalf of the MSPA.
- 680.** The MSPA on behalf of its members, i.e. sugar estates, had started negotiations with the trade unions representing agricultural and non-agricultural workers (the Sugar Industry Labourers' Union, Union of Artisans of the Sugar Industry, Artisans' and General Workers' Union and the Organization of Artisans' Unity, hereafter the "trade unions") with a view to establishing a new collective agreement. However, in view of the fact that both parties could not agree on the quantum of wage compensation to be granted to the workers, four workers' organizations in the sugar industry reported in March 2010, a labour dispute against the MSPA to the Commission for Conciliation and Mediation (CCM), a dispute resolution institution. As provided in the legislation, the CCM offered its services for conciliation and mediation but was unable to bring the parties to agree on a new package for terms and conditions of employment, and in particular in respect of the quantum on wage compensation. In fact, in its report, the CCM recommended the two parties to refer the case for joint voluntary arbitration to the Employment Relations

Tribunal (ERT) or to an independent arbitrator as provided in the Employment Relations Act 2008. The trade unions refused to jointly refer the case for voluntary arbitration and threatened to organize a general strike in the industry. In view of the situation prevailing in the sugar sector, the Ministry of Labour, Industrial Relations and Employment then invited the MSPA and the trade unions to pursue negotiations under its aegis following which an agreement was reached. A valid collective agreement was thus signed on 23 June 2010 for a duration of four years.

- 681.** The agreement to negotiate (attached to the complaint) signed on 15 June 2010 with respect to a 20 per cent salary increase, contains the following clause: “Notwithstanding this present agreement, the parties hereby also agree that they will include the issues raised before the CCM as contained in the report in a new collective agreement. Negotiations will start as from 16 June 2010 under the aegis of the Ministry of Labour, Industrial Relations and Employment.” According to the complainant, this clause clearly spells out that the issues raised before the CCM were to be discussed during new negotiations carried out under the aegis of the Ministry of Labour, Industrial Relations and Employment. Following this new round of negotiations, a collective agreement was signed on 23 June 2010 which includes the following in the preamble: “Further to (i) the agreement reached between the parties on 15 June 2010 on the salary increase of 20 per cent in presence of the Minister of Labour, Industrial Relations and Employment; and (ii) discussion held under the aegis of the Minister of Labour, Industrial Relations and Employment to negotiate on issues raised before the Commission for Conciliation and Mediation, the following have been agreed by the parties.” According to the complainant, the above shows that, following the negotiations, a collective agreement was signed by the parties after issues raised before the CCM were considered. In the process of these negotiations, issues upon which agreement was reached were retained and consigned in a collective agreement, while others on which no agreement was possible, were jointly set aside. Furthermore, all collective agreements signed by the parties contain the following clause: “3. Application of the Agreement. 3.1 Existing Terms and Conditions of Employment (i) prescribed by the Sugar Industry (Non-Agricultural) Workers (Remuneration Orders) Regulations 1985; (ii) agreed upon by the parties as per the *Protocole d’Accord* signed on 1 June 1994; and (iii) stipulated in the different awards, interpretation or variation orders of the Permanent Arbitration Tribunal (PAT); which are not covered by the present agreement, shall continue to be binding on the parties.” According to the complainant, the foregoing clause sheds light on the true intentions of the parties when the collective agreements were signed on the application of the said agreements. In fact, a proper construction of the clause shows that the intention of the parties, by signing the collective agreement, was to bring finality to the ongoing negotiations and that certain existing terms and conditions found in three distinct set of sources, as mentioned above, would continue to be binding on the parties together with those specified in the collective agreement.
- 682.** In August 2010, the National Remuneration Board (NRB) which is the wage-fixing machinery established to meet the Government’s obligation under Conventions Nos 26 and 99, issued a notice informing that the Minister of Labour, Industrial Relations and Employment had referred the relevant Remuneration Orders applicable to workers of the sugar industry to be reviewed partially, and invited interested parties to submit representation on the 21 issues which could not be resolved during the collective bargaining process.
- 683.** According to the complainant, the reference to the NRB for a partial review constitutes a serious departure from the principle of promotion of sound and harmonious industrial relations and a clear violation of Article 4 of Convention No. 98. Such a reference is also incompatible with the spirit of collective bargaining as embodied in the national legislation. Furthermore, this act constitutes a wrong signal to employers to engage in collective bargaining, if following the conclusion of valid collective agreements, the



minimum wage fixing machinery is used unilaterally to review terms and conditions of employment in organized sectors. The recommendations which the NRB has been requested to submit do not only concern minimum wage rate but also affect terms and conditions of employment. According to the complainant, there is no doubt that the scope of the partial review of the sugar industry as requested by the Minister of Labour, Industrial Relations and Employment will vary the duly signed collective agreement in such a manner and as a result of the occurrence of such circumstances which were not provided in the collective agreement. According to the complainant, the administrative decision to refer unavowed issues to the NRB requesting it to make recommendations has put into peril the newly signed collective agreement and goes against the principle of collective bargaining. The complainant contends that the NRB cannot rely on the referral made by the Minister to make recommendations on terms and conditions of employment that would modify the collective agreement signed between the MSPA and the trade unions.

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

- 684.** In its communication dated 10 February 2012, the Government indicates that the dispute did not concern all the workers in the sugar industry. It in fact related to the workers employed by the MSPA members only and did not concern the workers employed by members of the Cane Growers Association and small planters.
- 685.** The Government adds that there is nothing in the collective agreement which provides either that the issues on which no agreement was reached were to be set aside, or that the signing of the agreement was to bring finality to the negotiations. In addition, the decision to refer the issues on which no agreement could be reached to the NRB, has not put into peril the newly signed collective agreement as the parties are still adhering to the provisions of the agreement. The reference to the NRB of the issues on which no agreement could be reached, in no way undermines collective bargaining, and did not constitute a serious and unreasonable departure from the principle of sound and harmonious industrial relations. The reference to the NRB for regulation or improvement of wages and conditions of employment under Sub-part C of Part VIII of the Employment Relations Act 2008 in a particular sector of employment does not necessarily mean that all the demands of the workers will be acceded to. Section 93 of the Act provides that where the Minister receives a recommendation from the NRB, he may either make regulations for implementing the recommendation or reject the recommendation and make no regulations or make such regulations as he thinks fit. According to the Government, it is premature for the MSPA to pre-empt, at this stage, what would be the recommendation of the NRB, and even if the recommendation is in favour of the workers, whether the Minister will implement the recommendation. The NRB has not yet submitted its recommendation to the Minister.
- 686.** The Government adds that the MSPA sought leave from the Supreme Court for an application for judicial review to quash, reverse and set aside the decision of the Minister to refer the 21 issues in dispute to the NRB, and it has still not been determined by the Supreme Court.
- 687.** The Government further indicates that the trade unions concerned have submitted their views concerning the complaint in a joint communication dated 7 December 2011 (attached to the Government's reply). The trade unions are strongly opposed to the views expressed by the complainant and are of the view that the facts have been misrepresented. In essence, they consider that the referral of the issues on which no agreement could be reached to the NRB by the Minister of Labour, Industrial Relations and Employment is reasonable, just and fair inasmuch as:

- (i) the issues do not, in any circumstances, alter or modify the issues agreed upon and signed within the existing collective agreement; the 21 issues referred for review to the NRB are precisely those issues not found within the scope of the collective agreements;
- (ii) issues not covered in a collective agreement can be varied, changed or altered by the proper mechanism provided by the Employment Relations Act 2008 – the Act only precludes the reporting of a labour dispute between the same parties within a period of six months, or precludes the reporting of a labour dispute on the same issues within a period of 24 months;
- (iii) the referral was the result of a package negotiated to bring industrial peace, economic justice and to end the recourse of legal strike action by the unions; and
- (iv) the referral was to the informed knowledge of the MSPA. The CCM made recommendation to that effect and the decision of the Minister was widely circulated in the media. Yet at no time during negotiations with the Minister, did the MSPA raise any formal objection to this referral. This is further entrenched by the fact that the sugar companies, members of the MSPA, have duly participated in the submission of memoranda and hearing before the NRB after the matter was referred by the Minister.

**688.** The trade unions add that the legal framework regulating all wages and all the terms and conditions of service of all employees of the sugar industry, which comprises presently some 13,000 labourers and artisans, are not regulated through a single set of collective agreements. They are regulated by 14 different pieces of legislation or legal instruments. The latest set of collective agreements are roughly regulating only 23 per cent of the issues covered by the 14 legal instruments regulating the minimal terms and conditions of service of some 5,500 labourers and artisans employed by the MSPA members.

**689.** According to the trade unions, the position taken by the complainant is tantamount to arguing that the 14 legal instruments, outside the scope of the latest collective agreements, are not subject to modification during the duration of the collective agreements and any modification of any of the regulative instruments would “put into peril”, “modify” or “vary” the existing collective agreement. However, a collective agreement does not, and cannot, preclude the future amendments of the statutory minimal conditions defined by any laws, whether related to terms and conditions of service of workers or laws related to wealth distribution benefitting the shareholders of companies. The trade union indicates that the paragraph quoted by the complainant was only inserted by the trade unions as a precautionary and clarity clause, to ensure that all other conditions of service found in other legal instruments would continue to be in force. In any case, it has no legal relevance, as laws are meant to be enforced. According to the trade unions, it is an abuse of interpretation and extrapolation to say that the “true intention” of the unions was to mean that minimal conditions foreseen by laws could not be changed during the duration of the collective agreement. The signature of any collective agreement does not preclude the possibility of new labour disputes to arise, and potentially leading to the signature of new collective agreements during the duration of an existing one. The law only precludes the reporting of a labour dispute between the same parties on the same issues for a duration of two years. At any time labour disputes can arise on any other issues. Thus, issues not covered in a collective agreement can be varied, changed or altered, by the proper mechanism provided for in the law. The signature of a collective agreement on some issues can never preclude changes on other issues. The signing of a collective agreement, as being argued by the complainant, does not bring “finality” as regards the potential modification of other existing terms and conditions, found in other legal instruments outside the collective agreement itself.

- 690.** The trade unions further indicate that the referral by the Minister was the result of a package negotiated by the State, under the supervision of the Prime Minister, to bring industrial peace, economic justice and end the recourse of legal strike action by the unions. This intervention of the Prime Minister was made on the eve of the day of legal strike ballots scheduled by the trade unions. The Prime Minister had two options: either, to eventually ask for an order from the Supreme Court to stop the continuation of the legal strike or to use his good office to try to find a reasonable settlement to a major industrial conflict and obtain industrial peace. The Prime Minister opted for the second option. The basis of the package for the settlement itself was not an imposed one, nor did it come out of the blue. It was certainly not a plot. It was all public, in the media and done to the informed knowledge of the MSPA. The package was based on recommendations made by the conciliatory mechanism, the CCM, during its proceedings. The package was a twofold commitment: (i) the MSPA and the trade unions will sign a collective agreement on issues agreed upon and recommended by the CCM; (ii) the State will refer the 21 issues not agreed upon at the level of the CCM to the NRB to make appropriate recommendations. Therefore, the trade unions never “jointly set aside other issues on which no agreement was possible”, as indicated by the complainant. The trade unions add that, at no time, during the negotiations at the office of the Ministry of Labour, did the MSPA raise a formal objection to this referral, in the presence of the trade unions. Should it have been the case, the trade unions would have never signed any of the collective agreements.
- 691.** The trade unions add that after analysing all the objective facts and proposals made by a conciliatory body, the State was of the view that in addition to the limited collective agreements, an independent tripartite board (the NRB) should look into the 21 issues concerning terms and conditions of service of workers and make proper recommendations. The trade unions indicate that the labourers’ and artisans’ Remuneration Orders (to which reference for changes was decided by the Minister) have not been fully reviewed since more than a quarter of a century and since then, there have been major transformations and mutations in the sector. According to the trade unions, the referral to the NRB is not a departure by the Minister from what is prescribed in Section 91 of the Employment Relations Act 2008, nor is it a departure from the process of collective bargaining as provided for in Article 4 of Convention No. 98.
- 692.** Finally, the trade unions indicate that the negotiations itself were characterized by the disrespect of collective bargaining by the MSPA. According to the trade unions, the MSPA refused to undertake collective bargaining for more than a year – it imposed illegal pre-conditions during the collective bargaining process, it refused access to information during the collective bargaining, it tried to undermine collective bargaining at industry level; and it used lies to undermine the principle of collective bargaining.

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

- 693.** *The Committee recalls that this case concerns allegations that the reference of 21 issues which could not be resolved during the collective bargaining process to the NRB by the Minister of Labour, Industrial Relations and Employment for a partial review, constitutes a serious departure from the principle of promotion of sound and harmonious industrial relations and a clear violation of Article 4 of Convention No. 98.*
- 694.** *The Committee notes that according to the complainant, such a reference is also incompatible with the spirit of collective bargaining as embodied in the national legislation and that this Act constitutes a wrong signal to employers to engage in collective bargaining, if following the conclusion of valid collective agreements, the minimum wage fixing machinery is used unilaterally to review terms and conditions of employment in organized sectors. According to the complainant, the recommendations which the NRB has been requested to submit do not only concern minimum wage rate but also affect terms and*

conditions of employment. According to the complainant, there is no doubt that the scope of the partial review of the sugar industry, as requested by the Minister of Labour, Industrial Relations and Employment, will vary the duly signed collective agreement in such a manner and as a result of the occurrence of such circumstances which were not provided in the collective agreement. According to the complainant, the administrative decision to refer unavowed issues to the NRB requesting it to make recommendations has put into peril the newly signed collective agreements and goes against the principle of collective bargaining. The complainant contends that the NRB cannot rely on the referral made by the Minister to make recommendations on terms and conditions of employment that would modify the collective agreement signed between the MSPA and the trade unions.

**695.** *The Committee however notes that the Government and the trade unions are strongly opposed to the views expressed by the complainant and are of the view that the facts have been misrepresented. The Committee notes that both of them states that:*

- (i) there is nothing in the collective agreement which provides either, that the issues on which no agreement was reached were to be set aside, or that the signing of the agreement was to bring finality to the negotiations;*
- (ii) the decision to refer the issues on which no agreement could be reached to the NRB has not put into peril the newly signed collective agreement as the parties are still adhering to the provisions of the agreement;*
- (iii) the issues do not, in any circumstances, alter or modify the issues agreed upon and signed within the existing collective agreement; the 21 issues referred for review to the NRB are precisely those issues not found within the scope of the collective agreements;*
- (iv) the reference to the NRB of the issues on which no agreement could be reached in no way undermines collective bargaining and did not constitute a serious and unreasonable departure from the principle of sound and harmonious industrial relations; and*
- (v) the reference to the NRB for regulation or improvement of wages and conditions of employment under Sub-part C of Part VIII of the Employment Relations Act 2008, in a particular sector of employment (section 91 of the Act), does not necessarily mean that all the demands of the workers will be acceded to. Section 93 of the Act provides that where the Minister receives a recommendation from the NRB, he may either make regulations for implementing the recommendation or reject the recommendation and make no regulations or make such regulations as he thinks fit. It is premature for the MSPA to pre-empt, at this stage, the recommendation of the NRB and even if the recommendation is in favour of the workers, whether the Minister will implement the recommendation. The NRB has not yet submitted its recommendation to the Minister.*

**696.** *In addition, the Committee notes that the trade unions further indicate that:*

- (i) the referral was the result of a package negotiated to bring industrial peace, economic justice and to end the recourse of legal strike action by the unions; the package was based on recommendations made by the conciliatory mechanism, the CCM, during its proceedings and was a twofold commitment: (a) the MSPA and the trade unions would sign a collective agreement on issues agreed upon and recommended by the CCM; (b) the State would refer the 21 issues not agreed upon at the level of the CCM to the NRB to make appropriate recommendations;*

- (ii) *the referral was to the informed knowledge of the MSPA. The CCM made a recommendation to that effect and the decision of the Minister was widely circulated in the media. Yet at no time during negotiations with the Minister did the MSPA raise any formal objection to this referral. Should it have been the case, the union would never have signed any of the collective agreements. This is further entrenched by the fact that the sugar companies, members of the MSPA, have duly participated in the submission of memoranda and hearing before the NRB after the matter was referred by the Minister;*
- (iii) *issues not covered in a collective agreement can be varied, changed or altered by the proper mechanism provided by the Employment Relations Act 2008 – the Act only precludes the reporting of a labour dispute between the same parties within a period of six months, or precludes the reporting of a labour dispute on the same issues within a period of 24 months; and*
- (iv) *the legal framework regulating all wages and all the terms and conditions of service of all employees of the sugar industry, which comprises presently some 13,000 labourers and artisans, are not regulated through a single set of collective agreements, they are regulated by 14 different pieces of legislation or legal instruments. The latest set of collective agreements are roughly regulating only 23 per cent of the issues covered by the 14 legal instruments regulating the minimal terms and conditions of service of some 5,500 labourers and artisans employed by the MSPA members.*

**697.** *The Committee wishes to emphasize that the overall aim of Article 4 of Convention No. 98 is the promotion of good faith collective bargaining with a view to reaching an agreement on terms and conditions of employment. The agreements so concluded must be respected and must be able to establish conditions of work more favourable than those envisaged in law, indeed, if this were not so, there would be no reason for engaging in collective bargaining. Public authorities should refrain from any interference which would restrict the right to bargain freely or impede the lawful exercise thereof. Moreover, collective bargaining if it is to be effective, must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 881 and 926]. In one case it was alleged that Article 4 of Convention No. 98 had been infringed because, when lengthy negotiations had reached a deadlock, the Government gave effect to the claims of the union by an enactment. The Committee pointed out that such an argument would, if carried to its logical conclusion, mean that, in nearly every country where the workers were not sufficiently strongly organized to obtain a minimum wage, and that this standard was prescribed by law, Article 4 of Convention No. 98 would be infringed. Such an argument would clearly be untenable. If a government, however, adopted a systematic policy of granting by law what the unions could not obtain by negotiation, the situation might call for reappraisal. Moreover, in a case in which general wage increases in the private sector were established by law and which were added to the increases agreed upon in collective agreements, the Committee drew the Government's attention to the fact that harmonious development of industrial relations would be promoted if the public authorities, in tackling problems relating to the loss of the workers' purchasing power, were to adopt solutions which did not entail modifications of what had been agreed upon between workers' and employers' organizations without the consent of both parties. The harmonious development of labour relations would be facilitated if the public authorities, when dealing with the problems concerning the workers' loss of purchasing power, adopted solutions which did not involve modifications of agreements without the consent of the parties [see **Digest**, *op. cit.*, paras 1044, 1045 and 1010].*

**698.** *In the present case, the Committee notes that a collective agreement was signed between the complainant and the trade unions on 23 June 2011, whereby the parties agreed to a 20 per cent salary increase. The Committee understands that there is a divergence of view as to whether this agreement brought to a conclusion the 21 issues that had previously been discussed and that the Minister decided to refer to the NRB under Article 91 of the Employment Relations Act 2008 and following the recommendation of the CCM. In these circumstances, the Committee considers that it is not in a position to determine whether the referral made by the Minister was actually in contradiction of the agreement in force or even if it concerned the same group of workers, as the Government states that these questions go beyond those covered by the scope of the collective agreement and concern all workers of the sugar industry. The Committee observes that recourse to bodies appointed for the settlement of disputes should be on a voluntary basis [see **Digest**, op. cit., para. 932.]*

**699.** *In view of the contradictory versions of the complainant, the Government and the trade unions concerned and with respect to the effect on the collective agreements of the action taken by the Minister to refer the 21 issues that could not be resolved during the collective bargaining process to the NRB, and the legality of such action, and noting that the complainant sought leave from the Supreme Court for an application for judicial review to quash, reverse and set aside the decision of the Minister which has still not been determined by the Court, the Committee expects that the abovementioned principles will be brought to the attention of the Court and requests the Government to provide a copy of the court judgment as soon as it is handed down.*

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

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

- (a) The Committee draws the attention of the Government to the principles set out in the above conclusions including the constraints which apply to public authorities when intervening in the process of collective bargaining between the social partners.*
- (b) In view of the contradictory versions of the complainant, the Government and the trade unions concerned and with respect to the effect on the collective agreements of the action taken by the Minister to refer the 21 issues that could not be resolved during the collective bargaining process to the NRB, and the legality of such action, and noting that the complainant sought leave from the Supreme Court for an application for judicial review to quash, reverse and set aside the decision of the Minister which has still not been determined by the Court, the Committee expects that the abovementioned principles will be brought to the attention of the Court and requests the Government to provide a copy of the court judgment as soon as it is handed down.*

CASE NO. 2901

DEFINITIVE REPORT

**Complaint against the Government of Mauritius  
presented by  
the Federation of United Workers (FTU)**

***Allegations: The complainant organization alleges anti-union practices by Chue Wing & Co. Ltd (ABC Foods) against the Syndicat des Travailleurs des Etablissements Privés (STEP), including intimidation to withdraw from the trade union, anti-union campaign, prohibition to hold trade union meetings, surveillance arrangements and refusal by the management of professional assistance to union members***

**701.** The complaint is contained in communications dated 10 October and 4 November 2011 from the Federation of United Workers (FTU).

**702.** The Government sent its observations in a communication dated 28 February 2012.

**703.** Mauritius 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 allegation**

**704.** In a communication dated 10 October 2011, the FTU alleges that the Chue Wing & Co. Ltd – also called ABC Foods – which is a private company trading in various food products for local market and exportation, carried out anti-union activities against its affiliate trade union, namely the Syndicat des Travailleurs des Etablissements Privés (STEP), recognized by the said company for more than 18 years. The complainant organization indicates that the anti-union practices started in December 2010, further to the external appointment of a new general manager and sales manager at the company.

**705.** The FTU further indicates that the anti-union practices include the following:

- intimidation of workers to withdraw themselves from the trade union by the signing of a resignation letter prepared by the company. In a communication of 4 November 2011, the complainant organization asserts that the sales manager of the company admitted having dictated in his own office the resignation letter of a union member, namely Mr Daniel Jean Louis;
- anti-union campaign via a press article placed on the company's noticeboard in the workers' mess room;
- prohibition to hold trade union meetings in the workers' mess room, which led the trade union to file a complaint against the company before the Employment Relations Tribunal;

- surveillance of the workers' mess room by the installation of a camera despite a formal protest by the trade union in the presence of the Mauritius Employers Federation (MEF);
- refusal from the management to provide assistance to union members in relation to working condition issues.

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

- 706.** In its communication of 28 February 2012, the Government states that the issues raised by the FTU were discussed in various tripartite meetings held at the level of the Conciliation and Mediation Division of the Ministry of Labour, Industrial Relations and Employment. The Government provides the outcome of the Ministry's enquiry and intervention.
- 707.** With regard to the alleged intimidation of workers to withdraw themselves from the trade union by the signing of a resignation letter prepared by the company, the Government indicates that the company denied having intimidated or coerced any worker to withdraw from the trade union, however the sales manager admitted that he provided assistance to only one union member, at his request, to write his resignation letter. The Government indicates in this regard that the management was verbally cautioned on the relevant provisions of the Employment Relations Act pertaining to the basic workers' rights to freedom of association and protection of workers' trade unions against acts of interference. The Government further indicates that an investigation conducted by officers of the Ministry of Labour found that none of the former members of the union have been coerced to withdraw from the STEP.
- 708.** With regard to the alleged anti-union campaign, the Government indicates that the management admitted that it placed on the noticeboard of the workers' mess room copies of press articles on the conference given by Mr Atma Shanto, representative of the STEP, in order to apprise all its 120 employees, including the 24 union members, of the "boycott" campaign set by the STEP. At the request of the Ministry of Labour, the management withdrew these articles from the noticeboard.
- 709.** Concerning the alleged prohibition to hold trade union meetings on the premises of the company, the Government states that the management had requested Mr Shanto to wear a visitor's pass for identification purposes, when proceeding to hold any meeting on the premises. The latter refused to wear the visitor's pass and the union referred the matter to the Employment Relations Tribunal (ERT). However, the ERT resolved this issue by concluding that Mr Shanto had to wear a visitor's pass to get access to the workplace, since he had already held several meetings with the union members.
- 710.** Concerning the surveillance arrangements denounced by the complainant, the Government reports that, according to the company, the introduction of cameras was decided in order to ensure the security of the enterprise following threats made by the trade union. Cameras would be installed at different places including the workers' mess room.
- 711.** Concerning the disclosure of union membership to the management, the Government indicates that the trade union itself had requested that matters pertaining to its members be addressed to the union and not to individual members. In the management perspective, it is specifically in order to abide by this request of the STEP that the employees were asked if they were members of the trade union.
- 712.** The Government added to its own reply observations received from the MEF as well as the company's views on the issues raised by the complaint, communicated to the MEF.



- 713.** In a communication dated 16 January 2012 addressed to the Government, the MEF observes that the Employment Relations Act (Act No. 32 of 2008) provides adequate protection regarding trade union membership rights. More generally, the national legislation embodies the principles of freedom of association as laid down in the ILO Conventions and provides a mechanism to address any alleged infringements of rights. The MEF regrets that the complainant did not exhaust the remedy statutorily provided in the domestic law before presenting the complaint before the Committee. The MEF illustrates its point by referring to the ruling of the ERT on the complaint made by the representative of the STEP. The Tribunal did act promptly and concluded its proceedings in a timely manner to allow the aggrieved party to pursue its trade union activities.
- 714.** The company provided detailed observations on each of the issues raised in the complaint. In the first place, the company acknowledged that the STEP was granted voluntary recognition some 18 years ago and that there has been a long-standing partnership over the years. According to the company, 24 workers were members of the union out of a total of 121.
- 715.** With regard to the alleged intimidation of workers to withdraw themselves from the trade union by the signing of a resignation letter prepared by the company, the company denies the affirmation of the FTU that workers were intimidated to withdraw from the STEP. The withdrawal letters were written by the workers themselves without any coercion since they withdrew from the union at their own free will. With regard to the additional information submitted by the FTU on the case of Mr Daniel Jean Louis, the company pointed out that the meeting referred to by the union was in fact a disciplinary committee set up under section 38(2)(ii) of the Employment Rights Act 2008, so as to afford Mr Daniel Jean Louis an opportunity to answer charges of failure to resume duty on 10 August 2011 and/or report to the sales manager by 22 August 2011. The company indicates that absences from work without good and sufficient cause are deemed to be a unilateral breach of contract of employment as per law (the company provided a copy of the letter of charges). The company added that, as required under section 38(4) of the Employment Rights Act, Mr Jean Louis was represented by Mr Shanto, representative of the STEP, during the proceedings of the disciplinary committee. On the basis of the report of the disciplinary committee which found the acts, doings and/or omissions of Mr Jean Louis as tantamount to serious misconduct, the company terminated his employment on 18 October 2011. The company adds that Mr Jean Louis withdrew as a member of the union of his own volition on 29 June 2011, and rejoined the union as a member on 1 August 2011.
- 716.** With regard to the alleged anti-union campaign, the company explains that it had no ulterior and sinister motive when it affixed a copy of the press article dated 2 June 2011 on the noticeboard situated in the workers' mess room. It only wanted to draw the attention of its workers to the acts and doings of a trade union which led to the closure of an enterprise. The press article was subsequently removed from the noticeboard. The company asserts that in a press conference, Mr Shanto threatened to boycott its products. The secretary of the union phoned the residence of the general manager of the company requesting his residential address. In response to such a threat which could adversely affect its commercial interest, the company served a *mise en demeure* formally prohibiting Mr Shanto from launching any such illegal campaign of boycott. However, in spite of the *mise en demeure* served to Mr Shanto in August 2011, the latter addressed a letter on 31 October 2011 to the CEO of a company producing dry noodles, for which the company is the main distributor, informing him of the trade union's decision to undertake a public local campaign for a boycott of the products of the company.
- 717.** Concerning the alleged prohibition to hold trade union meetings on the premises of the company, the general manager stated before the ERT that he had no intention to unreasonably deny Mr Shanto entry to the workers' mess room to hold trade union

meetings with its members, provided Mr Shanto agreed, as per the visitor's policy of the company, to sign in and wear the visitor's pass when he stayed on the company's premises and to return it to the receptionist before departure. Since the Vice-President of the ERT informed Mr Shanto that he was a visitor when he went to the employer's premises, the latter withdrew the case from the ERT. This matter is now considered by the company to be settled.

- 718.** Concerning the surveillance arrangements denounced by the complainant, the company admits that 24 cameras, including one in the mess room, had been installed on the premises for safety and security reasons. The mess room hosts the individual lockers of workers and a refrigerator where workers may store their meals and therefore needs constant surveillance. Other amenities without any camera are provided to the workers as changing rooms. The management asserts that arrangements have been made for a covered space in the company premises where both trade union and management meetings can be held. Management would also use the covered space for holding meetings with its workers.
- 719.** Finally, with regard to the disclosure of union membership to the management, the company explains that the management had always had an attentive ear to complaints raised by its workers irrespective of whether or not they are members of the trade union. However, according to the company, Mr Shanto misconstrued this attitude of the management to resolve workers' complaints and during a meeting held before the Commission for Conciliation and Mediation (CCM) on 18 May 2011 he complained that management was discussing terms and conditions of employment directly with individual workers who are members of the trade union. As a result, the Commission advised the management that it should discuss with the trade union issues concerning union members. Consequently, when a worker calls on the management, he is asked whether or not he is a member of the trade union, this to ensure compliance with the advice of the CCM.

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

- 720.** *The Committee observes that in this case the complainant alleges anti-union practices by Chue Wing & Co. Ltd (ABC Foods), a private company trading in various food products for local market and exportation, against its affiliate, the STEP. The Committee notes that, according to the allegations, the anti-union practices against the STEP, which was recognized by the company for more than 18 years, started in December 2010, further to the external appointment of a new general and sales manager at the company.*
- 721.** *The Committee notes that, according to the complainant, the anti-union practices by the management include the intimidation of workers to withdraw themselves from the trade union by the signing of a resignation letter prepared by the company, an anti union campaign via a press article placed on the company's noticeboard in the workers' mess room, the prohibition to hold trade union meetings in the workers' mess room, which led the trade union to file a complaint against the company before the ERT, a surveillance arrangement of the workers' mess room by the installation of cameras on the premises, and the refusal from the management to provide assistance to union members in relation to working condition issues.*
- 722.** *With regard to the alleged intimidation of workers to withdraw themselves from the trade union by the signing of a resignation letter prepared by the company, the Committee takes note of the statement of the Government according to which the company denied having intimidated any union member to withdraw from the STEP. The Government also indicated that an investigation conducted by officers of the Ministry of Labour found that none of the former members of the union have been coerced to withdraw from the union. However, since it was found that the sales manager admitted that he provided assistance to one union member, at his request, to write his resignation letter, the Government indicated that*

it had verbally cautioned the management on the relevant provisions of the Employment Relations Act pertaining to the basic workers' rights to freedom of association and protection of workers' trade unions against act of interference. The Committee takes note of this information and wishes to recall Article 2 of Convention No. 98, which provides that workers' and employers' organizations shall enjoy adequate protection against acts of interference in their establishment, functioning or administration. The Committee is of the view that acts such as management drafting of a union resignation letter constitutes a grave interference in the functioning of workers' organizations and expects that the Government will ensure that the company will fully respect this principle in the future.

723. With regard to the alleged anti-union campaign, the Committee observes that the management had admitted in its statement that it placed on the noticeboard of the workers' mess room copies of press articles on the conference given by the representative of the STEP, in order to apprise all its employees of a "boycott" campaign set by the union. The management asserts that its intention was to draw the attention of the workers to the acts and doings of the trade union which led to the closure of an enterprise. The Committee further notes that, at the request of the Ministry of Labour, the management withdrew these articles from the noticeboard and this matter would appear to be resolved.

724. The Committee notes that in reply to the allegation concerning the prohibition to hold trade union meetings, the Government supports that the conflict occurred from the fact that the management had requested the representative of the STEP – namely Mr Shanto – to wear a visitor's pass when proceeding to hold any meeting on the premises. According to the management, Mr Shanto refused to wear the visitor's pass and the union referred the matter to the ERT. However, since the ERT resolved this issue by concluding that Mr Shanto had to wear a visitor's pass to get access to the workplace, the union dropped the case. In this regard, the Committee wishes to recall that workers' representatives should be granted access to all workplaces in the undertaking where such access is necessary to enable them to carry out their representation function. Furthermore, trade union representatives who are not employed in the undertaking but whose trade union has members employed therein should be granted access to the undertaking. The granting of such facilities should not impair the efficient operation of the undertaking concerned [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 1104 and 1105]. The Committee observes the statement that since then Mr Shanto had met with union members on the premises of the company on several occasions. In these circumstances, the Committee will not pursue its examination of this allegation.

725. With regard to the surveillance arrangements denounced by the complainant, the Committee notes the company's argument that it had to invest in the installation of several cameras at different places including the workers' mess room for security reasons. The company added that the mess room hosts the individual lockers of workers and a refrigerator where workers may store their meals and therefore needs constant surveillance. Consequently, the company maintained the measures. However, the company asserts that other amenities without any camera are provided to the workers as changing rooms. The company further asserted that arrangements had been made for a covered space in the premises where trade union meetings could be held. Management would also use the covered space for holding meetings with the workers. While noting the security reasons invoked, the Committee nevertheless recalls that the right to organize union meetings is an essential aspect of trade union rights. The maintenance of camera surveillance in rooms set aside for trade union meetings is likely to produce an intimidating effect on trade union bodies and members and may give rise to employer interference in a manner contrary to the principles of freedom of association in relation to trade union meetings. The Committee expects that the Government will ensure that the new

covered space referred to by the company for future trade union meetings will be free from camera surveillance.

**726.** Finally, concerning the alleged refusal of the management to provide assistance to workers who are union members, the Committee notes the company's explanation that the representative of the STEP misconstrued the openness of the management to resolve workers' complaints and during a meeting held before the CCM, on May 2011, he complained that the management was discussing terms and conditions of employment directly with individual workers who are members of the trade union. Since, the Commission advised the company that it should discuss with the trade union issues concerning union members, now when workers call on the management, they are asked whether or not they are members of the trade union, this to ensure compliance with the advice of the CCM. While it takes note of the company's explanation, the Committee is of the view that the issue of a management requesting its employees to state whether or not they belong to a union, even though this may not be intended to interfere with the exercise of trade union rights, may naturally be regarded as such an interference and felt to be intimidating to union members. The Committee therefore requests the Government to review this matter with the STEP and the company so as to arrive at a mutually satisfactory manner of proceeding that ensures that no worker is prejudiced or intimidated in his or her employment by reason of his or her trade union membership.

**727.** As a general observation, the Committee notes with regret that this case concerns a number of allegations of infringements of the principles of freedom of association by the company but welcomes the rapid action taken by the Government with a view to resolving them. While acknowledging the intervention of the Government to solve the issues raised by the FTU by means of various tripartite meetings held at the level of the Conciliation and Mediation Division of the Ministry of Labour, Industrial Relations and Employment, the Committee expects that the observance of the principles of freedom of association recalled in this case will enable constructive and harmonious industrial relations between the company and the STEP in the future.

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

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

*While acknowledging the intervention of the Government to solve the issues raised by the FTU by means of various tripartite meetings held at the level of the Conciliation and Mediation Division of the Ministry of Labour, Industrial Relations and Employment, the Committee expects that the observance of the principles of freedom of association recalled in this case will enable constructive and harmonious industrial relations between Chue Wing & Co. Ltd and the STEP in the future.*

CASE NO. 2694

INTERIM REPORT

## **Complaint against the Government of Mexico**

**presented by**

**the International Metalworkers' Federation (IMF)**

**supported by**

- **the International Trade Union Confederation (ITUC)**
- **the Independent Union of Workers of the Metropolitan Autonomous University (SITUAM)**
- **the National Steel and Allied Workers Union (STIMAHCA)**
- **the Mexican National Union of Miners, Metal and Allied Workers and**
- **the Union of Telephone Operators of the Mexican Republic (STRM)**

*Allegations: General questioning of the industrial relations system as a consequence of the extremely widespread use of employer protection collective agreements*

**729.** The complaint in this case was examined by the Committee at its meeting in March 2011, when it presented an interim report to the Governing Body [see 359th report, paras 727–903, approved by the Governing Body at its 310th Session (March 2011)].

**730.** The Government presented new observations in communications dated 9 November 2011 and 6 March 2012.

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

**731.** In its previous examination of the case, the Committee made the following recommendations on matters still pending [see 359th Report, para. 903]:

- (a) The Committee invites the Government to take measures to initiate a constructive dialogue with the workers' organizations (including the five complainants) and employers' organizations, on the application of the labour and trade union legislation. This dialogue should include: (1) the questions relating to the trade union protection clauses, "exclusion clauses", declared unconstitutional by the Supreme Court which may give rise to certain situations contemplated in the complaint; (2) questions relating to the minimum representativeness of trade unions in order to bargain collectively; and (3) the allegations of the lack of impartiality of the conciliation and arbitration boards (JCAs) and the allegedly excessive length of its proceedings. The Committee requests the Government to inform it of the meetings held and the outcome of this dialogue.
- (b) The Committee also requests the Government to reply specifically to the allegations and examples from the complainants concerning: (1) the public personalities including public authorities, which made statements concerning the reality of employer protection collective agreements and high number of these agreements; and (2) the specific cases of companies mentioned in paragraphs 796–799, including the allegations of deficient or partial functioning of the JCAs in relation to the exercise of the distinct trade union rights of the STRACC.

**732.** Paragraphs 796–799 of the 359th Report of the Committee referred to in recommendation (b) above are reproduced below:

**796.** The IMF updates the facts in three of the cases mentioned in their initial complaint of February 2009.

**797.** With regard to the registration of the National Union of Petroleum Technicians and Professionals (UNTYPP), the IMF indicates the following:

- 18 March 2008, the UNTYPP was formed in a meeting in which its constitution is approved and the executive committee were elected.
- 29 April 2008, the UNTYPP requested registration with the Directorate for registration of Associations in the Secretariat of Labour and Social Affairs (STPS): in order to comply with the Federal Labour Act, it produced the convocation and minutes of the constituent meeting of the trade union which recorded the will of the workers present to join the trade union and request its registration; membership list showing 260 members, duly authorized constitution, 260 membership forms and documentation showing them to be PEMEX workers.
- 6 June 2008, the STPS required the UNTYPP, among other things, to amend its constitution and produce the minutes of the meeting approving the amendments, prove the existence of PEMEX and that the members were employed by that company.
- 11 June 2008, Oscar del Cueto Charles, Public Relations Secretary of the UNTYPP, was dismissed for trade union activism.
- 21 August 2008, for the second time, the STPS required the UNTYPP, among other things, to amend the constitution and produce the minutes of the meeting when the amendments were made, delete from the membership list those workers who did not produce original documents showing them to be PEMEX employees.
- 21 August 2008, Didier Marquina Cárdenas, General Secretary of the UNTYPP was summoned by Mr Marco Antonio Murillo Soberanis, PEMEX deputy human resources director, to the company offices in Mexico City, and pressured to withdraw the request for trade union registration, under threats that he should think of his future and that of his children.
- 16 October 2008, for the third time, the STPS required the UNTYPP to prove the wish of each member to belong to the trade union, to amend the constitution and produce the minutes of the meeting when the amendments were made, and to remove more members.
- 14 November 2008, PEMEX dismissed 14 members of the executive committee, and over 40 UNTYPP officials and members were violently ejected from their workplace by security personnel of that company and their personal belongings were confiscated.
- 18 November 2008, the UNTYPP requested the STPS to grant trade union registration as it had fulfilled all the requirements set out in the Federal Labour Act and over 60 days had elapsed without a decision being made in that regard.
- 19 November 2008, the STPS replied to the UNTYPP's request of 18 November 2008 indicating that the requested registration was not receivable because it had replied making various observations and that the registration was under consideration.
- 19 November 2008, the father of Felipe Jaime Valencia Galindo, UNTYPP executive committee member, died because he was refused urgent medical treatment in the PEMEX HOSPITAL, because his son was a member of the UNTYPP.
- 20 November 2008, PEMEX summoned several dismissed workers and offered them reinstatement on condition that they renounced the UNTYPP, and several of them, who urgently needed medical treatment, signed a letter of renunciation of the UNTYPP.

- 25 November 2008, the UNTYPP requested the STPS to grant trade union registration as it had fulfilled all the requirements set out in the Federal Labour Act and over 60 days had elapsed without a decision being made in that regard and three days had passed since the request in question without any decision in that regard, in accordance with article 366 of the Federal Labour Act.
- 27 November 2008, the STPS requested the UNTYPP to clarify whether it was a company or sectoral trade union.
- 27 and 28 November 2008, PEMEX embarked on a campaign of threats in the workplaces to force active UNTYPP members to renounce the trade union, failing which they would be sacked.
- 27 November 2008, the STPS informed the UNTYPP that it had requested PEMEX to inform it of the functions of the UNTYPP members and to confirm the details provided by them in the membership list.
- 1 December 2008, the UNTYPP responded to the observation of the STPS of 27 November 2008 and requested registration in accordance with the provisions of article 366 of the Federal Labour Act.
- PEMEX stepped up the violence against UNTYPP members, increased the veiled or direct threats against them personally and against their families, medical services for members were cancelled, blackmailing them by providing medical care only if they renounced the trade union, and enforced retirement.
- 23 December 2009, the STPS refused registration of the UNTYPP on the grounds that it did not comply with the requirements of the Federal Labour Act, including that the number of members was less than 20.
- In reply to the refusal to register, several members confirmed to the STPS that they belonged to the UNTYPP, showing that there were more than 20.
- 12 January 2009, a claim for unfair dismissal of union members and members of the executive committee, on the grounds of their organizing as a trade union, was lodged.
- 15 January 2009, the UNTYPP applied for amparo against the refusal to register by the Directorate for Registration of Associations.
- 2 July 2009, in reply to the application for amparo filed by the UNTYPP, the district primary judge for labour matters found that the registration was allowable, as the requirements of the Federal Labour Act had been fulfilled and ordered the STPS to register the UNTYPP.
- 16 July 2009, the STPS appealed the decision that ordered the registration of the UNTYPP.
- 30 November 2009, the 14th Labour Appeal Court found in favour and upheld the judgment that the UNTYPP should be granted registration.
- 21 December 2009, the STPS granted trade union registration to the UNTYPP and took note (tomaş de nota) of the national executive committee for the period 18 March 2008 to 17 March 2012.
- 23 December 2009, UNTYPP members and trade union representatives began to receive telephone calls threatening them with dismissal and physical violence if they did not renounce the trade union.
- 30 December 2009, the UNTYPP asked PEMEX for a meeting to start formal relations.
- January 2010, the UNTYPP launched a membership drive, visiting workplaces throughout the country.

- In reply to the UNTYPP’s membership drive, the company, through its security personnel and management, threatened workers who attended UNTYPP meetings with dismissal. Trade union representatives were threatened with physical violence and threats were made against their families, they were spied on and followed by strangers in cars.
  - January 2010, managers at each workplace summoned UNTYPP members individually to their offices, they were detained by security personnel for a long time, while they were threatened with dismissal if they did not renounce the trade union, they were forced to sign letters which were supposedly personal but all had the same format and appointed the same lawyer to undertake the procedures mentioned in them. The first letter was a renunciation of the trade union and the second, a request to the Secretariat of Labour and Social Security to dissolve the UNTYPP. The JFCA received these documents and opened cases Nos 1/2010 to 55/2010 in Special Board Twelve of the JFCA.
  - 18 January 2010, approximately 200 workers belonging to the UNTYPP were threatened with dismissal by PEMEX human resources management staff, supported by security personnel, to force them to sign the renunciation of the trade union and request for dissolution of the trade union. Three trade union members and officials were dismissed.
  - 28 January 2010, Erasto Luis de la Cruz, Labour Secretary of the executive committee and five members of the sectional executive committee in the Antonio Dovalí Jaime Refinery were threatened with dismissal by the human resources manager and deputy manager of the refinery because they refused to sign letters renouncing the trade union.
  - 15 February 2010, due to their refusal to sign letters of renunciation of the trade union, Erasto Luis de la Cruz, Labour Secretary of the executive committee and five members of the sectional executive committee in the Antonio Dovalí Jaime Refinery were dismissed.
  - March and April 2010, a fierce onslaught was unleashed against our members and advisers, in particular against the General Secretary with repeated calls to his mobile phone with threats of violence against himself and his family.
  - April 2010, trade unions launched a campaign of support for their fellow trade unionists with letters to the Mexican Government to cease the threats and attacks against them and demanding their reinstatement.
  - May 2010, PEMEX called the members of the executive committee to supposed negotiations, asked them to stop the campaign of letters and offered to reinstate some members.
  - End of May 2010, the executive committee agreed to stop the campaign in defence of the trade union on condition that the Government and PEMEX ended the repression of members and workers.
  - June 2010, the repression of members and workers ended. The talks between PEMEX and the trade union continued.
  - 16 July 2010, Didier Marquina Cárdenas and Francisco Ríos Piñeyro, General Secretary and Secretary of the organization, respectively, were reinstated, but their jobs were frozen.
- 798.** As regards the case of the bargaining rights of the Commercial, Office, Retail, Similar and Allied Workers’ Union (STRACC), the IMF indicates the following facts:
- 9 January 2003, the STRACC presented a claim for bargaining rights and requested the Federal District Conciliation and Arbitration Board (JCADF) to keep the details of workers belonging to the STRACC confidential, the said information to be supplied in a sealed envelope.
  - February 2003, leaders of the movement in the workplace were dismissed, having been identified because the envelope containing their personal data had been broken into.



- No hearings are being held, as the JCADF did not notify the defendant trade union and company or they are held at irregular intervals, and other claims for bargaining rights were held, and a ballot was finally called on 20 August 2003.
- 20 August 2003, two hours before the ballot, the JCADF suspended it, awaiting a petition lodged by one of the trade unions (the confederation CTC) which also claimed bargaining rights. Thanks to this ruse, the workers belonging to the STRACC were identified.
- Having identified the STRACC members, the company dismissed three more officials and intensified threats and violence against the workers.
- 10 November 2003, another trade union appeared, also claiming bargaining rights in a hearing to request a ballot date to be set. Groups of thugs turned up and harassed STRACC members to make them drop their claim. The JCADF did not set a date for the ballot and despite the fact that it was witness to the assaults and had the legal means to prevent them, it did nothing.
- 8 December 2003, the JCADF allowed the claim for bargaining rights by the trade union which appeared at the hearing on 10 November 2003.
- Various hearings were called, and more trade unions presented claims for bargaining rights which were invariably allowed by the JCADF, thus a ballot could be held until the cumulative hearings for each claim had been completed.
- The JCA continued to set dates for hearings which were not held due to failure to notify all the claiming unions or deliberate errors in the JCADF agreements.
- 18 November 2005 was set by the JCADF for the ballot at the company's sites, but it could not be held because thugs surrounded the sites and barred the entry of the JCADF official and the STRACC representatives, there were constant threats and aggression and a group of workers was abducted by the company to prevent them voting.
- Despite having the legal mechanisms to notify the defendant trade union and the repeated request by the STRACC representatives to use them, the JCA did not do so. The trade unions which also claimed bargaining rights are the CTM, CROM and CTC which have representatives in the JCADF.
- 15 January 2009, a hearing was held to hear the STRACC claim and a date was set for the ballot on 22 January 2009.
- 22 January 2009, the ballot was held and the JCADF used as the electoral list the one provided by the company without checking it, as required by law, and which contained persons who did not work for the refinery. The ballot takes place amid assaults by thugs without the JCADF taking any action to prevent it. Despite everything, the STRACC won the ballot.
- At the end of 2009, the JCA issued a final decision which recognized the STRACC as having bargaining rights under the collective agreement.
- In 2010, the parent company refused to reinstate the dismissed workers.

**799.** As regards the case of Johnson Controls, Puebla, the IMF mentions the following facts:

- In the second half of 2005 and throughout most of 2006, working time was unilaterally increased in the dressmaking area to 12 hours per shift, the Christmas bonus and profit-related pay were reduced and replaced by a bonus of lower value.
- In the face of the systematic abuse and violation of their rights, the workers organized into a coalition which confronted the protection trade union claiming better conditions of work, participation on collective and wage bargaining and participation in the election of their representatives.
- In May 2007, under the Federal Labour Act, the revision of the collective agreement signed by the Commercial, Office, Retail, Similar and Allied Workers' Union and the employees was due.

- On 4 June 2007, the workers' coalition requested the company trade union to allow them to participate in the wage review, although not the collective agreement, and requested a copy of the collective agreement for information; the trade union replied that they should come to its offices for that purpose.
- In June 2007, due to the growing disagreement expressed by the workers' coalition, the trade union initiated a campaign of harassment against any worker who expressed disagreement, hounding them and keeping production lines and villages under surveillance.
- In June 2007, seven members of the workers' coalition were dismissed in application of the exclusion clause. The workers lodged a complaint of unfair dismissal in the JFCA.
- On 26 and 27 October 2007, 150 workers were dismissed without any defence or recourse for a legal settlement for the workers concerned by the protection trade union.
- In August 2008, after a process of surveillance of the workers' coalition by the trade union and the company, 15 leaders were dismissed.
- In June 2008, 50 workers were dismissed. The company says that the reason was that they had enrolled in education.
- There was systematic direct physical aggression and threats against the workers, leaders and organizers.
- The company and the trade union refused to give a copy of the collective agreement to the workers, and those who requested it were dismissed and any attempt to organize detected was eliminated with the dismissal of the leaders.
- Johnson Controls contracted workers through various outsourcing firms, each of which had its respective trade union and CCPP.
- Due to the slowness and risks involved in requesting trade union registration, the workers' coalition decided to file a claim for bargaining rights, presentation of which is pending.
- In 2010, workers and leaders of Johnson Controls and the coalition were attacked and threatened by men linked to the company trade union.
- On 29 May 2010, the coalition and workers of the Johnson Controls (Resurrección Area) Puebla, claimed the right to form their own trade union section and affiliate with a national democratic trade union, and went on strike for three days before negotiating an agreement with the company and the regional authorities.

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

**733.** In its communication dated 9 November 2011 the Government states that it has made considerable efforts to comply with the Committee's March 2011 recommendations by initiating a formal dialogue with workers and employers and continuing to compile information on the subject which it will shortly be submitting.

**734.** In its communication dated 5 March 2012 referring to recommendation (a) of the Committee's 359th Report on Case No. 2694, the Government states that the promotion and consolidation of dialogue with the sectors of production is a constant concern of the Government of Mexico, since it is one of the guiding principles of its policies and measures in the field of labour. The Secretariat of Labour and Social Security (STPS) promotes continuity dialogue with the country's production sectors in order to exchange views on a variety of topics. In the case involving the complainant organizations especially, there is a respectful dialogue, notably with the National Union of Workers (UNT), and this dialogue was strengthened in April 2011 with the establishment of formal, regular meetings. Several recognized trade unions affiliated to the UNT have been taking part in this dialogue, including the Union of Telephone Operators of the Mexican Republic

(STRM), the Union of Workers of the National Autonomous University (STUNAM), the Trade Union Association of Airline Pilots of Mexico (ASPA) and the National Union of Petroleum Technicians and Professionals (UNTyPP), among others.

- 735.** The Government states that meetings held to discuss the issues of freedom of association and the procedures of the conciliation and arbitration boards raised in the present case have been attended by some of the STPS's senior officials. On 13 February 2012, for example, Ms Rosalinda Vélez Juárez, who is currently responsible for such matters, held a working meeting with the UNT's Executive Committee headed by Federal Deputy Francisco Hernández Juárez, Captain Fernando Perfecto and Mr Agustín Rodríguez, senior officials of the STRM, ASPA and STUNAM, respectively. The Undersecretary for Labour of the STPS held three working meetings (on 18 January, 3 February and 2 March 2012) with Mr Sergio Beltrán Reyes, Secretary for Internal and External Affairs and Official Records, Mr Javier Zúñiga García, Secretary for Labour, Mr José Barajas Prado, Treasurer, and Mr Juan Linares Montúfar, Secretary for Political Affairs, all of them members of the national Executive Committee of the National Union of Miners, Metalworkers and Allied Workers of the Mexican Republic, to discuss a number of issues related to the complaint. Arrangements have also been made to meet Mr Benedicto Martínez Orozco, General Secretary of the Union of Metal, Steel, Iron, Allied and Similar Workers (STIMAHCA), who also acts as national coordinator for the Authentic Workers' Front (FAT); the meeting was confirmed for 14 March 2012.
- 736.** The Government adds that social dialogue has also been extended to international trade union organizations. On 21 October 2011, for example, the then Secretary of Labour and Social Security, Mr Javier Lozano Alarcón, received a delegation of UNI Global Union led by Mr Larry Cohen, President of Communications Workers of America (CWA) of the United States, Ms Barb Dolan, Administrative Vice-President of the Communications, Energy and Paperworkers Union of Canada, Mr Marcus Courtney, Head of UNI Global Union's telecommunications department, and Mr Francisco Hernández Juárez, Secretary-General of the STRM, who is also President of the Executive Committee of UNT. An exchange was held on concerns raised by the international trade unions and on global and national labour issues. After a constructive dialogue with the international organizations, Mr Philip Jennings invited Mr Lozano to inaugurate the general assembly of UNI MEI (Global Union) held in Mexico City on 28 November 2011, at which it was stressed that economic competitiveness and employment creation were compatible with full respect for decent work.
- 737.** With regard to the Committee's recommendation (b) concerning the present case ("the Committee also requests the Government to reply specifically to the allegations and examples from the complainants concerning: (1) the public personalities including public authorities, which made statements concerning the reality of employer protection collective agreements and high number of these agreements; and (2) the specific cases of companies mentioned in paragraphs 796–799, including the allegations of deficient or partial functioning of the JCAs in relation to the exercise of the distinct trade union rights of the STRACC"), the Government refers to the relevant passages of the statements made by Mr Javier Lozano Alarcón.
- On 23 January 2009, in his closing speech to ASPA's general assembly commemorating Mexican Pilots Emancipation Day, Mr Javier Lozano Alarcón stated:

I share in very large measure the views, comments and ideas just expressed by your General Secretary, Mr Dennis Lazarus. That is why it is important that, if we are all so concerned about subcontracting, outsourcing, simulation, puppet unions and protection agreements, *we must tackle them together; and that is something we can and must do every day.*

I also congratulate ASPA because it has really found a way of dealing with competition in the sector. The competition is fierce: first the crisis generated by the twin towers in 2001 and then in recent years the opening of low-cost airlines – as Dennis said, not always with fair working conditions, because now we are seeing that protection agreements, puppet unions and sometimes simulation are common practice. *In this country we cannot allow ourselves the luxury of achieving low costs by trampling on workers' rights and even simulating legal instruments as if they were genuinely legal. That is why there has to be transparency. That is why it is important that we all know which unions, which collective agreements, which executive committees we are talking about so that we can point to them and set matters straight. That is why our legislation has to be brought up to date, because when it was adopted this kind of scenario was never on the cards. That is why it is time for us to act responsibly.*

The Government observes that the fact that reference is made to employer protection collective agreements does not mean that they are recognized or legitimate. On the contrary, the Secretary of Labour and Social Security stated that society as a whole is worried about fake labour relations and trade unions, as they do not respect workers' rights and undermine the law. That was why he invited the unions to work with him to eliminate practices which are so prejudicial to the workers.

- On 4 August 2009 Mr Lozano Alarcón presided over the general assembly of the airline pilots' union:

Mr Javier Lozano rejected the practices engaged in by certain companies that have attempted to impose so-called "protection agreements", which in many cases have proved to be a serious breach of the Federal Labour Act, *as a result of which companies that have tried to simulate working conditions required by law have been severely punished.*

The Government states that Mr Lozano Alarcón was referring to the practice by certain companies of imposing collective agreements that are not in the workers' interests, as they are signed with fictitious unions that do not represent the workers and sometimes do not even exist except on paper. He added that such practices have been condemned as illegal and that, where their existence has been clearly established, they have been sanctioned accordingly.

- On 25 March 2010, in a meeting with Mr Carlos Puig of W Radio, Mr Lozano Alarcón stated:

I am against both puppet trade unions and protection agreements. The antidote is transparency, allowing workers themselves to access collective agreements on the Internet, elect their executive committee in a free, direct and secret ballot and be able to change their union membership without being dismissed under the exclusion clause. This is the labour initiative that my party is proposing, precisely to tackle and remedy many of the shortcomings that unfortunately exist in our legal system.

The Government states that what Mr Lozano Alarcón said is true and that it was confirmed in a press release published by the *El Universal* newspaper on 5 May 2008, which read: "The Secretary of Labour and Social Security also expressed the view that *the best antidote to protection agreements was transparency and information.*"

The Government states that it is clear from Mr Lozano Alarcón's statement that, if workers are properly informed of their rights, of the unions that have been officially registered and of the collective agreements that are in force, then they are in a better position to take decisions and, if they wish, to appeal to the competent authorities to demand that their individual and collective rights be respected. The then Secretary of Labour and Social Security emphasized that the antidote to simulation was transparency, and that is why the present administration decided right from the start to make public the secretariat's information on trade union registration and on collective

agreements registered with the Federal Conciliation and Arbitration Board (JFCA), in accordance with the Federal Act on Transparency and Access to Public Government Information (which excludes workers' personal data). Consequently, according to the Government, the workers and the public at large have, from 1 January 2008, been able to access the STPS website ([http://contratoscolectivos.stps.gob.mx/RegAso/legal\\_contratos.asp](http://contratoscolectivos.stps.gob.mx/RegAso/legal_contratos.asp)) containing 100 per cent of trade union's executive committee minutes, statutes and lists of members, as well as collective labour agreements, official contract administration agreements and the internal labour regulations of the federal jurisdiction. If, in any labour centre, an agreement is concluded with a trade union unknown to the workers, they now have the opportunity to know the name of the union they belong to and the name of its Secretary-General and to obtain a copy of the agreement. This way they can be fully informed of their rights and duties so as to be in a position to defend those rights before the competent authorities. This also has a positive impact on labour relations, strengthens freedom of association and is conducive to industrial peace.

- 738.** The Government states further that Mr Lozano Alarcón also mentioned that the federal legislature was currently analyzing and studying an initiative to reform the Federal Labour Act which, if adopted as proposed, would resolve some of the problems in Mexico's labour relations system. It is untrue, as the complainants' claim, that under the reform of the Federal Labour Act employer protection collective agreements would be tolerated. The amendments proposed to the Act are actually designed to prevent such practices becoming commonplace, as can be seen from the last paragraph of point 35 of the initiative which revises, expands and derogates from several provisions of the Federal Labour Act presented in March 2010 and which stipulates:

Similarly, and in order to prevent the conclusion of so-called "protection agreements" in collective labour relations, article 390 proposes that the aforementioned requirements must be complied with when collective labour agreements are submitted to the Conciliation and Arbitration Boards.

- 739.** The Government goes on to state that the amendment proposed to article 390 reads as follows:

Article 390. Collective agreements must be concluded in writing, failing which they shall be null and void. They shall be drawn up in triplicate, one copy being held by each of the parties and the third being registered with the relevant Conciliation and Arbitration Board. No agreement may be registered that does not include the documentation listed under Clause IV, point 2 of article 920 of the present Act.

This shows that the proposed amendment to article 390 goes hand in hand with a complete revision of article 920 to bring it in line with article 390. It is proposed that the amended article 920, and specifically clause IV, read as follows:

Article 920. The procedure for calling a strike shall begin with the presentation of a list of demands, which must meet the following requirements:

I to III ...

IV. If the object of the strike is the signing of a collective agreement, the request must be accompanied by the current registration documents or by certified copies thereof issued by the registering authority, concerning:

1. the executive committee of the trade union;
2. the union's statutes, in order to verify that the object of the strike concerns the industrial sector or branch of activity of the company or establishment with which the union wishes to conclude an agreement; and
3. the list of the trade union's members who work for the company or establishment.

- 740.** The Government states that its intention is that the registering authority should be able to establish with a greater degree of certainty that there really is a trade union behind the collective agreement to be registered. In this way the workers' power of legal recourse will also be enhanced, as they can be sure that the collective agreement registered with the authorities is backed by a trade union, since the authorities will not accept to register any agreement that is not accompanied by the statutes of the trade union with which it was concluded.
- 741.** Regarding the specific case of the companies cited in paragraphs 796 and 799 of the Committee's 359th Report, the Government submits the information below.

*National Union of Petroleum Technicians  
and Professionals (UNTyPP)*

- 742.** On 29 April 2008 the UNTyPP applied for registration to the General Directorate for Registration on Associations (DGRA) of the STPS. At the time the DGRA rejected the union's request on the grounds that its own members had not endorsed the union's statutes, inasmuch as the workers' expressed wish to set up a trade union was subsequent to the date of the request for registration, that there was no proof that the workers were in positions of trust and that the workers' coalition did not have the required minimum number of members. On 16 December 2009, following a series of administrative and judicial procedures initiated by the UNTyPP, the DGRA accepted the organization's registration as a trade union composed of workers in positions of trust of Petróleos Mexicanos (PEMEX) and its subsidiaries. As a further demonstration of its respect for freedom of association as embodied in the Constitution and in the Federal Labour Law, the STPS through the DGPA took note of the creation of two sections of the trade union and of the updated list of its members; the average time taken for these formalities was one day in each case. In its complaint the UNTyPP alleges that PEMEX then began a campaign of harassment and intimidation of the trade union, dismissed its principal officers and cut back the social benefits of its members in order to undermine the Union of Petroleum Workers of the Mexican Republic.
- 743.** The Government adds that, upon inquiry, it has learnt that PEMEX had been informed in writing by Didier Marquina Cárdenas, Secretary-General of the UNTyPP, that the union had been registered on 30 December 2009. Discussions with Mr Marquina Cárdenas prior to the union's registration had been cordial and respectful and at no moment had he been placed under any kind of duress. Since 25 March 2010 PEMEX and the UNTyPP had held over 15 meetings to discuss matters raised by the latter, including the dismissal of workers. PEMEX had explained to the union that the movements of personnel were attributable to developments within the company itself, mainly arising from the optimization of its production processes and the introduction of new technology that had obliged the company to make a number of cuts in staff, none of which, it stressed, had been motivated by the workers' trade union activities. At the meetings PEMEX agreed to see what possibilities there might be of re-hiring the members of the UNTyPP who had been affected by the movements of personnel, to the extent that their skills were needed. The meetings between PEMEX and UNTyPP were suspended when the union failed to respond to two invitations from the company, one on 9 August 2011 and the other on 12 September, thereby manifesting its lack of interest in reaching an agreement through dialogue. It should, however, be mentioned that the matter is being looked into in the context of the talks with the UNT and that a number of meetings have been held with the mediation of the authorities to try and reach agreement between the parties and end the dispute.
- 744.** Regarding the dismissed union officers, the Government points to the cases of Mr Oscar del Cueto Charles, Mr Didier Marquina Cárdenas, Mr Francisco Ríos Piñeiro and Mr Eloy Castellanos Cruz, who are alleged to have been dismissed without grounds. PEMEX has

informed the Government that the contract of Mr Oscar del Cueto Charles was terminated on 8 June 2008 following the reorganization of the company's storage and distribution unit. Upon termination he received the benefits provided for by law. As to Mr Didier Marquina Cárdenas, Mr Francisco Ríos Piñeiro and Mr Eloy Castellanos Cruz, the Government states that they have since been reinstated in their jobs. The complainant also alleges that PEMEX failed to pay medical benefits due to UNTyPP officers and their families, but PEMEX claims that social security benefits are of a general nature and due only to workers with a current contract and to their dependants.

*Commercial, Office, Retail, Similar and Allied Workers' Union (STRACC)*

- 745.** Regarding the issue of collective bargaining rights, the complainant organization alleges that the Local Conciliation and Arbitration Board of the Federal District (JLCADF) did not respect the confidential nature of the names and addresses of workers affiliated to STRACC, when it submitted a request for bargaining rights in the Nivel Superior de Servicios SA de CV company, and that this resulted in dismissals and a delay in STRACC's recognition as the signatory of the agreement. In response, the JLCADF denied having made public the information contained in the sealed envelope presented by STRACC; it was the trade union itself that authorized the release of the contents, as can be seen from the written request it submitted. The JLCAD did not at any moment show the parties or anyone else the documents that were attached to the request.
- 746.** According to the complainant, the JLCADF refused to hold a hearing to verify STRACC's claim to bargaining rights, on the grounds that one of the parties had not been notified or had been irregularly notified. On this point, the JLCADF stated that on 12 March 2003, for the first time, a conciliation, demand and exceptions hearing was held which STRACC did not attend even though an invitation had been sent to the address it had given.
- 747.** In accordance with the procedure for awarding collective bargaining rights, the JFCADF set the ballot for 20 August 2003. However, the counting procedure had to be suspended because on 15 August 2003 the co-respondent trade union (the National Union of Workers of the Petroleum Products, Distribution and Sales, Services, Similar and Allied Industries of the Mexican Republic, signatory at the time of the company's collective agreement) called for the procedure to be declared null and void on the grounds that the address of the union concerned was not the one it had indicated. On 8 September 2003 the procedure was ruled to be null and void, and the JLCADF therefore annulled the proceedings initiated by STRACC and summoned the co-respondent to appear.
- 748.** The complainant argues that in conducting the ballot the JLCADF used the voting list provided by the company without verifying that some of the people on the list did not work for it, and the whole process degenerated into a climate of aggression that the JLCADF was unable to prevent. The JLCADF claims that it is required to draw up a list of workers to serve as a basis for the ballot and that, in the case in point, it used the information provided by the company and by the two trade unions. Moreover, it examined every aspect of the dispute in detail as required by the Federal Labour Act and at all times endeavoured to ensure that justice prevailed. As a result of the JLCADF's procedure for awarding bargaining rights for the collective agreement concluded with the company, the STRACC won the ballot.

*Johnson Controls, Puebla*

- 749.** The complaint mentions that the Johnson Controls company has started systematically denying workers their labour rights, for instance by making them work longer hours and reducing their bonus and share of profits. Consequently, a group of workers got together to request that the signatory of the collective agreement protect their rights.
- 750.** The Government states that Johnson Controls Servicios, S. de RL de CV, signed a collective agreement with the Union of Workers and Employees of the Natural Mineral and Fibres Extraction and Processing, Similar and Allied Industries of the Mexican Republic, affiliated to the Confederation of Trade Unions (COS). A coalition of Johnson Controls workers, dissatisfied with their union, then formed an independent organization and decided to join the National Union of Miners, Metalworkers and Allied Workers of the Mexican Republic (Mining Union). They held a number of demonstrations on the company's premises, took over the plant and stopped production, in defiance of the provisions of articles 444, 450 and 451 of the Federal Labour Law. In spite of this, the company decided on 29 May 2010 to sign an agreement with the Mining Union whereby it undertook to:
- withdraw its legal recognition of the Natural Mineral and Fibres Extraction and Processing, Similar and Allied Industries of the Mexican Republic; and
  - sign a collective agreement with the Mining Union.
- 751.** On 10 September 2010 the collective agreement between the Mining Union and the company was submitted to the Federal Conciliation and Arbitration Board. Contrary to the complainants' claim that this was a typical case of an employer protection collective agreement, the fact is that it stemmed from a dispute over collective agreement rights between workers' organizations, one of which is a coalition of workers affiliated to the Mining Union while the other is affiliated to the COS. It must be pointed out that, under the rules set out in article 388 of the Federal Labour Act, the only requirement for acquiring collective agreements rights, where there are two or more organizations in a company or establishment, is that a union demonstrate that it has the largest number of members.
- 752.** According to the complainants, the company dismissed the workers' coalition and the Union of Workers and Employees of the Natural Mineral and Fibres Extraction and Processing, Similar and Allied Industries of the Mexican Republic cancelled their membership by resorting to the exclusion clause. Regarding the alleged dismissal of workers by the company, the complainants failed to mention the number of workers dismissed, and it has therefore been impossible to follow up each individual case and inform the Committee accordingly. The Government can, however, confirm that the Supreme Court of Justice has ruled that the provisions of the Federal Labour Act allowing the application of the exclusion clause are unconstitutional. Consequently, workers are free to join the union organization of their choice or not to join any organization at all.
- 753.** Finally, the Government makes the following final observations:
- (a) Mexico's legal system does not provide for employer protection collective agreements;



- (b) workers and employers have the right to establish trade unions to study, improve and defend their interests, in accordance with articles 356 and 357 of the Federal Labour Act. Under article 359 of the Act, trade unions are free to set up organizations, draw up their statutes, designate their representatives and officers and determine their structure and internal affairs;
- (c) collective labour agreements are the product of negotiation and agreement between workers and employers; should the workers or trade unions deem that their rights have been infringed by so-called “ employer protection collective agreements” or any other kind of agreement, appropriate appeals procedures exist to guarantee their rights;
- (d) ever since the present administration came to power, the STPS has stressed that the solution to employer protection collective agreements is transparency. That is why it decided to make the trade union registration data in its possession public, along with the information on collective agreements deposited with the Federal Conciliation and Arbitration Board – other than workers’ personal data, for reasons of confidentiality;
- (e) as from 1 January 2008, workers and the public at large were granted access on the STPS website ([http://contratoscolectivos.stps.gob.mx/RegAso/legal\\_contratos.asp](http://contratoscolectivos.stps.gob.mx/RegAso/legal_contratos.asp)) to 100 per cent of trade union’s executive committee minutes, statutes and lists of members, as well as to collective labour agreements, official contract administration agreements and the internal labour regulations of the federal jurisdiction;
- (f) consequently, should a collective agreement be concluded with a trade union unknown to the workers, they now have the possibility to find out what union they belong to and the name of its Secretary-General, and to have a copy of the agreement that concerns them. This enables them to be fully informed of their rights and duties and thus be in a position to defend those rights before the competent authorities. It also has a positive impact on labour relations, strengthens freedom of association and is conducive to industrial peace;
- (g) this range of measures supports the STPS’s conviction that the greater the transparency shown by trade unions the better informed the workers will be of their rights, and thus the easier it will be to prevent pernicious practices that are of no benefit to them;
- (h) finally, the Government repeats its commitment to maintain a respectful and inclusive social dialogue with the sectors of production, in compliance with the law and the principles of freedom of association and collective bargaining.

## C. The Committee’s conclusions

**754.** *Regarding recommendation (a) in its previous report on this case (inviting the Government to take measures to initiate a constructive dialogue with workers’ organizations – including the five complainants – and employers’ organizations, on the application of the labour and trade union legislation, in order to examine the issues raised in the complaint), the Committee notes the Government’s statement concerning the considerable efforts it is making since April 2011 to comply with the recommendation by initiating a formal dialogue with employers and workers and notes with interest its commitment to engage in social dialogue with the sectors of production as well as a series of meetings between the authorities, the national trade unions, including some of those that supported the present complaint, and international organizations that have discussed issues connected with the present complaint. The Committee also notes the Government’s statement that: (1) since the year 2008 the STPS has granted access on its website to 100 per cent of trade unions’*

*executive committee minutes, statutes and lists of union members, as well as to collective labour agreements, official contract administration agreements and the internal labour regulations of the federal jurisdiction, so that the issue of employer protection collective agreements can be resolved in all transparency by preventive measures and by judicial appeals; (2) the workers and trade unions that believe that their rights have been violated by employer protection collective agreements are able to lodge legal appeals to have their rights vindicated; (3) contrary to the complainants' claims, the current reform of the Federal Labour Act contains provisions (described in detail by the Government) that are designed to prevent such practices as the acceptance of employer protection collective agreements from becoming commonplace.*

- 755.** *The Committee requests the Government to examine, within the framework of the tripartite dialogue, the issues raised in this complaint regarding the enforcement of labour and trade union legislation. As the Committee stated in its previous examination of this case, such dialogue should cover: (1) the questions relating to the trade union protection clauses, "exclusion clauses", which were declared unconstitutional by the Supreme Court and which may give rise to the kind of situation contemplated in the complaint; (2) questions relating to the minimum representativeness of trade unions in order to bargain collectively; and (3) the alleged lack of impartiality of the JCAs and the allegedly excessive length of their proceedings. The Committee firmly expects that a dialogue will take place with the most representative national workers' and employers' organizations, as well as the six organizations that are complainants in this case or have supported it. The Committee requests the Government and the complainants to report on developments and expects that the legislative and other measures will be taken in near future to strengthen protection against anti-trade union practices in breach of collective bargaining principles, which have been raised in the present complaint.*
- 756.** *Regarding recommendation (b) of its previous examination of the case, concerning certain allegations and examples presented by the complainants, the Committee takes note of the information sent by the Government and by the companies concerned. The Committee recalls that the said examples were made available by the complainant organization at the Committee's request in order to back up their allegations and not for it to formulate conclusions on alleged incidents that occurred years ago in the companies referred to. The Committee observes that the information provided does not cover all the issues raised, but it does not discount the possibility that problems exist in granting trade unions the right to bargain collectively or in the functioning of the system for protecting trade union rights. The Committee expects that such situations as those cited in the complaint will be borne in mind as a subject for discussion in the formal dialogue that the Government plans to organize.*
- 757.** *The Committee also takes note of the information sent by the Government regarding the statements of the former Secretary of Labour and Social Security confirming instances of collective agreements being concluded with fictitious organizations which, he says, are illegal and have been duly sanctioned, as well as the use of trade union security clauses (exclusion clauses) which are unconstitutional and which it is hoped that the current labour legislation reform will put an end to.*
- 758.** *The Committee notes that the Government has not sent any specific information on the statements of other public figures or on the alleged large number of employer protection collective agreements but considers that with the facts that will be at the disposal of the round table of tripartite dialogue it is no longer necessary that it do so.*

## The Committee's recommendations

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

- (a) *The Committee requests the Government to examine, in the framework of the tripartite dialogue, the issues raised in this complaint regarding the enforcement of labour and trade union legislation. As the Committee stated in its previous examination of this case, such dialogue should cover: (1) the questions relating to the trade union security clauses, "exclusion clauses", which were declared unconstitutional by the Supreme Court and which may give rise to the kind of situations contemplated in the complaint; (2) questions relating to the minimum representativeness of trade unions in order to bargain collectively; and (3) the alleged lack of impartiality of the conciliation and arbitration boards (JCAs) and the allegedly excessive length of their proceedings.*
- (b) *The Committee firmly expects that a dialogue will take place with the most representative national workers' and employers' organizations, as well as the six organizations that are complainants in this case or that have supported it.*
- (c) *The Committee requests the Government and the complainants to report on developments and trusts that legislative and other measures will be taken in the near future to strengthen protection against anti-trade union practices in breach of collective bargaining principles, which have been raised in the present complaint.*

CASE NO. 2855

INTERIM REPORT

### **Complaint against the Government of Pakistan presented by the Pakistan Workers' Federation (PWF)**

*Allegations: The complainant organization alleges that the management of the National Bank of Pakistan has illegally dismissed the General Secretary of the National Bank of Pakistan Trade Union Federation, Mr Syed Jahangir*

760. The complaint is contained in a communication from the Pakistan Workers' Federation (PWF) dated 2 April 2011.

761. The Government sent its observations in a communication dated 13 March 2012.

762. Pakistan 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

763. In its communication dated 2 April 2011, the complainant indicates that, on 20 October 2010, the management of the National Bank of Pakistan illegally dismissed Mr Syed Jahangir, the General Secretary of the National Bank of Pakistan Trade Union Federation, for his exercise of lawful trade union activities and presenting a just charter of demands to the management.

764. The complainant indicates that the dismissal took place while the National Industrial Relations Commission (NIRC) had issued, in the framework of an unfair labour practice complaint filed by the General Secretary against his employer, a prohibitory order to the management on 30 April 2010 ruling that "... disciplinary proceedings against the petitioner may continue but till next date of hearing final order shall not be passed".

765. Subsequently, on 25 October 2010, the NIRC suspended the operation of the order of dismissal dated 20 October 2010 and ordered reinstatement: "The contention raised by the learned counsel for the petitioner needs consideration. Admit. Notice. In the meanwhile the operation of the impugned order dated 20.10.2010 regarding dismissal of the petitioner is suspended."

766. The management then approached the Sindh High Court, Karachi against the 25 October 2010 order, seeking a stay of execution on the basis that the NIRC was not competent to suspend the order of dismissal. The High Court ordered, on 28 October 2010, that until the next audition, the status quo shall be maintained: "It is inter alia contended that Respondent No. 1 [NIRC] through interim order passed on 25.10.2010, has ordered reinstatement of an employee dismissed from service. Learned Counsel admitted that even the learned Member NIRC is not competent to do so in view of provisions contained in Regulation 32 of NIRC (Procedures and Functions), 1973. Let the admission notice be issued to the Respondent. Notice. Till the next date status quo shall be maintained".

767. Despite the illegal order of dismissal passed by the employer, which was suspended by the NIRC, the management has refused to reinstate Mr Syed Jahangir and pay his lawful dues.

#### B. The Government's reply

768. In its communication dated 13 March 2012, the Government indicates that the NIRC passed a prohibitory order in favour of Mr Syed Jahangir and that the Sindh High Court stayed the orders of the NIRC. According to the Government, presently two cases are pending adjudication before the Court, thus the NIRC cannot take further action in this regard.

#### C. The Committee's conclusions

769. *The Committee notes that, on 20 October 2010, Mr Syed Jahangir, General Secretary of the National Bank of Pakistan Trade Union Federation was allegedly dismissed for the exercise of lawful trade union activities and presenting a just charter of demands to the management. The dismissal took place while a prohibiting order to do so had been issued by the NIRC. Subsequently, the NIRC suspended the operation of the order of dismissal dated 20 October 2010. The management appealed this decision before the Sindh High Court which stayed the orders of the NIRC. The management has refused to reinstate*

*Mr Syed Jahangir. The Committee notes that according to the Government, presently two cases are pending adjudication before the Court, thus the NIRC cannot take further action in this regard.*

- 770.** *The Committee recalls 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. In no case should it be possible to dismiss a trade union officer merely for having presented a list of dispute grievances; this constitutes an extremely serious act of discrimination. The Government is responsible for preventing all acts of anti-union discrimination and it must ensure that complaints of anti-union discrimination are examined in the framework of national procedures which should be prompt, impartial and considered as such by the parties concerned [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 769, 808 and 817]. Noting that according to the Government, two cases concerning Mr Syed Jahangir are pending adjudication before the Court, the Committee expects that any information relating to the alleged anti union nature of the dismissal will be considered by the courts bearing in mind these principles and expects that these decisions will be handed down in the very near future. The Committee requests the Government to take steps in consultation with the parties concerned, aimed at ensuring the reinstatement of Mr Jahangir pending the final decisions to be rendered by the courts. It requests the Government and the complainant to provide the court judgments as soon as they are handed down, as well as any further information relating to the anti-union nature of this dismissal.*

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

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

*Noting that according to the Government, two cases concerning Mr Syed Jahangir are pending adjudication before the Court, the Committee trusts that any information relating to the alleged anti-union nature of the dismissal will be considered by the courts bearing in mind these principles and expects that these decisions will be handed down in the very near future. The Committee requests the Government to take steps, in consultation with the parties concerned, aimed at ensuring the reinstatement of Mr Jahangir pending the final decisions to be rendered by the courts. It requests the Government and the complainant to provide the court judgments as soon as they are handed down, as well as any further information relating to the anti-union nature of this dismissal.*

CASE NO. 2864

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

**Complaint against the Government of Pakistan  
presented by  
the Bank of Punjab Employees Union of Pakistan**

***Allegations: The complainant organization alleges that the management of the Bank of Punjab has transferred trade union officers and members, dismissed five union officials and multiplied legal actions in order to block the registration of the Bank of Punjab Employees Union of Pakistan***

772. The complaint is contained in a communication from the Bank of Punjab Employees Union of Pakistan dated 25 May 2011.
773. The Government sent its observations in a communication dated 12 March 2012.
774. Pakistan 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**

775. In its communication dated 25 May 2011, the complainant indicates that on 3 April 2005, the employees of the Bank of Punjab formed the Bank of Punjab Employees Union of Pakistan. The Bank of Punjab is a scheduled bank at the national level owned by the Provincial Government of Punjab. It has around 4,000 employees and 2,500 of them were considered workmen with the right to form unions under the then Industrial Relations Ordinance (IRO), 2002.
776. An application for registration of the union was filed with the National Industrial Relations Commission (NIRC) on 21 April 2005 and the management was informed of this application through registered post on 20 April 2005. On receipt of the above application, the Chairperson of the NIRC asked the President of the Bank of Punjab to present a list of employees of the bank. In compliance of the order of the Chairperson, an officer of the bank appeared before the NIRC on 4 May 2005 and confirmed that the members of the union were regular employees of the bank.
777. In an interim order, the NIRC directed the management of the Bank of Punjab not to transfer, discharge, dismiss or punish any officer of the union during pendency of the application for registration as provided under section 10 of the then IRO, 2002 (the complainant attached the decision to the complaint). However, in utter violation of the orders of the NIRC, the management of the bank transferred ten employees to different parts of the country and the services of five office bearers of the union including the President, Vice-President, General Secretary and Deputy General Secretary were terminated on 3 May 2005.

- 778.** The union approached the NIRC against the transfer and termination orders and the NIRC suspended the above decisions taken by the bank (Cases Nos 4(2)/05 and 4(3)/05 of 16 May 2005, attached to the complaint). The management filed a writ petition against the orders of the NIRC before the High Court in May 2005. According to the complainant, the management's delay tactics unduly prolonged the litigation before the High Court.
- 779.** In 2007, two years later, the High Court rendered its decision and dismissed the application filed by the bank (decision W.P. No. 12257-2005, attached to the complaint). The bank thereafter filed an inter-court appeal before the Division Bench of the High Court. The Division Bench rejected the review petition filed by the bank on 26 January 2009 after a lapse of another two years and directed the case to the NIRC for remedial action (decision I.C.A. 60/2007, attached to the complaint). On 9 September 2009, the NIRC issued a Show Cause Notice to the Punjab Bank, as to why they should not be proceeded against for having committed contempt of Court under Section 27 of Industrial Relations Act (IRA), 2008, as well as unfair labour practices for violation of Regulation 32(1) of NIRC (P&F) Regulations, 1973 read with section 10 and section 17(d) of IRA, 2008 (NIRC Case No. 3(05)/2005, attached to the complaint). The management again filed a writ petition before the High Court requesting a stay order to pre-empt any action by the NIRC.
- 780.** According to the complainant, the Bank of Punjab and the Government of Punjab have been creating all sorts of hurdles for the past six years and are prolonging proceedings to deprive the workers of their legitimate right of association, which is a grave violation of the national laws and of Convention No. 87, ratified by Pakistan. The office bearers of the Union and their family members are undergoing untold suffering since 2005.

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

- 781.** In a communication dated 12 March 2012, the Government indicates that the case was referred to the Registrar of the NIRC for its registration as an industry-wide trade union during 2005. The Chairperson of the Commission issued a stay order dated 4 May 2005 not to terminate or transfer the members of the union. The management of the Punjab Bank, however, terminated the services of Ch. Muhammad Farooq and other members of the union and challenged the matter of registration of the union in the Lahore High Court. The High Court remanded the case to the NIRC after two years.
- 782.** The Government adds that the NIRC issued a Show Cause Notice to the Punjab Bank but again the case was appealed before the High Court which directed the NIRC, on 27 January 2012, to transfer the record of the case to the concerned provinces. The union on the other hand went to Inter-Court Appeal and the appeal is pending adjudication before the High Court in Islamabad. As the matter is before the court, the petitioner union has been advised to pursue it in the court. The Government adds that a final report may be sent when the case is decided.

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

- 783.** *The Committee recalls that this case concerns allegations that the management of the Bank of Punjab has transferred and dismissed trade union officers and members and multiplied legal actions in order to block the registration of the Bank of Punjab Employees Union of Pakistan.*
- 784.** *The Committee notes that the Government and the complainant appear to concur on the following facts: (1) the Bank of Punjab Employees Union of Pakistan filed an application for registration with the NIRC on 21 April 2005; (2) in an interim order, the NIRC directed the management of the bank not to transfer, discharge, dismiss or punish any officer of the*

union during the pendency of the application for registration; (3) the management of the bank transferred ten employees to different parts of the country and the services of five office bearers of the union, including the President, Vice-President, General Secretary and Deputy General Secretary were terminated on 3 May 2005; (4) the Union filed a complaint before the NIRC against the transfer and terminative orders and the NIRC suspended the above decisions taken by the bank; (5) the management filed a writ petition against the orders of the NIRC before the High Court in May 2005 and two years later, in 2007, the High Court rendered its decision and dismissed the application filed by the bank; (6) the bank thereafter filed an inter-court appeal before the Division Bench of the High Court but it rejected the review petition on 26 January 2009 after a lapse of another two years and referred the case back to the NIRC for remedial action; and (7) on 9 September 2009, the NIRC issued a Show Cause Notice to the bank but the management again filed a writ petition before the High Court requesting a stay order to pre-empt any action by the NIRC. The Government adds that the High Court directed the NIRC on 27 January 2012 to transfer the record of the case to the concerned provinces and the union has filed an inter-court appeal, which is pending adjudication before the High Court in Islamabad.

- 785.** *The Committee notes with deep concern that, to date, more than seven years after the registration was filed with the NIRC, and as a result of successive appeals by the bank, ignoring the initial protection order issued by the NIRC, the workers of the bank have still not been able to see their union registered and the union officers have remained dismissed for over seven years. The Committee recalls that justice delayed is justice denied. A long registration procedure constitutes a serious obstacle to the establishment of organizations and amounts to denial of the right of workers to establish organizations without previous authorization [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 105 and 307].*
- 786.** *The Committee understands that the recent deliberations occurred during a time when the status of the national labour legislation was unclear and that this may be the reason for the deferral of the case in January 2012 to the relevant provinces [The Committee had the opportunity to examine this issue in Case No. 2799 (Pakistan), 359th Report, March 2011, paras 970–990 and 362nd Report, November 2011, paras 98–101]. Observing however the recent steps taken to avoid a legal vacuum and, more particularly, the adoption of the Industrial Relations Act (IRA), 2012, on 14 March 2012, which has avoided the expiration of the NIRC and of the legal status of national and industry-wide trade unions, the Committee expects that the union will be registered without delay under this new legislation and requests the Government to keep it informed of developments.*
- 787.** *The Committee further notes with deep concern that, in apparent violation of the orders of the NIRC, the management of the bank transferred ten employees to different parts of the country and the services of five office bearers of the union including Bashir Ahmed (Vice-President), Muhammad Farooq (General Secretary), Muhammad Ashraf Khan (Deputy General Secretary), and the President were terminated on 3 May 2005 and that this matter is also still pending before the courts. The Committee recalls 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. Measures taken against workers because they attempt to constitute organizations would be incompatible with the principle that workers should have the right to establish and join organizations of their own choosing without previous authorization. The Government is responsible for preventing all acts of anti-union discrimination and it must ensure that complaints of anti-union discrimination are examined in the framework of national procedures which should be prompt, impartial and considered as such by the parties concerned. Cases concerning anti-union discrimination contrary to Convention No. 98 should be examined rapidly so that the necessary remedies can be really effective. An excessive delay in processing cases of anti-union discrimination, and in particular lengthy delay in concluding the proceedings*



concerning the reinstatement of the trade union leaders dismissed by the enterprise, constitutes a denial of justice and therefore a denial of the trade union rights of the persons concerned [see *Digest*, *op. cit.*, paras 769, 338, 817 and 826]. In view of the NIRC injunction orders for the protection of the trade union officials and members and that these employees have nevertheless remained without remedy for over seven years, the Committee firmly urges the Government to take the necessary steps for their immediate reinstatement pending any remaining judicial decisions and to keep it informed of the progress made in this regard. In the event that reinstatement is not possible due to the time that has elapsed, the Committee expects that the Government will take steps to ensure the payment of adequate compensation to the persons concerned so as to constitute sufficiently dissuasive sanctions against such acts.

## The Committee's recommendations

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

- (a) *Observing the recent adoption of the Industrial Relations Act (IRA), 2012, on 14 March 2012, which has avoided the expiration of the NIRC and of the legal status of national and industry-wide trade unions, the Committee expects that the union will be registered without delay under this new legislation and requests the Government to keep it informed of developments.*
- (b) *In view of the NIRC injunction orders for the protection of the bank trade union officials and members and that these employees have nevertheless remained without remedy for over seven years, the Committee firmly urges the Government to take the necessary steps for their immediate reinstatement pending any remaining judicial decisions and to keep it informed of the progress made in this regard. In the event that reinstatement is not possible due to the time that has elapsed, the Committee expects that the Government will take steps to ensure the payment of adequate compensation to the persons concerned so as to constitute sufficiently dissuasive sanctions against such acts.*

CASE NO. 2833

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

### **Complaint against the Government of Peru presented by the Autonomous Confederation of Workers of Peru (CATP)**

***Allegations: Violations of the right to collective bargaining and acts of anti-union discrimination by Proyecto Especial CORAH***

**789.** The complaint is contained in a communication from the Autonomous Confederation of Workers of Peru (CATP) dated 10 December 2010.

- 790.** The Government sent its observations in communications dated 8 May and 24 October 2011, and February 2012.
- 791.** 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**

- 792.** In its communication of 10 December 2010, the CATP explained that it has an affiliate union, the Single Union of Workers at CORAH (SUTCORAH), which operates within the Proyecto Especial CORAH (the Special Project for Control and Reduction of Coca Farming in the Alto Huallaga), a subdivision of the Ministry of the Interior that exists solely to eradicate illegal farming of coca leaves in Peru. Its workers have contracts under local private labour law. The CATP adds that a very large number of these workers are employed in the Narcotics Affairs Section (NAS) under the auspices of the United States Embassy.
- 793.** The CATP alleges that, in September 2009, SUTCORAH submitted its list of demands to launch a collective bargaining process with the employer's representatives and a process of conciliation through the Ministry of Labour for the Ucayali region. The employer maintained that it was not in a financial position to meet the main demands of the workers, and that it therefore could not sign the collective agreement. At present, after more than a year of attempts at dialogue and conciliation through the Ministry of Labour, the employer (Proyecto Especial CORAH) still maintains that it lacks the financial resources to fulfil what is asked in the list of demands, arguing that the institution's international budget does not account for these demands. However, despite the foregoing, in June 2010, the whole workforce was awarded a minimal wage increase, which makes a mockery of collective bargaining and of the application for arbitration submitted by the union.
- 794.** Furthermore, the CATP alleges that the employer continues to demand that non-unionized workers sign a "compulsory" register to state that the union does not represent them. The union has reported this to the Ministry of Labour. These claims were corroborated by statements concerning employer interference in connection with the signing of the register made by workers during a labour inspection. Specifically, the inspector took sworn statements from two workers who had recently joined and who claimed they had been made to sign the aforesaid register. The CATP also alleges that, on the first day on which the register was being signed, the meeting of workers called by the union (17 March 2010 at 6 p.m.–7 p.m.) was sabotaged; although the meeting had written authorization to proceed, all the relevant managers urged their workers not to attend as it was "during working hours and [they could] not have the necessary permission".
- 795.** Likewise, in March 2009, the general secretary of the union, Mr Iván Carlos Bazán Villanueva, was arbitrarily dismissed following an accusation of serious misconduct against a female co-worker. This case has been before the court for over a year, during which there has been no significant change in his situation and he has not been reinstated in his previous position, even though at no stage has there been any impartial administrative investigation. The place where the events are alleged to have occurred (the NAS facilities at Pucallpa Airport) is monitored by a large number of security cameras, but no recordings of the events have ever been supplied to shed light on the allegations under investigation.
- 796.** Likewise, the union's sports secretary, Mr Jesús Aníbal Mancilla Gamero, was also dismissed arbitrarily following an accusation of gross misconduct supposedly against the employer. This accusation is false.

797. The CATP also alleges that six employees who were members of SUTCORAH, Messrs Martín Saavedra Cartagena, Linder Ibarra Zavaleta, Aquiles del Águila Ruiz, César Wilfredo Vergara Castillo, Daniel Fasabi Manihuari and José Ríos Rodríguez, were forced to resign their membership. It is claimed that, under threat, coercion and pressure of a rescission of their employment contracts, they were made to register their resignation from the union on the same day, and using the format and type of paper (the size of card used by the NAS), under direct interference from the employer.
798. Furthermore, the employer, Proyecto Especial CORAH, appealed to the Ucayali region Ministry of Labour, requesting the annulment of the order under which the union had been registered. In April 2009, the employer transferred the union's defence secretary, Mr Leoncio Morales, to another post, as a reprisal for his request for labour inspections; this irregular transfer was carried out the same day; the transfer had never been mentioned in the organization's plan.
799. The CATP also alleges that Mr Manuel Fonseca Núñez, a union member, was dismissed arbitrarily following an accusation of gross misconduct against Proyecto Especial CORAH.
800. The complainant organization also alleges that SUTCORAH was repeatedly treated by the employer as a "minority union", even though no other union existed within Proyecto Especial CORAH. It further alleges persistent refusal by the managing director to allow entry to the union's legal adviser and the CATP's own adviser during the process of direct collective bargaining.
801. Lastly, the complainant organization notes a failure to meet legal standards concerning workers' benefits and concerning some general assertions that lack adequate data or names.

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

802. In its communication of 8 May 2011, the Government affirms its total respect for the Constitution and other standards concerning the collective rights of workers. It states that the State respects the right to form trade unions, to conduct collective bargaining and to strike, and that it has a vital role to play in ensuring the democratic exercise of those rights; it guarantees freedom of association, encourages collective bargaining, promotes peaceful solutions to labour disputes and regulates the right to strike so that it is exercised in harmony with the interests of society. Both the State and the employers, as well as either of their representatives, are forbidden from acts of any kind that might curtail, restrict or undermine in any way the right of workers to form trade unions, and are forbidden from interfering in any way in the creation, administration or upkeep of trade union organizations formed by those workers. While there is full freedom of association, when a group of workers makes that free and voluntary decision to form a trade union, there is a comprehensive regulatory framework that exists to safeguard and protect them. However, the specific standards governing the formation of trade unions contained in article 28 of the Political Constitution of Peru provide that such a trade union may exist for the purposes of studying, developing, protecting and defending the relevant rights and interests [of workers] (legal defence), as well as furthering the social, economic and moral improvement of its members. By virtue of SUTCORAH's application for union status, all the above applies to it. However, unions must equally respect the standards and rights that apply to other organizations and bodies, since they may not, in exercising their own rights, jeopardize the rights of others, including those conferred on their employer by the national Constitution and the applicable laws. Similarly, a union must recognize the jurisdiction and competence of the judiciary, while both employer and union must respect the courts and

not expect to be able to speed up or even override their decisions through collective pressure.

- 803.** In general terms, the Government states that the complaint that has been made lacks any real or legal basis, as it bears no relation to the truth and hence lacks any documentary evidence to support the claim that the Ministry of the Interior has violated or is violating labour or trade union rights in any way. The Government flatly denies all the allegations in the complaint brought by SUTCORAH.
- 804.** Concerning the allegation of violation of collective bargaining, the Government expresses its full respect for the standards governing this process, and stresses that it could never attempt to “skip” any of the steps and stages contained in the process. In this respect, SUTCORAH cannot claim that the Government breached labour standards in regard to collective bargaining simply because the negotiations and talks did not result in their objectives’ being met.
- 805.** With regard to the allegation concerning the register of non-unionized workers, the Government states that it is by no means clear that the employer has been “requiring” non-unionized workers to sign registers stating that the union does not represent them. Any document signed by workers – unionized or not – is signed of their own free will on the basis that they are adults.
- 806.** With regard to the allegations of anti-union discrimination, the Government states that, on 6 February 2009, Mr Iván Bazán did commit gross misconduct in the form of improper physical contact against his female co-worker Ms Marina Liz Montesinos Chávez. The executive management ordered the launch of an investigation process into the complaint submitted by Ms Montesinos Chávez and the two were sent memoranda dated 18 February 2009 summoning them to attend CORAH premises to make their respective statements to the preliminary investigation ordered by the executive management. Mr Iván Bazán did not appear or make any statement on this or any later occasion, but merely sent an affidavit in which he appealed to a piece of legislation that was no longer in force. Before this, he was sent, in accordance with the law, a charge letter informing him of the launch of the labour disciplinary process, giving him six calendar days to exercise his right of defence and excusing him from attending his usual workplace. The whole procedure was carried out in accordance with current relevant labour law. Mr Iván Bazán contested the charge letter through an affidavit of 23 February 2009, which simply referred to Supreme Decree No. 032-91-TR, a law that had been (and still is) repealed, and in which he once again failed to respond to the charges levelled against him by Ms Montesinos Chávez. This is why, in an affidavit dated 2 March 2009, the worker Mr Iván Carlos Bazán Villanueva was permanently dismissed from his post at CORAH, since he had not submitted a defence of any kind against the accusation made against him of gross misconduct against his co-worker Ms Marina Liz Montesinos Chávez under subparagraph (f) of section 25 of the Consolidated Amended Text of the Act on Labour Productivity and Competitiveness, Supreme Decree No. 003-97-TR. The settlement of his social benefits was drawn up, but the now former employee refused to accept them, so they were paid by means of a court deposit in his name at the Banco de la Nación. The former employee instigated court proceedings in the Labour Court of Coronel Portillo, which is currently in process.
- 807.** With regard to Mr Jesús Aníbal Mancilla Gamero, this worker was dismissed from CORAH for gross misconduct under subparagraph (d) of section 25 of Supreme Decree No. 003-97-TR, the Consolidated Amended Text of the Act on Labour Productivity and Competitiveness, for providing “false information to the detriment of the employer”. In a sworn statement given by the former employee Mr Jesús Aníbal Mancilla Gamero, his signature witnessed by a public notary, he claimed to defend Mr Iván Carlos Bazán Villanueva from the allegations of improper conduct, stating that he had been in the city of

Pucallpa and had been a present witness that on 6 February 2009, Mr Iván Carlos Bazán Villanueva had been at the NAS facilities at Pucallpa Airport and had not attempted to make improper physical contact with Ms Marina Liz Montesinos Chávez. However, in reality, Mr Mancilla Gamero had spent that day at the police station in Santa Lucía (Tocache province, San Martín department), on work business. In the affidavit giving notice of his dismissal, dated 13 March 2009, he was given the official period (six calendar days) to make his defence. In his defence letter, dated 17 March 2009, Mr Mancilla Gamero acknowledged having made a sworn statement to be used as evidence of the supposed impropriety of the dismissal of Mr Iván Carlos Bazán Villanueva; however, he made no defence against the accusation that he could not have been a witness on the aforesaid date on account of having been elsewhere. As he failed to answer the charge against him, he was indeed dismissed for the serious misconduct of having provided false information as provided for in subparagraph (c) of section 25 of the Consolidated Amended Text of the Act on Labour Productivity and Competitiveness, Supreme Decree No. 003-97-TR. Mr Mancilla Gamero received the sum of 2,772.23 nuevos soles (PEN) as settlement of his social benefits and has not, to date, instigated any legal proceedings against CORAH.

- 808.** As regards the allegations of forced resignation of union membership by workers, the Government states that at no time did CORAH ever threaten, coerce or pressure the employees Messrs Martín Saavedra Cartagena, Linder Ibarra Zavaleta, Aquiles del Águila Ruiz, César Wilfredo Vergara Castillo, Daniel Fasabi Manihuari and José Ríos Rodríguez into not taking up or resigning membership of SUTCORAH, since this is a free, personal decision which each individual worker must make for her/himself, and it never threatened to dissolve their employment contracts.
- 809.** With regard to the appeal to the Ministry of Labour submitted by the employer (Proyecto Especial CORAH) against the decision to register the union, the Government states that, under the broad and unreserved rights afforded it in the Constitution and in administrative law, CORAH is entitled to present arguments relating to the administrative procedural system with regard to any situation that it considers irregular in regard to the law, and to submit to the labour authorities an appeal seeking to ensure compliance with due process and enjoy the protection of the appropriate court.
- 810.** As regards the allegation concerning the transfer of one worker, the Government states that the employee Mr Leoncio Morales Castro (personnel assistant) was relocated to the infrastructure management department as a maintenance assistant on 13 April 2009 as his services were required there. He retained his previous occupational category and wage in accordance with the law. At no point did CORAH act in reprisal for his involvement in the management of SUTCORAH; merely, it is sometimes appropriate for the institution to transfer or rotate its employees in accordance with labour requirements.
- 811.** With regard to the allegations concerning Mr Manuel Fonseca Núñez, the Government states that, in the exercise of his duties as an administrative assistant in the logistics subsection, among others, one of his tasks was to purchase air travel tickets for institution staff needing to travel to other cities in the country, for which purpose he would be entrusted with the cost of the tickets. In a letter dated 13 May 2009, the firm Amazon World – Pucallpa asked CORAH to settle an amount outstanding for the purchase of plane tickets for its staff. Prior to this, an internal audit was carried out, which found that Mr Manuel Fonseca had been unlawfully keeping sums entrusted to him for the purchase of plane tickets on several occasions. On this basis, he was sent a charge letter on 27 May 2009 citing subparagraph (c) of section 25 of Supreme Decree No. 003-97-TR. Mr Manuel Fonseca failed to file any defence within the legal time limit; thus, under section 42 of Supreme Decree No. 001-96-TR, he was sent notice of dismissal on just cause and issued with a settlement of his social benefits in accordance with the law. As the now former

employee refused to accept this settlement, it was paid by means of a court deposit in his name at the Banco de la Nación. Mr Fonseca's claim under labour law was declared inadmissible in two incidents by the court.

- 812.** The Government states that it rejects all claims of hostility towards and/or discrimination against any worker; the workers mentioned in the complaint, just like any other workers under the managerial authority granted to the employer by the law, may be required to perform labour duties according to the administrative needs of the organization, account taken of that worker's category and wage under the relevant legal framework.
- 813.** With regard to the allegation that the SUTCORAH was repeatedly treated as a minority union, despite the absence of any other union, the Government states that it complies with the national Constitution and the standards relating to workers' collective rights and that, for its own part, it rejects any allegation of improper treatment of SUTCORAH. The Government adds that the union in question may in fact meet the criteria for a "minority" union, given its small membership (34) out of a current workforce of 661.
- 814.** With regard to the allegation of persistent denial of access to the CORAH premises for the legal adviser and the adviser from the union confederation during the collective bargaining process, the Government states that it never denied access to SUTCORAH's legal adviser and that he was in fact granted entry to CORAH headquarters every time he asked. The Government respects section 50 of the Consolidated Amended Text of the Act on Collective Labour Relations approved by Supreme Decree No. 010-2003-TR.
- 815.** With regard to the allegations of pressure put on the workers Messrs Martín Saavedra Cartagena, Linder Ibarra Zavaleta, Aquiles del Águila Ruiz, César Wilfredo Vergara Castillo, Daniel Fasabi Manihuari and José Ríos Rodríguez to resign their membership of the union, the Government states that the Administrative Labour Authority ordered inspection No. 001562 (file No. 238-2009-DRTPE-SD-ISST-UC) to be conducted at the Ministry of the Interior (Proyecto Especial CORAH) and, inter alia, ordered that the resignation of union membership by the aforesaid workers be investigated. The inspection report notes that, at the hearing held on 23 March 2009, the competent assistant labour inspector recorded that Messrs César Wilfredo Vergara Castillo, Aquiles del Águila Ruiz and José Ríos Rodríguez had stated that their decisions to leave the union had been voluntary, and that they had not been threatened or coerced in any way to make their decision.
- 816.** The Government adds that it has asked the Director-General of the labour inspectorate to provide it with information on the outcomes of other inspections. As soon as it receives this information, it will send it to the Committee on Freedom of Association.
- 817.** Lastly, in its communication of February 2012, the Government resends and summarizes its previous replies concerning this case.

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

### ***Allegations concerning violations of the right to collective bargaining and concerning the consideration of SUTCORAH as a minority union***

- 818.** *The Committee takes note of the allegations of the complainant organization, according to which: (1) Proyecto Especial CORAH persistently treats SUTCORAH as a "minority union" even though no other union exists at the organization; (2) the union's legal adviser and the adviser from the CATP (of which the union is a member) were denied access to the*

direct talks stage of collective bargaining; and (3) during the collective bargaining process launched in September 2009, SUTCORAH submitted its list of demands and, during the talks that followed, Proyecto Especial CORAH stated that it could not sign the collective agreement as it did not have the necessary funds in June 2010; however, Proyecto Especial CORAH did grant a minimal wage rise to its whole workforce.

- 819.** *The Committee notes the Government's statements that: (1) it never denied access to the union's legal adviser, but rather granted him entry to CORAH headquarters every time he asked and that, under the law, parties to collective bargaining may be advised by lawyers or professional colleagues and by directors of higher level organizations to which the union is affiliated, although the law also requires such advisers to restrict their intervention to within their own professional competencies and in no way to act as substitutes for the parties to bargaining or to take decisions; (2) it strenuously denies all accusations of improper treatment of SUTCORAH by CORAH, and, in particular, notes that the union has only 34 members out of a total of 661 workers; and (3) it has complied with all standards governing collective bargaining but in this particular case the talks to date have only shown that the union's objectives have not been met and the union cannot try to "skip" the various steps and stages of the collective bargaining process. The Committee also notes that, according to the allegations (which the Government has not denied), CORAH did not accept the union's request to take the issue of wages to arbitration, preferring instead to grant a minimal wage rise to the whole workforce.*
- 820.** *On this last point, the Committee stresses that CORAH's "minimal" offer of a rise, as referred to by the complainant organization, was below the level demanded by the union (which had demanded a rise of 30 per cent, according to the documentation that it submitted). The Committee concludes that, considering the evidence, SUTCORAH's limited representativeness, as highlighted by the Government, cannot but have affected its practical chances of success in the direct bargaining process and, later, in its demand for binding arbitration. Consequently, the Committee does not intend to continue further in examining these allegations as they relate to wage bargaining.*
- 821.** *With regard to the allegation that CORAH denied access to the legal adviser and the adviser from the complainant organization (CATP) "during the negotiations" between the union and CORAH, the Committee takes due note that the Government claims that it has never hindered the union's legal adviser from entering CORAH, cites the legal provisions permitting intervention by advisers for the parties to collective bargaining and emphasizes that such advisers must restrict their intervention to within their own professional competencies and in no way act as substitutes for the parties to bargaining or make decisions. However, the Committee points out that the Government has not explicitly denied having prevented the participation of two union advisers in collective bargaining (it has only referred to the access of one adviser). The Committee therefore requests the Government to ensure that SUTCORAH is able to make use of support from its two advisers in practice in collective bargaining, if it so wishes.*

### **Allegations concerning acts of anti-union discrimination**

- 822.** *With regard to the allegation concerning a compulsory register of signatures for non-unionized workers (a claim that, according to the allegations, was evidenced before the labour inspectorate by means of statements of workers who had recently joined that attempts were made to make them sign such a register – according to the complainant organization), and to the allegation that, on the day on which these signatures were first collected, CORAH area directors urged workers not to attend a meeting that had been called by the union on 17 March 2010 with CORAH's authorization, the Committee notes the Government's statement that it is unclear whether the employer had been "forcing"*

*non-unionized workers to sign registers stating that the union did not represent them; any such document signed by workers, unionized or not, would have been signed of their own free will and on the basis that they were adults. The Committee observes that the Government's statement is couched in rather vague terms, failing as it does to refer either to the statements made by the workers to the labour inspectorate on the collecting of signatures or to the meeting called by the union for the same day, with CORAH's authorization, which area directors are alleged to have prevented. In these circumstances, the Committee requests the Government to hold a further investigation on these allegations and to keep it informed in this respect so that it can re-examine the allegations in full knowledge of the facts.*

- 823.** *With regard to the allegations concerning the arbitrary dismissal of the union leaders Messrs Iván Carlos Bazán Villanueva and Jesús Aníbal Mancilla Gamero without an impartial administrative investigation, the Committee notes the Government's statements that the former of these two individuals was dismissed as a result of an accusation of improper physical contact made by a female co-worker while the latter was dismissed for making false statements sworn before a notary to the effect that he had been on the premises where the events concerning Mr Bazán Villanueva were alleged to have occurred, in an attempt to exonerate Mr Bazán Villanueva. The Committee observes that, according to the Government, the union leader Mr Jesús Aníbal Mancilla Gamero received settlement for his social benefits and did not instigate court proceedings, while the union leader Mr Bazán Villanueva did begin court proceedings demanding reinstatement, which are still ongoing. The Committee requests the Government to communicate to it the outcome of these proceedings.*
- 824.** *With regard to the alleged arbitrary dismissal of the union member Mr Manuel Fonseca Núñez, the Committee notes the Government's statements that: (1) an internal audit found that this administrative assistant had been unlawfully keeping sums entrusted to him by Proyecto Especial CORAH for the purchase of plane tickets; and (2) the court found against Mr Fonseca Núñez.*
- 825.** *With regard to the alleged forced resignation of six employees who were union members under the threat of a rescission of their contracts, the Committee notes the Government's denial of these allegations and the threats and its report that a labour inspection was carried out on 23 March 2009 in which three of these workers stated that they had left the union voluntarily, with no threats or coercion. The Committee draws attention to the complainant organization's claim that the resignations were written on the same day and used the same format and type of paper. The Committee observes that the Government has not made any reference to these claims and asks it to conduct a further investigation on this matter.*
- 826.** *With regard to the transfer to another post of the union leader Mr Leoncio Morales in April 2009 for the reason, according to the allegations, that he had requested labour inspections, the Committee notes the Government's statement that the law allows a worker to be assigned to different work duties according to the needs of the organization with due account taken of her/his category and wage. The Committee also observes that the complainant organization has not provided information on any appeals lodged against the transfer.*

### **Appeal against the registration of the union SUTCORAH**

- 827.** *The Committee takes note of the allegations that the employer, Proyecto Especial CORAH, lodged an appeal with the Ministry of Labour requesting that the registration of the union SUTCORAH be annulled. The Committee notes the Government's statement that CORAH*



is free under the law to present arguments relevant to the administrative procedural system in regard to any situation that it considers irregular, including lodging appeals with the administrative authorities. The Committee requests the Government to send it a copy of the administrative appeal filed by CORAH in which it declares SUTCORAH's registration invalid, and to communicate the text of the administrative decision in order that it should have enough information to make a judgement on the allegations.

## **The Committee's recommendations**

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

- (a) The Committee requests the Government to ensure that the union SUTCORAH can make use of support from its two advisers in practice in collective bargaining, if it so wishes.*
- (b) With regard to the allegation concerning a compulsory register of signatures for non-unionized workers and the allegation that, on the day on which these signatures were first collected, CORAH area directors urged the workers not to attend a meeting that had been called by the union on 17 March 2010 with CORAH's authorization, the Committee observes that the Government has not responded fully and requests it to hold a further investigation and, to keep it informed in this respect so that it can re-examine these allegations in full knowledge of the facts.*
- (c) The Committee requests the Government to communicate to it the outcome of the proceedings currently in progress concerning the dismissal of the union leader Mr Bazán Villanueva.*
- (d) With regard to the alleged forced resignation of six workers from the union under threat of rescission of their contracts, the Committee notes the Government's denial of these allegations and the threats and its report that a labour inspection was conducted on 23 March 2009, in which three of these workers stated that they had left the union voluntarily. The Committee draws attention to the complainant organization's claim that the resignations were written on the same day and used the same format and type of paper. The Committee observes that the Government has not made any reference to these claims and requests it to conduct a further investigation into this issue.*
- (e) The Committee requests the Government to send it a copy of the administrative appeal lodged by CORAH in which it declares SUTCORAH's registration invalid, and to communicate the text of the administrative decision in order that it should have enough information to make a judgement on the allegations.*

CASE NO. 2866

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

**Complaint against the Government of Peru  
presented by  
the Autonomous Confederation of Peruvian Workers (CATP)**

*Allegations: Hindrances to collective bargaining  
by the Union of Labour Inspectors of the  
Ministry of Labour and Employment Promotion  
(SI-PERÚ), anti-union tactics and restrictions  
of the right of union leave*

- 829.** The complaint is contained in communications dated 28 April and 19 July 2011 from the Autonomous Confederation of Peruvian Workers (CATP).
- 830.** The Government sent its observations in communications dated 27 July 2011 and 23 February 2012.
- 831.** Peru has ratified the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

**A. Allegations of the complainant organization**

- 832.** In its communications dated 28 April and 19 July 2011, the CATP claims that its affiliates, the Union of Labour Inspectors of the Ministry of Labour and Employment Promotion (SI-PERÚ), associates only inspectors of the private-sector labour system and has 202 members, i.e. more than half the workers in its field, and is therefore a majority union that is representative of all labour inspectors in Peru.
- 833.** On 23 June 2010, the CAPT management board formally submitted to the Ministry of Labour and Employment Promotion the list of demands approved by the general assembly on 25 May 2010, which contained the proposals for the negotiation of wage increases and working conditions for 2010–12. In the following months, the Ministry showed no interest whatsoever in starting discussion of the list of demands submitted, even though the law establishes that the parties must start the bargaining process within ten days of the list being received. It was only after repeated denunciations in Congress and on the strength of communications to the Ministry of Labour from the national parliament that our employer was obliged to appoint representatives with a view to starting the bargaining process.
- 834.** In September 2010 (three months after the list of demands had been submitted), the first face-to-face meeting between the parties took place. Later, at the second face-to-face meeting, in response to the union's demands with regard to financial and working conditions, the Ministry limited itself to offering, as its sole proposal, a small space to be fitted for use as a union notice board. Beyond this, citing budget restrictions set out in the Public Sector Spending Act for 2011, the Ministry offered nothing in respect of wage increases or even working conditions with no budgetary implications (for instance, access to teaching or research, safe working conditions, signage, etc.).

- 835.** In that context, the Deputy Minister of Labour herself told the negotiating committee that the Ministry of Labour had resumed the process of transferring inspection activities and agents to the regional governments of Lima-Provincias and Callao. This is a source of disquiet to the members, because the so-called “transfer of personnel to the regions” implies, in fact, a forced and permanent move by some inspectors to places far removed from their homes. The employer’s practical goal was to have the union set aside the ongoing collective bargaining process and focus on this problem.
- 836.** Simultaneously, in early November 2010, the Ministry of Labour sent a notice of dismissal for dereliction of duty to the union’s Secretary-General, Mr Hipólito Carlos Javier Bráñez, who was a member of the committee negotiating the list of demands, alleging that he had not completed the internal procedure (request approved by the supervisor) for obtaining leave to attend an academic event. The Labour Ministry authorities refused to consider his request for leave and to provide the corresponding authorizations, despite having granted authorization and leave to other workers who had followed the same procedure as the Secretary-General. The effect of the allegation was none other than to exert anti-union pressure on the union negotiating committee so that it would agree to the “zero proposal” put on the table by the Ministry of Labour, which comprised no wage increase. Weeks later, when a new management board was elected and the Secretary-General left his post, the Ministry of Labour decided to apply only a light disciplinary penalty.
- 837.** Realizing that it was impossible to reach an agreement through face-to-face negotiations, and given that the other party had no proposals, in late November 2010, the union decided to declare that this phase had ended and to start conciliation proceedings. During this second phase, the representatives of the Ministry of Labour repeated their “zero proposal” during the conciliation meetings, invoking supposed budget constraints. The Ministry of Labour having failed to negotiate in good faith, and aware that the conciliation was not being conducted by an impartial body that was independent of the parties, but rather by public servants from the Ministry itself, the union’s general assembly decided to end the conciliation proceedings, a decision it communicated to the Ministry of Labour on 27 January 2011, seven months after the start of the collective bargaining process.
- 838.** In accordance with the legal framework in force in Peru, on 3 and 15 February 2011, the union informed the Ministry of its decision to submit the dispute to arbitration. The Ministry has yet to reply to that request, even though ten months have elapsed, and, on the contrary, continues to adopt anti-union tactics against union leaders.
- 839.** The complainant organization draws attention to the fact that, in this lengthy process, the employer (Ministry of Labour) attended the meetings but never put forward a single tangible proposal. It always maintained the “zero proposal”, violating the principle of good faith and delaying the proceedings by arguing – mistakenly – that the budget laws barred any financial proposal whatsoever.
- 840.** Indeed, the Labour Ministry’s argument that the Public Sector Budget Act makes it impossible for it to grant wage increases is not true, given that collective bargaining with entities subject to the Public Sector Budget Act is guided by those entities’ budget allocations.
- 841.** In addition, the CATP alleges that, acting arbitrarily and in a manner inconsistent with the rules, the Ministry of Labour instituted disciplinary proceedings against the Assistant Secretary-General, Mr Carlos Antonio Espinoza Neyra, who was informed on 16 February 2011 that he stood accused of false and non-existent acts (insulting behaviour and disobedience). This occurred in the context of the Ministry’s decision not to negotiate and the union’s request that the dispute be submitted for arbitration. Thus, for example, the accusation of insulting behaviour mentions no specific word or sentence that could be

considered, even subjectively, as an insult to the authorities or colleagues. This irregular proceeding violates the rules of due process and affects the right of defence, as it is impossible to determine whether the supposed content of the alleged insulting behaviour is correct or not, or whether it transgresses Peruvian labour legislation. In relation to the second alleged fault, “disobedience”, no details are provided about the existence of even one act of disobedience. The proceedings were thus instituted without observing the formalities established by the regulations governing the career of inspector, which provide that an investigation must be conducted before any accusations are made. Since the hidden purpose of the dismissal proceedings was to frighten the union leader concerned, the Ministry initially obviated the investigation phase and directly formulated the accusation. Later, in the face of the irregularities, the Ministry itself decided to “suspend” the dismissal proceedings in order to “investigate” anew what had already served as grounds for accusation and dismissal. That decision contravenes the regulations in force and is indicative of the employer’s bad faith and of its intent to use dismissal proceedings to scare union leaders, given that the irregularities committed led to excessive and unnecessary delay in the ultimate settlement of the improperly instituted disciplinary procedure, generating uncertainty as to the outcome and reflecting its true anti-union motive.

**842.** Another anti-union act committed by the employer was the attempt to prevent the union from carrying out its legitimate activities to have its demands met. Specifically, when the Ministry learned that the trade union planned to hold various peaceful activities on 23 March 2011 to promote industrial peace and uphold the right to collective bargaining (sit-in near the Labour Ministry), it decided temporarily to second ten inspectors, five of them members and five union leaders, for duty outside Lima from 21 to 31 March 2011. In practice, this meant that the union’s entire management board was sent out of Lima on supposed inspection duties, even though they had requested union leave. None of the ten inspectors was on the list of those scheduled to travel in March (the schedule is drawn up at the start of each month); on the contrary, they had inspections scheduled for the same period. The Ministry rejected the union’s request not to second the leaders, which was accompanied by a proposal to replace them with other inspectors.

**843.** The complainant organization further indicates that:

- Mr Carlos Antonio Espinoza Neyra, the union’s Assistant Secretary-General, was on vacation, a fact that the employer should have taken into account before scheduling his secondment; he had been given union leave for 24 March 2011;
- Mr Julmer Rettis Garay, the union’s Financial Secretary, had inspections scheduled for 21, 22 and 23 March 2011;
- Ms Paola del Carmen Egúsquiza Granda, the union’s Secretary-General, had been granted sick leave from 18 to 22 March 2011 and had inspections scheduled on 23 March 2011; furthermore, she had been given union leave for 24 and 25 March 2011;
- Mr Ricardo Cerna Obregón, the union’s Defence Secretary, had been given union leave for 22 and 25 March 2011 and had inspections scheduled for 23 and 24 March 2011; and
- Mr Víctor Gómez Rojas, the union’s Organization Secretary, had been given union leave for 22 and 25 March 2011 and had inspections scheduled for 23 and 24 March 2011.

- 844.** Lastly, in the wake of our protest action, the Ministry has been hindering the work of the union's leaders by restricting union leave for various trade union activities (inter alia, participation in workshops at the ILO office in Lima or in inter-union working groups the aim of which is to participate more effectively in the ILO's standard-setting activities). Indeed, the Ministry has denied requests for leave and demanded that written evidence be provided of the invitations to the events for which leave has been requested. The denials are based on a narrow interpretation of the national legislation relating to union leave and contravene the States' obligation under ILO Conventions (which form part of the Constitution) to guarantee that national rules are applied in such a way as to uphold the principle of freedom of association.
- 845.** The CATP further alleges that the Ministry of Labour and Employment Promotion, acting in a manner inconsistent with the rules and in response to a call for an indefinite national strike (scheduled to start on 25 May 2011) of which it was informed on 17 May 2011, within the deadline and in compliance with the law, acted as judge and party in declaring the strike unlawful in Subdirectorate Order No. 048-2011-MTPE/1/20.21, dated 18 May 2011. That order was not duly communicated, and the union learned of it on reading file No. 57801-2011-MTPE/1/20.21, dated 24 May 2011. On 24 May 2011, within the legal deadline, the union filed a request for annulment and appeal. On 25 May 2011, the union started to exert pressure by exercising the constitutional right to strike; it was notified in the afternoon that the strike was illegal in Subdirectorate Orders Nos 064-2011-MTPE and 054-2011-MTPE/1/20.21, which were based on a labour inspection report verifying the "realization of the strike". Representatives of the Ministry of Labour and Employment Promotion posted a notice on the main entrance to the Ministry, ordering the strikers to return to their workplace on 27 May 2011, failing which appropriate legal action would be taken.
- 846.** The complainant organization goes on to say that the workers affiliated with the union returned to their workplace of their own volition on 31 March 2011, even though the illegality of the strike had not been confirmed and without having missed a single day of work without justification. The workers nevertheless ascertained that a notice had been posted on the front of the Ministry requiring them all to return to their usual duties; that notice did not meet the requirements of the law.
- 847.** In this context, the Ministry sent 18 members, labour inspectors and auxiliary inspectors, and SI-PERÚ's Secretary-General, Ms Paola del Carmen Egúsqiza Granda, notices of dismissal on 3 and 4 June 2011, undoubtedly in response to the exercise of the right to strike. The 18 letters of notice were annulled and filed, but the union's Secretary-General was accused of having attended, allegedly without having been invited, a "reserved" meeting of the CNTPE (National Board for Labour and Employment Promotion), despite the fact that she attended as an invited advisor, in her capacity as a union leader and representing a trade union (CATP), that the supposedly "reserved" nature of the CNTPE meeting she attended had not been agreed by the parties, much less communicated to the union representatives attending, and that she was not on duty or working that day.
- 848.** The complainant organization adds that the Ministry, through the Labour Inspection Director for Lima, in a clear act of intimidation and discrimination, sent out notices of dismissal that had no grounds at all; 18 were filed and annulled; the case of the Secretary-General, Ms Paola del Carmen Egúsqiza Granda, is pending.
- 849.** The disciplinary proceedings instituted against the Secretary-General, Ms Paola del Carmen Egúsqiza Granda, are being pursued despite the fact that the allegations have been refuted and that no evidence has been found of culpability. This violates Ms Egúsqiza Granda's right of defence. The proceedings started on 26 May 2011 and have been adjourned pending an investigation of the merits. A request has been made to

“extend the evidence” to acts unrelated to the notice of dismissal in an attempt to bring a fresh serious error to Ms Egúsqüiza Granda’s account, thus violating procedure, the right of defence and also the right to be presumed innocent.

## **B. The Government’s response**

- 850.** In its communications dated 27 July 2011 and 23 February 2012, the Government sent its observations on the complaint presented by the CATP on behalf of its member, SI-PERÚ, in connection with alleged anti-union tactics by the Ministry of Labour and Employment Promotion with regard to collective bargaining of the 2010–12 list of demands, disciplinary proceedings, temporary secondments of inspectors forming part of the union management board, and the granting of union leave.
- 851.** With regard to collective bargaining of the list of demands for 2010–12, the Government states in letter No. 1485-2011-MTPE/1/20 that the Metropolitan Lima Regional Director for Labour and Employment Promotion – as Chairperson of the Committee negotiating the 2010–12 list of demands – refutes the allegations, specifying that the Ministry did not manifest a lack of interest in engaging in collective bargaining with SI-PERÚ. It adds that the collective bargaining process was started by the Ministry itself, even though the workers’ organization concerned had not formally submitted its request to the corresponding administrative labour authority; the request was presented to the Subdirectorate for Collective Bargaining on 27 September 2010.
- 852.** Likewise, in letter No. 846-2011-MTPE/2/14, the Ministry’s Director General of Labour – tasked with replacing the abovementioned Regional Director as Chairperson of the negotiating Committee – holds that SI-PERÚ’s complaint relating to the Ministry’s supposed lack of interest in the collective bargaining process and to the fact that the Ministry offer was limited to a space for the publication of union notices does not correspond to the truth. In this respect, the letter appended to this report sets out the proposals made in the list of demands that were implemented by the Ministry and which are not limited to providing a space for announcements. It specifies that it undertook to make the requisite representations to the Ministry of the Economy and Finance – the unit responsible for budget matters – for approval of a permanent wage increase.
- 853.** From the facts set out in the abovementioned document, it can be seen that the Ministry was constantly open to dialogue, and even took the steps required for the start of face-to-face negotiations. Two meetings were held before SI-PERÚ formally presented its request to the Subdirectorate for Collective Bargaining. In this respect, and in relation to the list of demands, the Ministry had held more than four extraordinary meetings before an indefinite national strike was called, for the purpose of finding a solution and examining the demands formulated. Subsequently it even reaffirmed to SI-PERÚ’s management board its pledge to maintain an open-door policy of constant dialogue.
- 854.** Likewise, there is evidence to the effect that the Ministry approved various measures to improve the labour inspectors’ working conditions and technology, and to raise professional standards with various training programmes aimed at improving working conditions. However, despite the labour conditions and benefits implemented for the inspectors’ benefit in response to the list of demands submitted, SI-PERÚ insisted on submitting its case for arbitration, proposing a series of measures that were financial in nature and which the Ministry was not enabled to implement: Like all public sector entities, the Ministry is subject to the restrictions established by the Public Sector Budget Act and the General National Budget System Act.

- 855.** Lastly, what is set out above is in keeping with the Peruvian legal system, which recognizes the right to freedom of association and collective bargaining of public servants in State entities and corporations subject to the private-sector labour system, insofar as the exercise of those rights does not run counter to the specific rules limiting the benefits stipulated, as is the case of the legal provisions on the budget.
- 856.** With regard to the disciplinary proceedings and the temporary secondment of inspectors forming part of the union's management board, in letter No. 1534-2011-MTPE/1/20.4 the Labour Inspection Directorate, which has jurisdiction in the matter, issued the corresponding discharges; these are appended as part of the communication submitted by the Metropolitan Lima Regional Directorate for Labour and Employment Promotion (referred to above).
- 857.** SI-PERÚ alleges anti-union tactics in the form of various disciplinary proceedings against the following leaders:
- The institution of dismissal proceedings for dereliction of duty (in November 2010) against the then Secretary-General, Mr Hipólito Carlos Javier Bráñez, who it says had completed an internal procedure to obtain leave to attend an academic event.

In this regard, the documents presented indicate that Mr Hipólito Carlos Javier Bráñez was not dismissed. The Ministry concluded that this worker had merely failed formally to comply with the procedure for obtaining leave, in that he decided to go on vacation unilaterally and to take leave without making the corresponding request or obtaining due authorization from his supervisor; the Ministry considered this a minor fault.

- The arbitrary and irregular institution of disciplinary proceedings against the Assistant Secretary-General, Mr Carlos Antonio Espinoza Neyra, who was falsely accused of acts (insulting behaviour and disobedience) which, because they were not described in detail, affected his right of defence.

The Government states that the documents submitted indicate that Mr Carlos Antonio Espinoza Neyra was not dismissed. The Ministry concluded that this worker had merely failed temporarily to follow his supervisor's order; the Ministry considered this a minor fault.

- 858.** The Government goes on to say that the Labour Inspection Directorate, in letter No. 1534-2011-MTPE/1/20.4, set out arguments discrediting each of the facts denounced with regard to the disciplinary proceedings instituted against the abovementioned union leaders, concluding that in all cases it acted in strict compliance with the disciplinary authority it has under the Regulations on the Career of Labour Inspector, approved by Supreme Decree No. 021-2007-TR; it specifies that the fact that they are union members or leaders does not absolve inspectors in the public service from fulfilling their obligations as Labour Inspection agents.
- 859.** SI-PERÚ also maintains that the Ministry endeavoured to prevent its union activities by making improper use of its managerial capacities when, in the face of planned peaceful activities (sit-in in the vicinity of the Ministry), it assigned ten inspectors, five of them members and five union leaders, to temporary secondments from 21 to 31 March 2011.
- 860.** In this respect, the Government states that the Labour Inspection Directorate has specified that the temporary secondment was made in response to a request from the Labour Inspection General Directorate to the Metropolitan Lima Regional Directorate for Labour and Employment Promotion for the secondment of ten inspectors to various parts of the country between 20 and 31 March 2011. That measure is in keeping with the provisions

governing the inspection system. According to article 22 of the General Law on Labour Inspection, No. 28806, in order to ensure that the labour inspection system functions properly, the central authority can order activities to be carried out outside the territorial limits of the territorial body concerned, either by seconding inspectors to another territorial inspection unit or by conducting inspection activities in companies or sectors active in the territory of more than one region.

- 861.** Lastly, account must be taken of the fact that the requirements of the central authority – the General Directorate of Labour Inspection – are not limited to secondments scheduled and communicated in timely fashion to the supervisory inspectors, given that operational decisions are based more on the need for Labour Inspection action, which can modify plans, and that trade union leaders and members must meet their work obligations just like all other agents and are therefore at the administration’s disposal for the discharge of their duties as established by the law.
- 862.** Turning to the allegations relating to the granting of union leave, SI-PERÚ alleges that the Ministry has restricted such leave for its leaders by demanding that the invitations to attend the events justifying such leave be provided in writing. The Government states that, in letter No. 109-2011-MTPE/4/12, the Head of the General Office of Human Resources maintains that the nature of the public labour inspection service requires that union leave be requested in good time, because inspection agents have a daily schedule of visits. It goes on to say that, in letter No. 28-2011-MTPE/4/12, the request for union leave formulated by SI-PERÚ one day in advance was granted, despite the lateness of the request, with the indication that in future such requests had to be submitted 48 hours in advance.
- 863.** The Ministry, clearly in keeping with a policy of respect for trade union freedoms, grants union leave as a rule whenever such leave is requested in good time, in line with the provisions of Article 6.2 of the Labour Relations (Public Service) Convention, 1978 (No. 151), which stipulates that the granting of facilities is not to impair the efficient operation of the administration or service concerned.
- 864.** Regarding the alleged inadmissibility of the declaration that the SI-PERÚ strike of 25 May 2011 was illegal, on the grounds that the union was not duly notified, the Government states that, in accordance with what is indicated in Directorate Order No. 070-2011-MTPE/1/20.2, such notification was duly communicated by the Subdirectorate for Collective Bargaining in Subdirectorate Order No. 048-2011-MTPE/1/20.21. According to article 1 of Supreme Decree No. 001-93-TR, it is for the authority in charge (the Assistant Director of Collective Bargaining) to handle collective bargaining proceedings and for the Conflict Prevention Directorate to resolve, in second and final instance, appeals against orders issued at first instance. For this, article 1 of the Single Ordered Text of the Industrial Relations Act, approved by Supreme Decree No. 010-2003-TR, stipulates that the law applies to workers covered by the private-sector labour system working for private employers and to public sector workers subject to the same labour system.
- 865.** In letter No. 303-2012-MTPE/1/20.4, dated 30 January 2012, information was provided with regard to auxiliary inspector Paola del Carmen Egúsquiza Granda, indicating that the Metropolitan Lima Regional Directorate of Labour and Employment Promotion decided to dock her one calendar day of pay for having incurred a minor fault with respect to the failure to fulfill the obligation set out in letter (g) of article 15.1 of the regulations, which stipulates: “any other obligation governed by the relevant rules ...”. This includes the obligation to act in compliance with the provisions established for the private-sector labour system of the Ministry of Labour and Employment Promotion, approved in Secretary-General Resolution No. 029-2005-TR/SG, of 20 October 2009. The inspector filed an appeal for reconsideration of the Directorate Resolution on 27 December 2011, and the



resolution was annulled, the appeal for reconsideration having been declared valid and the penalty therefore inapplicable.

- 866.** With regard to the alleged systematic violation by the Ministry of Labour and Employment Promotion of the trade union rights of 18 members, the Government states that the law enables the Labour Inspection Directorate to investigate, in the light of events, whether a given inspector is liable to a penalty for any act or omission, deliberate, involuntary or negligent, that contravenes the obligations, prohibitions and other provisions governing the career of labour inspectors. The Government repeats that none of the inspectors was penalized in any way.

## C. The Committee's conclusions

### ***Allegations of hindrances to the right to collective bargaining***

- 867.** *The Committee observes that, in the present case, the complainant organization alleges that the Ministry of Labour and Employment Promotion delayed in negotiating the list of demands (2010–12) approved by SI-PERÚ on 25 May 2010, and acted in a manner inconsistent with the principle of good faith by maintaining a “zero proposal” for wage increases on the grounds of budget restrictions set out in the Public Sector Budget Act for 2011 and by not making tangible offers with regard to working conditions having no budget implications. According to the complainant organization, face-to-face meetings between the parties only started in September 2010; in November 2010, the union declared that this phase had ended and instituted conciliation proceedings, which it declared ended on 27 January 2011; in February 2011, the union communicated to the Ministry the decision to submit the dispute for arbitration but had received no reply at the time it filed this complaint.*
- 868.** *The Committee notes the Government's statements that: (1) the Ministry did not show a lack of interest in the collective bargaining process; in fact, it was the Ministry itself that started the process, even though the union had not formally submitted its request (which was only submitted on 27 September 2010); (2) contrary to what is indicated by the complainant organization, the Ministry did not limit its proposal to a space for a notice board, but rather implemented various proposals on the list of demands; (3) the Ministry held various meetings with the union, undertook to make the requisite representations to the Ministry of the Economy and Finance for the approval of a permanent wage increase and had informed the union that it pledged to maintain an open-door policy of permanent dialogue; (4) the Ministry approved various units to improve the inspectors' working conditions and technology and to raise professional standards with training programmes; and (5) despite this, the union insisted on submitting its case for arbitration, proposing a series of financial measures with budget implications that the Ministry was not in a position to implement.*
- 869.** *The Committee notes that the complainant organization and the Government present different versions of events during the collective bargaining process. It observes, however, that the Government mentions various meetings between the parties and affirms that the Ministry has accepted and implemented various proposals from the list of demands, including the undertaking to make the requisite representations to the Ministry of the Economy and Finance for approval of a permanent wage increase, which appears to be the union's principal demand; in this sense, in the Committee's view, the Ministry does not appear to have acted in bad faith in the negotiations, rather the parties apparently failed to reach full agreement in a process that undoubtedly went on for a long time. The Committee notes, nonetheless, that the Government has not provided further details on the question of the wage increase and refuses to submit it to arbitration, which does not*

constitute in and of itself a violation of the principle of collective bargaining. Taking account of the length of the negotiations between the parties, the Committee requests the Government, in keeping with its offer to the union, to make representations to the Ministry of the Economy and Finance for consideration of approval of a wage increase for the inspectors and to keep it informed in this respect.

### **Allegations relating to anti-union tactics and union leave**

- 870.** *With regard to the allegations relating to anti-union discrimination during the collective bargaining process, the Committee observes that, according to the complainant organization: (1) in November 2010, a notice of dismissal for dereliction of duty was sent to Mr Hipólito Carlos Javier Bráñez, accused by the Ministry of not having obtained his supervisor's approval for leave to attend an academic event but whose request for leave, according to the allegations, was in fact refused by the Ministry; weeks later, the Ministry decided to apply a minor penalty; (2) in February 2011, the Ministry instituted disciplinary proceedings against Mr Carlos Antonio Espinoza Neyra, the union's new Secretary-General, for supposed "insulting behaviour and disobedience", but without providing details of the disobedience or objectionable words; and (3) on 31 March 2011, five members and five leaders of the union were seconded to carry out supposed inspection duties, at a time when the trade union had scheduled various activities in connection with the collective bargaining process for 23 March 2011.*
- 871.** *The Committee notes the Government's statements according to which: (1) the union leader, Mr Hipólito Carlos Javier Bráñez, was penalized for having incurred a minor fault by failing to meet the formal requirements for requesting union leave (he did not submit the request and did not have his supervisor's authorization); (2) the union leader, Mr Carlos Antonio Espinoza Neyra, was penalized for a minor fault for having temporarily failed to obey his superior's order. With regard to the secondment in which five union members and five union leaders were forced to participate, the Government invokes the requirement of the Labour Inspection General Directorate to provide support for 11 days outside the territorial limits, for service reasons, which is authorized by the legislation and is one of the obligations such persons have as labour inspection agents under the law. According to the Government, those activities had been scheduled and were communicated in timely fashion to the supervisory inspectors. The Committee duly notes the Government's explanations but requests that it send its observations on the union's affirmation that several leaders had union leave during the secondment period.*
- 872.** *With regard to the alleged restrictions of union leave, and concretely to certain refusals reflecting a narrow interpretation of the legislation, the Committee notes the Government's statements underscoring that union leave must be requested in good time so as not to disrupt the daily schedule of inspections, and that in one case in which leave was requested one day in advance it was authorized, but with the stipulation that subsequent requests had to be received 48 hours in advance, in keeping with Article 6 of Convention No. 151, which stipulates that the granting of facilities to trade union leaders is not to impair the efficient operation of the administration or service concerned.*
- 873.** *With regard to the allegations relating to the strike of May 2011, the Committee observes that, according to the Government's response, the administrative authority's declaration that the strike was illegal was issued in accordance with the law. The Committee once again wishes to draw the Government's attention to the principle according to which 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 of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 628]. The Committee once again requests the Government, as it has on several*

*occasions in the past, to take steps to modify the legislation so that the decision to declare a strike illegal lies, not with the administrative authority, but with an independent body which has the confidence of the parties involved.*

**874.** *Lastly, with regard to the allegations relating to the notices of dismissal sent to 18 trade union members and to Ms Paola del Carmen Egúsquiza Granda, Secretary-General of the union, in respect of the exercise of the right to strike, the Committee notes that the complainant organization states that neither the 18 members nor the Secretary-General were penalized. According to the Government, the law authorizes the Ministry to investigate the job performance of labour inspectors; in this case, no penalty was incurred because the appeal for reconsideration of the decision to dock Ms Egúsquiza Granda one calendar day of pay was successful. The Committee wishes to draw attention to the fact that the communication of notices of dismissal (subsequently annulled) was related to the exercise of trade union activities and that such letters in the context described in this complaint could not fail to have an intimidating effect on the exercise of trade union rights.*

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

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

- (a) The Committee requests the Government, in keeping with its offer to the union, to make representations to the Ministry of the Economy and Finance for consideration of approval of a wage increase for the inspectors and to keep it informed in this respect.*
- (b) The Committee requests the Government to send its observations on the union's affirmation that various leaders were on union leave during the obligatory secondment ordered by the Ministry.*
- (c) The Committee once again requests the Government to take steps to modify the law so that the decision to declare a strike illegal lies, not with the administrative authority, but with an independent body which has the confidence of the parties involved.*

CASE NO. 2891

DEFINITIVE REPORT

**Complaint against the Government of Peru  
presented by  
the National Trade Union of Health Social  
Security Workers (SINACUT ESSALUD)**

***Allegations: The complainant alleges restrictions to trade union members' right to defence by union officials***

**876.** The complaint is contained in communications from the National Trade Union of Health Social Security Workers (SINACUT ESSALUD) dated 31 May 2010. The complainant trade union sent additional information in a communication dated 15 February 2011.

- 877.** The Government sent its observations in communications dated 25 October 2011 and 24 February 2012.
- 878.** 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**

- 879.** In its communications of 31 May 2010 and 15 February 2011, SINACUT ESSALUD, alleges that the National Health Social Security (ESSALUD), in letters dated 17 November 2009 and 30 April 2010, has without valid legal grounds, called into question the Legal Defence Officer of SINACUT ESSALUD, lawyer, Mr Luís Oswaldo Apéstegui Márquez, who is also an employee of ESSALUD and a public servant subject to public sector employment provisions, claiming: (1) that he is barred from acting as a lawyer for SINACUT and/or for its Deputy General Secretary, Mr Octavio Rojas Caballero, in proceedings generally involving government departments, including administrative procedures; and (2) that the national official in question signed the appeals in Case Nos 240-CEN-SINACUT-ESSALUD-2009 and 091-CEN-SINACUT-ESSALUD-2010, dated 6 November 2009 and 14 April 2010 respectively, not only as SINACUT Legal Defence Officer, but also as the lawyer representing Mr Octavio Rojas Caballero, who is claiming a right in administrative procedures, even though representing a third party as a lawyer constitutes a violation of article 2(f) of Act No. 27588, "Act on Incompatibilities and Responsibilities of Public Employees and persons providing services to the State under any type of contractual arrangement". In addition, ESSALUD calls for the trade union to rectify the situation within three days of the notification in letters Nos 5581-GCRH-OGA-ESSALUD-2009, dated 17 November 2009, and 1655-GAP-GCRH-OGA-ESSALUD-2010, dated 30 April 2010, by having its appeal signed by a lawyer who is not subject to any legal impediment to representing his/her client.
- 880.** The complainant trade union considers that ESSALUD is making its own specific, arbitrary and legally unfounded interpretations:
- it has wrongly extended the application of article 2(f) of Act No. 27588 to all public servants indiscriminately and without exception, which is incorrect on the grounds that two essential requirements must be met for its implementation: (1) that the persons to whom the impediment applies must be clearly defined in article 1 of Act No. 27588; and (2) that those same persons, in respect of business or private institutions, fall within the specific scope of public service;
  - the standard exhaustively employed the word "proceedings", namely for the purposes of legal interpretation, referring to civil or criminal proceedings (that is, referring to court procedural law), exclusively and in order to distinguish it from the word "procedure" used in administrative law to identify administrative proceedings, from which it can be concluded that Act No. 27588 excluded administrative procedures;
  - it is under a misconception regarding the nature of representation. Mr Octavio Rojas Caballero, in his capacity as Deputy General Secretary and head of the administrative and management affairs of the trade union, did not sign Case Nos 240-CEN-SINACUT-ESSALUD-2009 and 091-CEN-SINACUT-ESSALUD-2010 in a personal capacity, but on behalf of the legal entity SINACUT ESSALUD, and in turn represents its members, thus he did not claim the right in administrative procedures for himself, but on behalf of the trade union and for a group of officials responsible for carrying out the statutory duty of implementing a national election process. It is therefore incorrect to state that the Legal Defence Officer signed the appeal as the

lawyer representing the person Octavio Rojas, which would be defending an individual, and then to state that the professional provided such representation as a lawyer of a third party. Moreover, the lawyer and Legal Defence Officer acted within the scope of the powers conferred on him under the SINACUT statutes, that is on behalf of the members and of the organization that he represents and, in this specific case, in defence of the rights and interests of the trade union representatives commissioned to conduct the latest general elections, without such representation causing any harm to the employing institution (none of the information in its communications have indicated in what way or form it has been harmed).

- 881.** The complainant trade union states that Act No. 27588 has two primary objectives: (1) to prevent persons who have worked for or still work for the State, with specific duties, and who, due to the character or nature of their role or the services they provide, have had access to privileged or relevant information, from using or disclosing matters or information which are deemed in law to be secret or confidential; and (2) in the event there are situations of conflicts of interest that may harm the State, it seeks to prevent those same persons from disclosing or using any information which, in the absence of express legal restrictions, might be privileged because of its relevance, and using it to their advantage or that of third parties and to the disadvantage or detriment of the State or third parties.
- 882.** Furthermore, Act No. 27588 also establishes the prohibitions and incompatibilities applicable to public officials and servants, calling for the fulfilment of a basic requirement, that is that the persons to whom the prohibitions apply are set forth in article 1 of its regulatory framework. However, among other prohibitions, in the provisions of article 2(f) it is stipulated that the persons referred to in article 1, in respect of business or private institutions falling within the specific scope of their public duties, must not act as lawyers, proxies, advisers, sponsors, experts or arbitrators of individuals in any proceedings they may have pending before the courts with the same State department in which they serve, while they are still in office or carrying out the duties conferred on them. It also stipulates that the prohibitions will remain in force in the specific cases or matters in which they are directly involved.
- 883.** The complainant trade union also states that in article 16 of Supreme Decree No. 003-82-PCM, the Government further expanded article 4 of the Supreme Decree. It also gave greater insight into the provisions of article 122 of Supreme Decree No. 005-90-PCM, establishing the regulatory power to specify the remit and working practices of trade union officials in the defence of the rights and interests of members, including reference in the statutes to the ability to determine the composition and powers of the governing board; henceforth, legislation gave the statutes the “standard-setting basis” to regulate the roles and powers of each component of the governing board, meaning in our case that the Legal Defence Officer is responsible for “representing in all matters relating to the defence of the rights and interests of members and the trade union organization itself”. In addition, the trade union’s Legal Defence Officer does not have a leadership role, neither is he a senior official, nor do his duties allow him access to privileged information; similarly, he has no decision-making powers, nor is he in a position of trust or leadership. Thus, in ESSALUD’s classification of posts he appears in the “professional” occupational group rather than in the “executive” occupational group.
- 884.** The complainant trade union alleges that ESSALUD intends for the national official Luís Oswaldo Apéstegui Márquez to abandon his obligation to continue fulfilling his statutory role as Legal Defence Officer and in turn to force him to terminate the legal support he has been providing in his capacity as lawyer for the defence and representation of the trade union organization on behalf of its members, be they ordinary members or appointed or elected union representatives. Such coercive measures used by ESSALUD are not only evidence of blatant interference and a restriction of the right to defence, but are also

contrary to an equally fundamental principle, which is the right of freedom of association, since one of the main reasons for forming trade union organizations is to take on the defence of the rights and interests of their members.

**885.** In the light of the foregoing, SINACUT has rejected the coercive measures of ESSALUD, objecting to the withdrawal of the respective appeals signed by the lawyer and Legal Defence Officer of SINACUT.

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

**886.** In its communications of 25 October 2011 and 24 February 2012, the Government states that in the complaint, the complainant organization accuses ESSALUD of unjustifiably calling into question its Legal Defence Officer, Mr Luís Oswaldo Apéstegui Márquez, who is also an employee of the institution in question and a public servant subject to public sector employment provisions, because of his role as a lawyer in the administrative procedures instituted by the Deputy Secretary General Mr Octavio Rojas Caballero; arguing that the first of the officials mentioned is barred from acting as a lawyer representing any trade union organization or its members in any proceedings in which the State department where he provides his services (including administrative procedures) is a party. It adds that ESSALUD requested that within three days of receipt of the respective aforementioned notification, the Deputy Secretary General of the trade union organization in question should rectify the situation by having the appeals signed by a lawyer who is not subject to any impediment to providing legal representation. It also follows from the arguments in the complaint that there would be no regulatory basis to prevent the aforementioned Legal Defence Officer from acting as the lawyer for SINACUT or any member, since Act No. 27588 and its regulations, adopted by Supreme Decree No. 019-2002-PCM, which regulates the regulatory framework on the prohibitions applicable to public officials and servants, stipulates as a prohibition acting – among other duties – as lawyers for individuals who have matters pending before the courts within the State department in which they serve, provided that some of the conditions provided for in article 1 of the aforementioned legislation<sup>1</sup> are met (cases not featuring the aforementioned trade union official, who holds the occupational post of professional, does not handle privileged information and whose decisions are not crucial to decision-making on the institution's actions).

**887.** The Government reports the comments of ESSALUD on the complaint, which can be summarized as follows:

- ESSALUD observes that SINACUT states that the alleged violation had arisen as a result of the content of letter No. 1655-GAP-GCRH-OGA-ESSALUD-2010, which instructed the trade union to remedy the appeal filed against trade union leave granted in letters Nos 1187, 1185, 1219, 1188, 1221, and 1186-GCRH-ESSALUD-2010, through which trade union leave was granted to members of the national electoral committee and representatives of electoral subcommittees, in accordance with the provisions of directive No. 0013-GG-ESSALUD-2007, “Rules on granting trade union leave to the officials of administrative workers trade union organizations”;

<sup>1</sup> “Article 1. Purpose of the act. [1] The directors, officers, senior officials and members of advisory councils, administrative courts, commissions and other corporate bodies that have a State public role or duty, directors of public companies or State representatives on boards of directors, and consultants, officials or public servants with specific duties who, due to the character or nature of their role or the services that they provide, [2] have had access to privileged or relevant information, or whose opinion has been crucial in decision-making, are bound to secrecy or confidentiality with regard to the matters or information which are deemed in law to be secret or confidential.”

- the aforementioned appeal had been authorized by the lawyer, Luís Apéstegui Márquez, who signed the documents not only in his capacity as SINACUT Legal Defence Officer, but as the lawyer for Octavio Rojas Caballero, which was prohibited under article 2(f) of Act No. 27588, stipulating that public servants are barred from acting as lawyers, proxies and sponsors of individuals in proceedings against the State department in which they serve during their term of office. The appeal filed was therefore returned to him so that he could remedy this omission in accordance with the provisions of article 211 of Act No. 27444, General Administrative Procedure Act;<sup>2</sup>
- in the light of the foregoing, ESSALUD categorically rejects the arguments of the complaint made by SINACUT, as the institution respects freedom of association within the established legal boundaries and unfailingly demonstrates its openness to dialogue and willingness to grant the concessions needed to ensure that members have the respective trade union leave and conditions to carry out their trade union activities.

**888.** The Government also reports the opinion issued by the National Civil Service Authority (SERVIR), governing body of the Human Resources Management Administrative System, on the incompatibility of public servants acting for individuals, resulting from the consultation undertaken on the issue by SINACUT itself. Specifically, in legal report No. 328-2010-SERVIR-GG-OAJ, dated 7 October 2010, the National Civil Service Authority supports the following arguments:

- In government institutions, public employees must observe certain rules of conduct to ensure professionalism and effectiveness when carrying out duties; rules which in some cases could reasonably affect the private activities of those persons.

Accordingly, the second paragraph of article 139 of the regulations of the Civil Service Career Act, adopted by Supreme Decree No. 005-090-PCM, provides that public officials and servants are barred from acting for or representing individual interests as lawyers, proxies, or arbitrators in judicial, administrative or arbitration proceedings in which the State and/or businesses owned directly or indirectly by the State are parties.

The general coverage of the prohibition ensures that it applies to all public servants, with no distinction made between those who are members of a trade union and those who are not, nor between members who hold a leadership position within those organizations and those who do not.

...

It is important to emphasize that this criterion does not affect freedom of association in general, nor the collective dimension of this right in particular, to the extent that it does not undermine the ability of trade unions to defend their members, and that it can be fully exercised through the comprehensive support provided to them by such organizations (institutionally) in the various disputes in which they are involved or, for example, through the representation provided by lawyers in that connection.

<sup>2</sup> “Article 211. Appeal requirements. The notice of appeal must state the action being appealed against and meet the other requirements stipulated in article 113 of this act. It must be authorized by a lawyer.”

**889.** The Government concludes that, in light of the foregoing, it can be stated that the complaint filed by SINACUT is unfounded, since ESSALUD adjusted its actions in line with the regulatory provisions in force, that is Act No. 27588, which is a law that provides for prohibitions and incompatibilities applicable to public officials and servants and persons providing services to the State under any type of contractual arrangement, and its regulations, adopted by Supreme Decree No. 019-2002-PCM, which in turn is interpreted in accordance with the provisions of Legislative Decree No. 276, Civil Service Career Act, and its regulations, adopted by Supreme Decree No. 005-090-PCM. In line with the opinion of the National Civil Service Authority that freedom of association does not represent an absolute right, it is correct to argue that it is incompatible for public servants and officials to act in a legal capacity against the interests of the institution in which they practise their profession, which is a reasonable measure and, moreover, it in no way affects their freedom of association, especially when there are alternative means through which members of the respective trade unions can exercise their right of defence.

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

**890.** *The Committee observes that in the current complaint the complainant contests the decision of ESSALUD not to allow Mr Luis Oswaldo Apéstegui Márquez, Legal Defence Officer of the complainant trade union and public servant subject to public sector employment provisions, to act as the lawyer representing the Deputy Secretary General of the complainant trade union, Mr Octavio Rojas Caballero, in an administrative appeal, citing alleged legal inconsistencies and potential conflicts of interest. The complainant organization also questions the interpretation of the legal standards used by ESSALUD, with a series of arguments that are extensively detailed in the trade union's allegations.*

**891.** *The Committee notes the Government's arguments highlighting that the complainant organization's Legal Defence Officer could have used a lawyer who was not employed by ESSALUD, and the legality of ESSALUD's decision. Specifically, the Government refers to the following provisions on incompatibilities of Act No. 27588, which are as follows:*

#### *Article 1. Purpose of the act*

*The directors, officers, senior officials and members of advisory councils, administrative courts, commissions and other corporate bodies that have a State public role or duty, directors of public companies or State representatives on boards of directors, and consultants, officials or public servants with specific duties who, due to the character or nature of their role or the services that they provide, have had access to privileged or relevant information, or whose opinion has been crucial in decision-making, are bound to secrecy or confidentiality with regard to the matters or information which are deemed in law to be secret or confidential.*

*Neither may they disclose or use any information which, in the absence of legal restrictions, might be privileged due to its relevance, using it to their advantage or that of third parties and to the disadvantage or detriment of the State or third parties.*

*Any violation of the provisions of this article shall be deemed to be in breach of the principle of good faith and shall be punished by prohibiting the provision of services to the State, without prejudice to any administrative, civil and criminal penalties that might be incurred.*

#### *Article 2. Prohibitions*

*The persons referred to in article 1 of this act, in respect of business or private institutions falling within the specific scope of their public duties, are subject to the following prohibitions:*

- (a) to provide any form of services to those institutions;*
- (b) to accept paid representations;*



- (c) *to be a member of the board of directors;*
- (d) *to acquire shares or holdings, directly or indirectly, in those institutions, their subsidiaries or those which could have a financial link;*
- (e) *to enter into civil or commercial contracts with them;*
- (f) *to act as lawyers, proxies, advisors, sponsors, experts or arbitrators of individuals in any proceedings they have pending before the courts with the same State department in which they provide their services, while they are still in office or carrying out the duties conferred on them; except when acting on their own behalf, or on behalf of their spouse, parents or children. The prohibitions shall remain in force in the specific cases or matters in which they had been directly involved.*

*The prohibitions remain in force until one year after the cessation or completion of the services provided under any type of contractual arrangement, be that due to resignation, cessation, dismissal or redundancy, expiration of the term of contract, or contract termination.*

**892.** *Although it has considered the serious arguments of both the complainant organization and the Government on the interpretation of the legislation on incompatibilities in the public sector, the Committee wishes to state, however, that it does not have the authority to interpret the scope of the national legislation in question, which falls to the national competent authorities and ultimately the courts.*

**893.** *The Committee considers that it is lawful for legislation to prevent conflicts of interests within public institutions and prohibit situations of corruption or use of privileged information, including stipulating incompatibilities in the exercise of certain duties by State employees.*

**894.** *However, in the case in question, although neither the complaint nor the Government's reply refer to specific conflicts of interest, the documents sent as an annex by the complainant organization contain a letter from ESSALUD, from which it emerges that the latter's refusal to allow the union's Legal Defence Officer to act as the lawyer representing the union's Deputy Secretary General refers to an appeal against an administrative decision of ESSALUD refusing trade union leave to the latter. The first paragraph of the letter from ESSALUD, dated 17 November 2009, states the following:*

*I am addressing you with regard to the reference document through which an appeal was filed against letter No. 5132-GCRH-OGA-ESSALUD-2009 dated 20 October 2009, informing him that, having been granted trade union leave for the periods inclusive from 24 February to 2 March, 26–28 March and 13–17 April 2009, it was not possible to grant more trade union leave because he would exceed the days permitted pursuant to directive No. 0013-GG-ESSALUD-2007, "Rules on granting trade union leave to officials of administrative workers trade union organizations".*

**895.** *Hence, the Committee concludes that this case refers to strictly trade union issues and that the issue of a potential conflict of interest between two public employees or between ESSALUD and a public employee does not arise. The Committee thus emphasizes the principle of non-interference of public authorities in the functioning and activities of trade union organizations in accordance with their statutes, enshrined in Article 3 of Convention No. 87, and requests the Government to adopt measures to ensure that, as regards trade union issues, ESSALUD recognizes the right of trade union officials and members to be represented in administrative appeals by a lawyer of their choice, especially when that lawyer is a trade union official.*

## The Committee's recommendation

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

*While it emphasizes the principle of non-interference of public authorities in the functioning and activities of trade union organizations in accordance with their statutes, enshrined in Article 3 of Convention No. 87, the Committee requests the Government to adopt measures to ensure that, as regards trade union issues, ESSALUD recognizes the right of trade union officials and members to be represented in administrative appeals by a lawyer of their choice, especially when that lawyer is a trade union official.*

CASE No. 2898

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

### **Complaint against the Government of Peru presented by the Peruvian Union of Bullfighting Professionals and Artists (SIPAT–PERU)**

*Allegations: Discriminatory rules under the current system for artists' unions to authorize, in exchange for the corresponding payment, performances by foreign artists*

- 897.** The complaint is contained in a communication from the Peruvian Union of Bullfighting Professionals and Artists (SIPAT–PERU) dated 8 August 2011.
- 898.** The Government sent its observations in communications dated 1 December 2011 and 24 February 2012.
- 899.** 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**

- 900.** In its communication dated 8 August 2011, the SIPAT–PERU, registered in 2010, alleges that according to a report by the director of the Ministry of Labour's Bureau for Labour Policy and Regulations dated 27 October 2010, only trade union organizations on the list contained in Ministerial Decision No. 053-91-TR are entitled to issue "inter-union passes" (which authorize, in exchange for the corresponding payment, foreign artists to perform on national territory) for activities associated with bullfighting, thus favouring certain trade union organizations simply because they were established earlier.

- 901.** According to the allegations, the list of trade union organizations established in 1991 is not a true reflection of reality in 2011: of the seven trade unions on the 1991 list, two no longer exist, and as the complainant trade union, registered in 2010, is not on the list it cannot issue inter-union passes.
- 902.** The complainant organization alleges that this situation constitutes discriminatory treatment against it by the authorities vis-à-vis the other two trade unions that operate in the bullfighting sector, both of which are authorized to issue inter-union passes.

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

- 903.** In its communications dated 1 December 2011 and 24 February 2012, the Government states that inter-union passes are a concept recognized in article 29 of Act No. 28131, the Performers Act, for trade unions made up of artists involved in the speciality or genre in which the foreign artist specializes. Article 16 of the implementing regulation of this Act, approved by way of Supreme Decree No. 058-2004-PCM, establishes that these passes must be issued in conformity with the provisions of the Ministry of Labour and Employment Promotion. Following on from this, Ministerial Decision No. 053-91-TR remains applicable and sets out in article 1 the trade union organizations that are authorized to issue inter-union passes. In order to comply with the right to organize, Act No. 28131, the Performers Act (article 29), must be applied with a degree of flexibility to allow trade union organizations to participate on an equal footing in the granting of inter-union passes.
- 904.** The Government adds that the need has now been recognized to replace Ministerial Decision No. 053-91-TR with a more efficient system as follows:
- in addition to currently registered trade unions, unions covering the same speciality or artistic genre that are subsequently established in accordance with the law should also be included;
  - the trade union organization that will issue the inter-union pass will be the one that represents the most artists involved in the speciality or genre practised by the foreign artist; where there is a divergence between two or more trade union organizations, the administrative labour authority will determine the majority union, on the basis of the following criteria:
    - when the divergence relates to two trade union organizations, the majority union will be considered to be the one that represents the absolute majority of artists involved in the speciality or genre practised by the foreign artist. Where there is no absolute majority, the majority union will be considered to be the one that represents the highest number of artists involved in the speciality or genre practised by the foreign artist;
    - when the divergence relates to more than two trade union organizations, the majority union will be considered to be the one that represents the highest number of artists in the speciality or genre practised by the foreign artist.
- 905.** The Government states that the current system for issuing inter-union passes does not violate freedom of association, given that Ministerial Decision No. 053-91-TR – which is what is under discussion – is not a case of the State intervening to affect the normal running of trade union activities, but rather, on the contrary, was originally intended to recognize the most representative organizations by speciality or artistic genre, in order to promote and/or encourage voluntary association in order to establish strong and united trade union organizations.

906. Lastly, the Government notes that on the basis of the above information the complaint is unfounded.

### C. The Committee's conclusions

907. *The Committee observes that in the present complaint, the complainant union alleges that according to the current system only trade union organizations on the list contained in Ministerial Decision No. 053-91-TR of 1991 are entitled to issue "inter-union passes" (which authorize, in exchange for the corresponding payment, foreign artists to perform on national territory) for activities associated with bullfighting, thus favouring certain trade union organizations simply because they were established earlier.*

908. *The complainant organization specifies that the 1991 list of trade union organizations is not a true reflection of reality in 2011: for example, two of the seven trade unions on the list no longer exist, and the complainant trade union, registered in 2010 (in other words after the 1991 list was drawn up), cannot issue inter-union passes, which implies discrimination vis-à-vis the other two trade unions of bullfighting artists contained in the 1991 list.*

909. *The Committee notes the Government's acknowledgement that article 1 of Ministerial Decision No. 053-91-TR of 1991 establishes the trade union organizations that are authorized to issue inter-union passes and indicates that in order to comply with the right to organize Act No. 28131, the Performers Act (article 29), must be applied with a degree of flexibility to allow trade union organizations to participate on an equal footing in the granting of inter-union passes. The Committee also notes the Government's statement that the need has been recognized to replace Ministerial Decision No. 053-91-TR with a more efficient system as follows:*

- *in addition to currently registered trade unions, unions covering the same speciality or artistic genre that are subsequently established in accordance with the law should also be included;*
- *the trade union organization that will issue the inter-union pass will be the one that represents the most artists involved in the speciality or genre practised by the foreign artist; where there is a divergence between two or more trade union organizations, the administrative labour authority will determine the majority union, on the basis of the following criteria:*
  - *when the divergence relates to two trade union organizations, the majority union will be considered to be the one that represents the absolute majority of artists involved in the speciality or genre practised by the foreign artist. Where there is no absolute majority, the majority union will be considered to be the one that represents the highest number of artists in the speciality or genre practised by the foreign artist;*
  - *when the divergence relates to more than two trade union organizations, the majority union will be considered to be the one that represents the highest number of artists involved in the speciality or genre practised by the foreign artist.*

910. *The Committee concludes that the changes that the Government says are needed in the system may solve the specific problem of discrimination affecting the complainant trade union vis-à-vis two other trade unions with respect to the issuing of inter-union passes. Nevertheless, observing that the changes planned for the system would only grant inter-union passes to trade union organizations that already have them, as well as to the*

most representative trade union, the Committee wishes to draw the Government's attention to the following principle [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 346]:

*The Committee has pointed out on several occasions, and particularly during discussion on the draft of the right to organize and collective bargaining Convention, that the International Labour Conference referred to the question of the representative character of trade unions, and, to a certain extent, it agreed to the distinction that is sometimes made between the various unions concerned according to how representative they are. Article 3, paragraph 5, of the Constitution of the ILO includes the concept of "most representative" organizations. Accordingly, the Committee felt that the mere fact that the law of a country draws a distinction between the most representative trade union organizations and other trade union organizations is not in itself a matter for criticism. Such a distinction, however, should not result in the most representative organizations being granted privileges extending beyond that of priority in representation, on the ground of their having the largest membership, for such purposes as collective bargaining or consultation by governments, or for the purpose of nominating delegates to international bodies. In other words, this distinction should not have the effect of depriving trade union organizations that are not recognized as being among the most representative of the essential means for defending the occupational interests of their members, for organizing their administration and activities and formulating their programmes, as provided for in Convention No. 87.*

- 911.** *Consequently, the Committee firmly expects that in accordance with the principles above, the changes planned for the concession system for inter-union passes will be introduced soon and will allow trade union organizations in the bullfighting sector, without distinction whatsoever, to issue inter-union passes. The Committee requests the Government to keep it informed of developments.*

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

- 912.** *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 changes that the Government considers necessary for the concession system for "inter-union passes" in the bullfighting sector will be introduced soon and in accordance with the principles enounced in the conclusions, so that trade union organizations in the bullfighting sector, without distinction whatsoever, can issue inter-union passes.*
- (b) *The Committee requests the Government to keep it informed of developments.*

CASE NO. 2528

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

**Complaint against the Government of the Philippines  
presented by  
the Kilusang Mayo Uno Labor Center (KMU)**

***Allegations: The complainant alleges killings, grave threats, continuous harassment and intimidation and other forms of violence inflicted on leaders, members, organizers, union supporters/labour advocates of trade unions and informal workers' organizations who actively pursue their legitimate demands at the local and national levels***

- 913.** The Committee last examined this case at its March 2011 meeting, when it presented an interim report to the Governing Body [359th Report, paras 1093–1134, approved by the Governing Body at its 310th Session (March 2011)].
- 914.** The Government forwarded additional observations in a communications dated 1 June 2011 and 5 March 2012.
- 915.** The Philippines 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**

- 916.** At its March 2011 session, in the light of the Committee's interim conclusions, the Governing Body approved the following recommendations:
- (a) Welcoming the measures taken so far by the Government, the Committee requests it to continue keeping it informed of the steps taken and envisaged to ensure a climate of justice and security for trade unionists in the Philippines, and encourages the Government to develop a fully fledged technical cooperation programme in this respect. The Committee expects that the Government will continue to engage with the KMU in dealing with cases involving its members and leaders and requests to be kept informed in this respect.
  - (b) As regards the alleged extrajudicial killings, abductions and enforced disappearances, the Committee:
    - (i) urges the Government to take all necessary measures in order to ensure that the investigation and judicial examination of all acts of extrajudicial killings, attempted murders, abductions and enforced disappearances advance successfully and without delay. It asks the Government to indicate without delay the progress made in this regard and provide any relevant court judgments;
    - (ii) with respect to the Hacienda Luisita incident, recalling that nine police officers had previously been identified as suspects in connection with the Hacienda Luisita incident and recommended to be charged for multiple homicide, urges the Government to provide specific information without further delay as to the institution of judicial proceedings for this incident which dates back to 2004; and

- (iii) requests the Government to inform it of the progress made in the adoption of the Bill concerning enforced disappearances.
- (c) As to the issue of lengthy procedures, the Committee:
  - (i) requests the Government to take the necessary measures to ensure the expeditious conclusion of proceedings in allegations of labour-related violence;
  - (ii) requests the Government to supply information on the working of the 99 regional trial courts designated by the Supreme Court, including on the length of procedures in practice, and to provide detailed information on the steps taken to create a special team of competent and well trained prosecutors; and
  - (iii) asks to be kept informed on any further developments regarding the adoption and implementation of the “Omnibus Rules” being elaborated by the CHR.
- (d) The Committee requests the Government to provide information on the implementation of Acts Nos 9851 and 9745.
- (e) With regard to the alleged harassment and intimidation of trade union leaders and members affiliated to the KMU, the Committee urges the Government to respond to the allegation submitted by the UFE–DFA–KMU without delay and to keep it informed on the outcome of the discussion of the allegations of harassment and intimidation of trade union leaders and members affiliated to the KMU by the TIPC Monitoring Body or of any other measures taken to facilitate the settlement of labour disputes and to indicate the progress made in ensuring the full and swift investigation of the alleged acts of harassment and intimidation.
- (f) With regard to the militarization of workplaces, the Committee:
  - (i) urges the Government to communicate its observations on the outstanding allegations;
  - (ii) requests the Government to keep it informed of the follow-through given to implementing the Guidelines for the conduct of the PNP, private security guards and company guard forces during strikes, lockouts and labour disputes, and of any progress made in updating them; and
  - (iii) further expects that the Government will take the necessary accompanying measures, including the issuance of appropriate high level instructions, to bring to an end prolonged military presence inside workplaces, to ensure that any emergency measures aimed at national security do not prevent the exercise of legitimate trade union rights and activities, including strikes, by all trade unions, irrespective of their philosophical or political orientation, in a climate of complete security, and to ensure the strict observance of due process guarantees in the context of any surveillance and interrogation operations by the army and police in a way that guarantees 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 requests to be kept informed in this regard.
- (g) With regard to the cases of arrest and detention, the Committee requests the Government:
  - (i) to communicate its observations in respect of the outstanding allegations of illegal arrest and detention;
  - (ii) to submit further and precise information in relation to these arrests and the legal or judicial proceedings upon which they are based;
  - (iii) to take all necessary measures so as to ensure that the investigation and judicial examination of all cases of alleged illegal arrests and detentions proceed in full independence and without further delay, so as to shed full light on the current situation of those concerned and the circumstances surrounding their arrest;
  - (iv) to communicate the texts of any judgments handed down in the above cases, together with the grounds adduced therefore; and

- (v) as regards the prolonged detention of 20 workers from Karnation Industries, should the investigation of the pending allegations lead to the determination that the persons concerned were detained in relation to their legitimate trade union activities, the Committee urges the Government to ensure that any of the workers that are still imprisoned are immediately released and to take the necessary measures to ensure that all remaining charges are dropped.
- (h) 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. The Government's reply**

**917.** In a communication dated 1 June 2011, the Government provides information in relation to the steps taken to follow up on the recommendations of the 2009 High-level Mission, which also touch upon the issues in this case. The Government generally reiterates the measures taken to strengthen the operational capacity of the Philippines National Police (PNP) and Armed Forces of the Philippines (AFP) so as to foster an enabling environment for the enjoyment of constitutionally guaranteed civil liberties and trade union rights.

**918.** In particular, the Government indicates that the revised Joint Department of Labor and Employment (DOLE)–PNP–Philippine Economic Zone Authority (PEZA) Guidelines on the conduct of PNP personnel, economic zone police and security guards, company security guards and similar personnel during labour disputes have been issued on 23 May 2011. In its communication dated 5 March 2012, it further states that a DOLE–Labor Sector–PNP Summit on the Protection and Promotion of Workers' Rights was held on 6 December 2011, and that the DOLE, labour groups and the PNP signed a Manifesto of Commitment as one of the outputs of the four area-wide orientation seminars on the Joint DOLE–PNP–PEZA Guidelines for the Regional Coordinating Council (RCC) and Regional Tripartite Industrial Peace Council (RTIPC) members. The activity, which was jointly conducted by the DOLE, PNP and PEZA, sought to foster a common understanding of the Guidelines and to ensure close coordination in resolving labour disputes. A DOLE Internal Operational Guidelines outlining the “Do’s and Don’ts” in the implementation of the Guidelines was issued for the purpose. Also, in order to strengthen command responsibility, the PNP has issued its Guidelines on the accountability of the immediate officer for the involvement of his subordinates in criminal offences. Thousands of human rights information and advocacy materials were also distributed to police personnel to enhance their practical knowledge about human rights.

**919.** The Government further highlights the commitment of the new AFP Chief to continue the roadmap provided by his predecessor, that is, the Internal Peace and Security Plan (IPSP) Bayanihan, under which troops will be shifted from combat operations to civilian–military operations such as building roads and schools in conflict areas. The implementation of the IPSP Bayanihan will be monitored by civil society-led oversight initiative or the Bantay Bayanihan.

**920.** Moreover, the Government enumerates the following capacity-building activities conducted in 2011: (i) PNP Human Rights Officers Seminar (18–20 January 2011), which sought to raise human rights awareness of the PNP and orient on the tasks required for human rights desks; (ii) Forum on Human Rights and Criminal Proceedings (14 February 2011); (iii) Seminar on EU–Philippines Justice Support Program (EPJUST) and the Human Rights Situation (extrajudicial killings, enforced disappearances, etc.) in the Philippines (15 February 2011); and (iv) Seminar on the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law for AFP and PNP Personnel (25 and 27 October 2011). The Government further indicates that the Department of Justice (DOJ), through Department Order No. 848 of 10 December 2010, formed a Special Task Force



(STF) to address extrajudicial killings and enforced disappearances tasked among others to review all reported and unresolved cases. The STF complements Task Force 211.

- 921.** Also, the Government reiterates the information concerning activities conducted under the EPJUST aimed at enhancing the capacity and effectiveness of the Philippine justice system and of the Commission of Human Rights (CHR). Moreover, the Government states that the Presidential Human Rights Committee will establish by the second to third quarter of 2012 the National Monitoring Mechanism (NMM) for extrajudicial killings, enforced disappearances and torture cases as a component of the EPJUST programme to bring together state agencies and civil society organizations in a credible and inclusive forum for monitoring the nation's progress in resolving extrajudicial killings and enforced disappearances. The NMM, which will be led by the CHR, will include the PNP, the AFP, the DOJ (especially the STF), the DOLE and other government agencies. It shall have the following functions: (i) to gather, receive and record cases or report of incidents; (ii) to collate, record and review cases or report of incidents in the past to determine the respective status or take appropriate measures; (iii) to share and pool information (except classified) regarding cases, researches, studies and best practices; (iv) to propose policies for prevention and resolution of extrajudicial killings, enforced disappearances and torture cases; (v) to come up with common case records, common reports and common nomenclature; and (vi) to monitor and ensure the appropriate interlinking and fulfilment of institutional mandates.
- 922.** In its most recent communication, the Government adds that the Executive Order establishing the Presidential Committee for the Prevention and Investigation of Extrajudicial Killings, Harassments, Intimidation, Torture and Enforced Disappearances is still undergoing consultations for refinement. This "super body" is intended to replace Task Force 211, serve as the lead executive body that will address cases involving violations of civil and political rights and form a major government component in the NMM. The mandate of the Presidential Committee is: (i) to receive formal and anonymous complaints from all sectors, conduct an inspection of facilities (especially military, police and other law enforcement agencies), inquire into involvement of State agents or order an explanation from the most senior officer; (ii) to conduct formal hearings and investigations to validate cases; (iii) to monitor and oversee the conduct of investigations and prosecutions of cases already filed; and (iv) to recommend court martial or administrative investigation against the immediate superior of state agents.
- 923.** In addition, the Government reports on reforms endorsed by the National Tripartite Industrial Peace Council (TIPC) seeking to ensure the de-judicialization of the labour dispute settlement system through: (i) a 30-day mandatory conciliation–mediation of all labour cases with settlement services that are speedy, impartial, inexpensive and accessible (DOLE Department Order No. 107-10 of 7 October 2010 and Rules of Procedure of the Single Entry Approach issued on 25 February 2011); and (ii) NLRC reforms, grievance settlement and voluntary arbitration.
- 924.** Pursuant to the identified follow-through activities in the Indicative Action Plan from a series of workshops conducted with the ILO, the Government states that the TIPC recognized the need to create a structure for the National TIPC Monitoring Body in RTIPCs. According to TIPC Resolution No. 3, Series of 2011, Administrative Order No. 263, Series of 2011, of 6 July 2011 directed all DOLE regional directors to create a regional tripartite monitoring body in their respective RTIPCs, which shall operate in accordance with the Operational Guidelines of the National TIPC Monitoring Body, in order to ensure observance of international labour standards in the regions, to verify or document allegations of possible trade union rights violations, to monitor or evaluate complaints involving allegation of violation of ILO Conventions Nos 87 and 98, to gather relevant information from regional authorities or courts, including comments from the

social partners, and prepare case/complaint profiles to be submitted to the National TIPC Monitoring Body.

- 925.** With particular regard to the allegations, the Government indicates that, while the complainant Kilusang Mayo Uno (KMU) has conveyed interest in participating in the TIPC and the National TIPC Monitoring Body and is to be appointed by the DOLE Secretary to the Technical Executive Committee (TEC) of the TIPC, recent developments appear to have made resurface the previous position of the KMU, and resulted in a request of the removal of its name from the inclusive social dialogue conducted by the DOLE on the basis that it had purportedly never been consulted on the Government's labour policy framework. In its communication dated 5 March 2012, the Government reports that the National TIPC has been formally reconstituted on 11 July 2011 with 20 workers' and 20 employers' representatives, and that the KMU has declined to participate in it, including at the TEC level, but that the invitation stands. The Government states that the TIPC Monitoring Body has already undertaken a comprehensive inventory of cases pending before the ILO supervisory body, the approach being to consolidate the cases which have been raised several times in the case number where it was first raised if it was not a different or separate incident. The KMU has been provided with a compilation of the cases and requested to provide additional information to facilitate the investigation, prosecution and resolution of the cases mentioned in the complaint. The Government also informs that, for 2011, the TIPC and the National TIPC Monitoring Body have been allocated a budget of 5.1 million Philippine pesos (PHP) and, for 2012, a budget of PHP7.33 million.
- 926.** The Government reports that the consolidation brought the number of cases/incidents cited in Case No. 2528 to a total of 62, or four cases less from the previous total of (66 affecting KMU leaders and/or members. The consolidated results showed allegations of 39 cases of killings (47 victims killed, 3 wounded) and 11 cases of abductions (30 victims). The previously 16 cases of harassment have been consolidated to 12 with 105 victims: the cases of Vicente Barrios et al., Zinafro Salomag et al. and Joel N. Cuyos et al. were consolidated as incidents of harassment at Fresh Banana Agricultural Corporation, Suyapa Farms, Compostela Valley; and the cases of Aldrene M. Tambalo, Roque O. Roncales and Nestor Legaspi were consolidated as incidents of harassment at Fresh Banana Agricultural Corporation, Barangay Osmiguel, Compostela Valley.
- 927.** The Government again indicates that the National TIPC Monitoring Body uses the ILO criteria of admissibility of cases/complaints and classified cases with allegations of extrajudicial killings, harassments and abductions into possibly labour-related, under Convention No. 87, if the circumstances of the case would constitute infringement of trade union rights, or possibly not labour-related, under Convention No. 87, if the circumstances of the case would not constitute infringement of trade union rights. The classification was designed to rationalize and prioritize the cases for investigation, prosecution and resolution, and not to exclude specific cases raised in the complaints.

### ***Extrajudicial killings***

- 928.** The Government reiterates that the TIPC Monitoring Body through Resolution No. 2, Series of 2010, adopted on 25 June 2010, recommended the following actions for the 39 cases of extrajudicial killings: (a) eight cases for closure; (b) six on-trial cases were requested to be prioritized by the courts and the DOJ for prosecution and resolution; (c) 11 cases for expeditious investigation by the DOJ; and (d) 14 cases for the CHR to conduct an in-depth investigation on the circumstances, or issue a "final pass" on those that had already been investigated by either the CHR, the PNP Task Force, or DOJ Task Force 211, with a view to accord justice to the victims and their families at the soonest possible time. The Government again states that the above resolution on the 39 cases of extrajudicial killings has already been forwarded to the concerned agencies for their

appropriate action, and the DOLE Secretary has sought audience with heads of agencies for their commitment to expedite the investigation, prosecution and resolution of the cases.

**929.** The Government indicates in particular that:

- (a) Resolution No. 1, Series of 2011, adopted by the National TIPC Monitoring Body on 24 May 2011, reaffirms the closure of eight cases in Resolution No. 2, Series of 2010, due to desistance, refusal to file a case or death of the suspect(s);
- (b) as to the six cases which are on trial, two cases (Samuel Bandilla and John Jun David et al.) are forwarded to the DOJ and four were endorsed to the Supreme Court. The Supreme Court reported that the four cases of killings (Teotimo Dante; Ricardo Ramos; Antonio Pantonial and Fr William Tadena) pending before the different regular courts are now covered with specific instruction dated 20 January 2012 from the Supreme Court to the judges handling the cases, to expedite the hearing and decide the same within 120 days; the Office of the Court Administrator monitoring observance of this instruction provided the following updates:
  - (i) Teotimo Dante: The presentation of the prosecution's last witness was originally set on 26 March 2012, but in view of the Supreme Court's instruction, the judge issued an order rescheduling the presentation to 13 February 2012 (postponed on motion of the Prosecutor); a subpoena was issued for the witness to appear and render testimony; warning was also issued that should the prosecution fail once more to adduce evidence against the accused, the court will be constrained to consider it as having terminated presentation of evidence;
  - (ii) Ricardo Ramos: An order dated 7 February 2012 was issued by the Regional Trial Court Branch 65 granting the Demurrer to Evidence which was filed by the accused on 2 November 2011; the accused was acquitted of the crime of murder for failure of the prosecution to prove his guilt beyond reasonable doubt and was released from jail;
  - (iii) Antonio Pantonial: The case was last heard on 8 February 2012, and the prosecution was given final opportunity to present its last witness on 14 March 2012 as said witness who, according to the private complainant was duly informed and was ready to testify, cannot appear in court due to the rising waters of the river in their place; and
  - (iv) Fr William Tadena: The accused is detained in Muntinlupa City Jail by reason of another case; no prosecution witness is appearing;
- (c) as regards the 13 cases for expeditious investigation by the DOJ (initially 11 cases plus two cases forwarded by the Supreme Court), the newly created STF has already started looking into the cases which were previously endorsed to DOJ TF211 and reported that two cases (Ronald Andrada and Angelito and Abit Mabansag), having been provisionally dismissed more than two years ago, were now considered permanently dismissed under Rule 118 of the Rules of the Court; four cases filed before the Prosecutor's Office (Paquito Diaz, Victoria and Pajo Samonte, Abelardo and Rosal Ladera and Rolando and Talla Mariano) were dismissed due to lack of probable cause or insufficient evidence but leads were being sought by the DOJ as these cases could be reinvestigated; three cases (Leodegario and Mawal Punzal, Samuel and Berdaje Dote and Tirso and Masiglat Cruz) were under investigation; three cases (Noel Garay and De Guzman, Ramon Namuro and John Jun David et al.) had been archived, the latter reportedly because the accused are at large and the DOJ tapped its investigation agencies to reopen the investigation with a view to identifying the perpetrators and apprehending them; and in one case (Samuel Bandilla), which

had been dismissed by the Prosecutor's Office, the dismissal was appealed to the DOJ under the previous administration of the agency, the case folder went missing due to improper turnover of files, the DOJ is exerting efforts to get a copy of the Petition for Review (the lawyer of the complainant was killed shortly after filing the petition and the complainant does not have a copy) and the STF is exploring, given the peculiar circumstances of this case, the exercise by the Secretary of Justice of her extraordinary powers under section 4 of Republic Act 10071, which grants the authority to act directly on any matter involving national security or a probable miscarriage of justice within the jurisdiction of the prosecution staff, and to review, reverse, revise, modify or affirm on appeal or petition for review final judgments and orders of the Prosecutor General and other prosecutors or to reopen cases dismissed by the prosecutors if and when warranted by the facts; and

- (d) with respect to the 14 cases endorsed to the CHR, ten were recommended for closure and/or archiving due to desistance, disinterest to pursue the case or lack of witnesses; of the ten, five (Diosdado Fortuna; Antonio Mercado Panaligan; Crisanto Teodoro; Florante Collantes and Bailon; and Francis Noel Desacola) are with clear findings of human rights violation and the recommendation for closure and/or archiving are with notation that it is closed or archived without prejudice to its reopening should new leads or evidences be available; Resolution No. 1, Series of 2011, adopted by the TIPC Monitoring Body on 24 May 2011 endorsed the CHR recommendation with a note that it will not foreclose further prosecution should witnesses or evidences be available and recommended provision of livelihood assistance to the immediate dependants of victims of extrajudicial killings recommended for closure; the Government indicates that, should there be new leads or developments or a case be reopened, such information will be monitored and reported to the ILO, and that the DOLE has already issued Administrative Order No. 185 on 20 May 2011, directing the concerned regional directors to extend livelihood grants/assistance to the immediate dependants of the victims in the cases recommended for closure or archiving; on 6 May 2011, the CHR officially recommended the closure of the remaining four cases (Jesus Butch Servida, Gerson Lastimoso, Gerardo Cristobal, and Armando Leabres Pallarca) due to reasons ranging from desistance or disinterest to lack of evidence and witnesses who can identify the perpetrators; the National TIPC Monitoring Body, taking into account the information gathered and reported by the PNP, referred through Resolution No. 1, Series of 2012, the cases back to the CHR and PNP Task Force Usig for further investigation and validation of facts considering the incomplete or conflicting sets of information.

**930.** In this context, the Government explains that desistance, disinterest to pursue the case, lack of witnesses or refusal to file a case trigger closure or archiving of a case because the existing Philippine criminal justice system relies heavily on testimonial evidence, rather than forensic evidence. Thus, although killing or murder is a crime against public order and should be pursued by the State, witnesses' retraction, and/or waiver or desistance by the victim's relative to prosecute the case will result in its dismissal unless there are other witnesses or the evidence is strong to convict the suspect beyond reasonable doubt. The criminal justice system has five pillars: community, investigation, prosecution, judiciary, and correction. The PNP and the National Bureau for Investigations (NBI) handle investigations, not the prosecution authorities (the DOJ). Prosecution evaluates investigation findings or complaints, and files the corresponding information.

**931.** As regards the new allegations of murder and attempted murder brought forward by the KMU in its communications dated 30 September and 10 December 2009, as well as 2 June 2010 (Sabina Ariola, Gil Gojol, Carlito Dacudao, Joel Ascutia, Arnold Cerdo, Armando Dolorosa, Maximo Barranda, Liza Alo, Vicente Barrios and Edward Panganiban), the Government indicates that the National TIPC Monitoring Body, through Resolution No. 7,

Series of 2012, classified one case of extrajudicial killing (Maximo Barranda) as possibly not labour related considering that the alleged facts would not constitute an infringement of the exercise of freedom of association and the right to organize under Convention No. 87. The case of Edward Panganiban is already included in the list of new cases, which is in the present case calendar of the National TIPC Monitoring Body and is covered under another resolution. The remaining cases were referred to the concerned agencies (CHR, PNP Task Force Usig, DOLE, Supreme Court and the AFP) for prompt action and speedy disposition.

- 932.** As regards the efforts to combat impunity more generally, the Government also refers to the indictment on 15 December 2011 of retired Major General Jovito Palparan, notoriously known as the “Butcher”, for two counts of kidnapping and serious illegal detention in connection with the abduction of still missing UP student activists in 2006. A warrant of arrest was issued on 20 December 2011. Since then, Palparan went into hiding and a manhunt for him is now on. Also recommended for indictment with Palparan are Lieutenant Colonel Felipe Anotado Jr, Master Sergeant Rizal Hilario and Staff Sergeant Edgardo Osorio. The indictment against General Palparan underscores the commitment of the Government to prosecute state actors implicated in extrajudicial killings and enforced disappearances. Although direct evidence is yet to be established that General Palparan ordered the extrajudicial killings and enforced disappearances, the indictment seeks to hold him liable under the principle of command responsibility, for failing to prevent, punish or condemn the killings. There are allegations that General Palparan had knowledge or, had reason to know of, or should have known about the criminal acts of his subordinates. He has been widely believed to be accountable for those acts because at certain period, where he had been the Commanding General or Brigade Commander of the 7th Infantry Division, Central Luzon, 8th Infantry Division, Eastern Visayas, and 2nd Infantry Division, Mindoro, the number of extrajudicial killings and enforced disappearances involving trade unionists, member of progressive groups, human rights advocates and media personalities rose in those areas. He has been tagged to have the biggest contribution to the alleged culture of impunity pervading the country in an effort to achieve the Macapagal-Arroyo Administration’s bold objective to defeat the communists in two years time. From September 2005 until his retirement in September 2006, General Palparan was the Commanding General or Brigade Commander of the 7th Infantry (Kaugnay) Division in Central Luzon. The regional breakdown of the 39 cases of extrajudicial killings and 11 cases of abduction reported in the complaint showed that the same increased or proliferated considerably during General Palparan’s tour of duty in the area.

### ***Abductions and enforced disappearances***

- 933.** The Government further indicates that, on the 11 cases of abduction, the National TIPC Monitoring Body has issued Resolution No. 2-A, Series of 2011, on 24 May 2011 recommending the following actions: (i) one case (Normelita Galon et al.) to be referred to the PEZA to conduct a thorough investigation on the claimed abduction as well as the direct assault cases filed by the PEZA police against Galon et al.; and (ii) 11 cases (including the case of Galon et al.) referred to the CHR for in-depth investigation or “final pass”.
- 934.** On 5 January 2012, the CHR recommended the closure of the eleven cases of alleged abduction for lack of interest of the parties to pursue the case, or lack of material evidence to establish that human or labour rights violations have been committed. Taking into account the CHR recommendation and the information gathered from other competent agencies, the National TIPC Monitoring Body adopted Resolution No. 2, Series of 2012, on the closure of two abduction cases (Robin Solano et al. and Ronald Intal) without prejudice to their reopening should new leads or evidence be available. The remaining nine cases (Jaime Rosios; Melvin Yares; Normelita Galon et al.; Perseus Geagoni; Virgilio

Calilap et al.; Lourdes Rubrico; Rogelio Concepción; Leopoldo Ancheta; and Rafael Tarroza) were referred for further investigation and information to the PNP Task Force Usig, DOJ and Office of the Ombudsman, some with request for clarification with the CHR. The RTIPC monitoring bodies were also requested to conduct further investigation, validation of evidence and/or reconciliation of reports. The DOLE is tasked to ensure and periodically report to the National TIPC Monitoring Body on the progress of investigation or prosecution.

- 935.** As regards the new allegations of abduction brought forward by the KMU in its communications dated 30 September and 10 December 2009, as well as 2 June 2010 (Roy Velez), the Government indicates that the case was referred to the agencies concerned for prompt action and speedy disposition.

### ***Harassment and intimidation***

- 936.** According to the Government, on the 12 cases of harassment (previously, 16 cases), the National TIPC Monitoring Body had issued Resolution No. 2-B, Series of 2011, on 24 May 2011, recommending the following actions: (i) five cases for closure but with request for “final pass” by the CHR (Rene Acinue Manalo; Ricardo Bellamia; Angelita Ladera; Mercy Santomin; and Vincent Borja); (ii) seven cases to be referred to the CHR for in-depth investigation or “final pass” (members of Sulpicio Lines Workers’ Union; Ariel Geres Legaspi; Edison Alpiedan et al; Noel Tenorio Sanches; 52 workers of Chiyoda Integre Phils.; Aldrene Tambalo, Roque Roncales and Nestor Legaspi at Fresh Banana Agricultural Corporation – Osmiguel; and Vincent Barrios et al., Packing Plant 92 Workers’ Union and Joel Cuyos et al. at Fresh Banana Agricultural Corporation – Suyapa); and (iii) DOLE to conduct follow-up action/validation and submit a final report on whether the labour issues related to the harassment cases have already been resolved with finality. The CHR recommended on 5 January 2012: (i) closure of the three cases of harassment for lack of interest of the parties to pursue the case, and/or no material evidence to establish that human or labour rights violations have been committed (Angelita Ladera; Mercy Santomin and Vincent Borja, who was arrested by virtue of a warrant of arrest but was released on 13 October 2010 after the only witness failed to identify him in open court); and (ii) further investigation on the other nine harassment cases (Rene Acinue Manalo; Ricardo Bellamia; members of Sulpicio Lines Workers’ Union; Ariel Geres Legaspi; Edison Alpiedan et al; Noel Tenorio Sanches; 52 workers of Chiyoda Integre Phils.; Aldrene Tambalo, Roque Roncales and Nestor Legaspi at Fresh Banana Agricultural Corporation – Osmiguel; and Vincent Barrios et al., Packing Plant 92 Workers’ Union and Joel Cuyos et al. at Fresh Banana Agricultural Corporation – Suyapa) to obtain evidence and determine the real motives for the crime and the identities of the person(s) responsible. The closure and archiving of the cases is without prejudice to their reopening if witnesses surface and material evidence are available. The verification of the harassment cases by DOLE yielded that six were connected to the labour strike at Nestlé, Footjoy, Chiyoda and Hanjin Garments but that documentation is only available on three strike incidents (Nestlé Phils., Chiyoda Integre Phils., Inc., and Hanjin Garments, Inc.) because Footjoy documentation is on the case of Merci Santomin, which has been closed by the CHR; the Chiyoda strike was settled on 10 September 2009; the Nestlé strike arising from a collective bargaining agreement deadlock with respect to the union position to make the unilateral retirement grant be made part of the negotiation was resolved by the DOLE in 2002 and finally decided by the Supreme Court on 3 March 2008 but the issue persisted despite the DOLE ruling on 28 November 2008 that the existing retirement plan in the parties collective bargaining agreement be maintained in its present form and directed Nestlé to establish a contributory retirement plan; and the Hanjin Garments strike was settled on 10 February 2008, but on 11 February 2009, the union leaders reported violation or non-reinstatement by the management of the illegally dismissed workers, which is now subject of a separate case before the National Labor Relations Commission (NLRC).

Consequently, through Resolution No. 3, Series of 2012, the National TIPC Monitoring Body requested the CHR to expedite the resolution of four cases (Fresh Banana Agricultural Corporation – Osmiguel; Fresh Banana Agricultural Corporation – Suyapa; Members of Sulpicio Lines Workers’ Union; and Edison Alpidan et al.) by taking into account the information that has been gathered and reported by other competent agencies such as the PNP. The DOLE and the NLRC were requested to exert efforts to resolve expeditiously the remaining issues in the labour disputes in Nestlé and Hanjin, and the RTIPC monitoring bodies to continuously gather information and monitor the cases.

- 937.** As regards the allegations of harassments, intimidation, discrimination on union members and union busting at Dole Philippines, the Government reports that, as an offshoot of an ILO–DOLE workshop on freedom of association in December 2010, Administrative Order No. 08, directing the DOLE Regional Office No. XII and the National Conciliation and Mediation Board in regions XI and XII to constitute an independent tripartite committee at Dole Philippines, was issued on 10 January 2011, to ensure the integrity of the forthcoming certification election. On 31 January 2011, during the committee’s third meeting, all the members present signed an accord entitled “Social Partnership Accord on the Conduct and Related Activities Before, During and After Certification Election at Dole Philippines, Inc., Cannery Site, Polomolok, South Cotabato”. The contending unions agreed to a consent election. Thus, the results of the 22 February 2011 certification election, with 3,776 votes cast from a total of 3,876 registered voters (97.42 per cent turnout), are as follows: LEAD PH with 2,814 votes, AMADO–KADENA–NAFLU–KMU with 922 votes and “No Union” with 15 votes. LEAD PH was certified on 28 February 2011, after a manifestation by AK–NAFLU–KMU during the tripartite committee meeting that they are not going to formalize the protest, and after the expiration of the five-day period to formalize the protest. Based on the report of the election officers, as compared to previous certification elections held at the Dole Philippines, Inc., the recently held election is the most orderly and they attributed this to the tripartite committee. The Government also indicates that the mobilization of a tripartite monitoring team was duplicated in DOLE national capital region for the conduct of the certification election at Bleustar/Advan Shoes on 18 February 2011. With the creation of a tripartite monitoring team the election was successful and peaceful. Bleustar Workers’ Labor Union (BWLU) with 106 votes of the 206 total votes cast was certified as the sole and exclusive bargaining agent on 4 March 2011.
- 938.** With respect to the new allegations of harassment and intimidation brought forward by the KMU in its communications dated 30 September and 10 December 2009, as well as 2 June 2010 (Rene Galang, Gaudencio Garcia, Luz Fortuna, Jason Hega, et al., Belen Navarro Rodriguez, Leo Caballero, Romualdo Basilio et al., Arman Blasé, Remigio Saladero, workers of Tritran Union, Universal Robina Corporation Employees’ Union, worker communities near Pacific Cordage Corporation, Maragusan United Workers’ Union et al., Romeo Legaspi, Union of Filipino Employees, Farm workers in the Cagayan Valley, Bukidnon and Davao del Sur; ULWU leaders, workers of Sumitomo Fruits Corporation, and union in Suyapa Farm, 20 workers of Karnation Industries), the Government indicates that the National TIPC Monitoring Body, through Resolution No. 7, Series of 2012, classified one case of harassment and intimidation (farm workers in the Cagayan Valley, Bukidnon and Davao del Sur) as possibly not labour related considering that the alleged facts would not constitute an infringement of the exercise of freedom of association and the right to organize under Convention No. 87. The case involving Remigio Saladero was recommended for closure considering that the criminal charges against him were already dismissed. The remaining cases were referred to the concerned agencies (CHR, PNP Task Force Usig, DOLE, Supreme Court and the AFP) for prompt action and speedy disposition.

**Other allegations**

- 939.** With regard to Karnation Industries, according to the Government, letters of intervention were sent urging for the early resolution of the cases against the 19 workers of Karnation Industries and Export Incorporated and Felicidad Caparal, which was raised in the unnumbered cases. The 19 workers of Karnation Industries were out on bail.
- 940.** Concerning the allegations of militarization or military harassments, the Government states that DOLE and AFP have already agreed in principle on the following items which are part of the Indicative Action Plan arising from the ILO series of seminars on freedom of association and collective bargaining: (a) participation in the RTIPC for better appreciation of social dialogue, freedom of association and civil liberties; (b) conduct of capacity-building seminars on freedom of association as it relates to civil liberties and human rights; and (c) 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. 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, in which the signatories 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 Government further indicates that several tripartite meetings with the AFP, PNP and PEZA have been held by the TEC 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.

**Other issues**

- 941.** Furthermore, the Government reports on the strategic action taken by the Supreme Court to expedite the resolution of cases involving extrajudicial killings. The Chief Justice Committee to address case congestions and delays in the lower courts was created to provide rationale and policy guidance and to oversee the Supreme Court's case decongestion efforts. This "high-level" committee, which is composed of associate justices and other officials of the Supreme Court and agencies in the justice system, will establish an inventory and profiles of case congestions and delays in the lower court and their causes. The Government recalls that, as early as 1 March 2007, the Supreme Court had issued Administrative Order No. 25-2007 (AO 25/2007) providing that cases involving violations of the Anti-Torture Law shall undergo mandatory continuous trial and be terminated within 60 days and judgment thereon shall be rendered within 30 days from submission for decision; Circular No. 103-2007 was issued by the Office of the Court Administrator directing all concerned regional trial courts to strictly observe AO 25/2007 and to submit a monthly report on the status of cases concerning extrajudicial killings of political ideologists and members of the media including reasons why AO 25/2007 could not be strictly followed. For failure of some regional trial courts to comply, Circular No. 46-2009 was issued reiterating the directives set forth in AO 25/2007. The Supreme Court is thus optimistic that cases involving extrajudicial killings would be resolved with immediate dispatch. Also, in 2008 the Supreme Court conducted a multi-sectoral and skills-building seminar workshop on extrajudicial killings and enforced disappearances for



the 3rd Judicial Region. The Supreme Court later brought the seminar workshop to all the 12 judicial regions. Regional trial court judges, prosecutors, public attorneys and representatives from the PNP, AFP and Integrated Bar of the Philippines participated in the seminar-workshops. Moreover, the Enhanced Justice on Wheels (EJOW) programme, which was developed for jail and court docket decongestion was enhanced to include mobile court annexed mediation proceedings. It also provided the following services: free legal, medical and dental aid; venue for dialogue with judges and other members of the justice sector; and information dissemination drives on the justice system and pertinent laws for community-based leaders and individuals. In 2010, the EJOW was assigned sufficient staff to simultaneously operate in several areas.

942. Finally, the Government indicates that the National TIPC Monitoring Body issued Resolution No. 4, Series of 2012, recommending provision of assistance, in accordance with the DOLE current programmes, policies and guidelines, to the qualified dependants of the alleged victims of labour-related killings, or to the purported victims of abduction and harassment cases and/or their qualified dependants as cited in Case No. 2528.

### C. The Committee's conclusions

943. *The Committee recalls that the present case concerns allegations of killings, grave threats, continuous harassment and intimidation and other forms of violence inflicted on leaders, members, organizers, union supporters/labour advocates of trade unions and informal workers' organizations who actively pursue their legitimate demands at the local and national levels.*
944. *The Committee notes that the Government indicates the measures taken to strengthen the operational capacity of the PNP and AFP and on the activities conducted under the EPJUST.*
945. *The Committee notes the information provided by the Government concerning: (i) the forthcoming establishment of the NMM to bring together relevant state agencies and civil society organizations in a credible and inclusive forum for monitoring the nation's progress in resolving extrajudicial killings and enforced disappearances; (ii) the forthcoming establishment of the Presidential Committee for the Prevention and Investigation of Extralegal Killings, Harassments, Intimidation, Torture and Enforced Disappearances, a "super body" intended to replace Task Force 211 and serve as the major government component in the CHR-led NMM; (iii) the creation of the STF of the DOJ, which has already started its work, with the mandate to complement Task Force 211 and review all reported and unresolved cases of extrajudicial killings and enforced disappearances; and (iv) the issuance of TIPC Resolution No. 3, Series of 2011, recognizing the need to create for the National TIPC Monitoring Body a corresponding structure in the RTIPCs and providing that the RTIPCs shall create regional monitoring bodies which shall operate in accordance with the Operational Guidelines of the National TIPC Monitoring Body and ensure observance of international labour standards in the regions, monitor and evaluate complaints and prepare case profiles.*
946. *The Committee notes, in particular, the Government's indication that the KMU had conveyed interest in participating in the TIPC and the National TIPC Monitoring Body and was to be appointed to the TEC, however, recent developments appear to have brought about a change in its position in so far that the KMU has declined to participate in the formally reconstituted National TIPC including at the TEC level; but the invitation stands. The Committee notes that the Government further states that the KMU was provided with the recently undertaken comprehensive inventory of the cases mentioned in the complaint and requested to provide additional information. Noting the efforts made by the Government to involve the KMU, the Committee expects that the Government will*

*continue to engage with the KMU in dealing with cases involving its members and leaders and invites the complainant organization to cooperate as far as possible with the Government to this end. The Committee requests to be kept informed in this respect.*

947. *The Committee welcomes the measures taken by the Government and requests the Government to continue to keep it informed of the steps taken and envisaged to ensure a climate of justice and security for trade unionists in the Philippines.*

### **Extrajudicial killings**

948. *The Committee notes that the Government reiterates previously submitted information on the status of the 39 cases of alleged killings. In addition, the Committee notes the Government's indication that: (a) Resolution No. 1, Series of 2011, adopted by the National TIPC Monitoring Body on 24 May 2011, reiterates the closure of eight cases in Resolution No. 2, Series of 2010, due to desistance, refusal to file a case or death of the suspect(s); (b) as to the six cases which are on trial, two cases (Samuel Bandilla and John Jun David et al.) were forwarded to the DOJ and four were endorsed to the Supreme Court (Teotimo Dante; Ricardo Ramos; Antonio Pantonial and Fr William Tadena), which issued a specific instruction dated 20 January 2012 to the judges handling the cases, to expedite the hearing and decide the same within 120 days; in the case of Ricardo Ramos, the accused was acquitted of the crime of murder for failure of the prosecution to prove his guilt beyond reasonable doubt and was released from jail; (c) as regards the 13 cases for expeditious investigation by the DOJ (initially 11 cases plus two cases forwarded by the Supreme Court), the STF has reported that two cases (Ronald Andrada and Angelito and Abit Mabansag), having been provisionally dismissed more than two years ago, were now considered permanently dismissed; four cases filed before the Prosecutor's Office (Paquito Diaz, Victoria and Pajo Samonte, Abelardo and Rosal Ladera and Rolando and Talla Mariano) were dismissed due to lack of probable cause or insufficient of evidence but leads were being sought as these cases could be reinvestigated; three cases (Leodegario and Mawal Punzal, Samuel and Berdaje Dote and Tirso and Masiglat Cruz) were under investigation; three cases (Noel Garay and De Guzman, Ramon Namuro and John Jun David et al.) had been archived, the latter reportedly because the accused are at large and the DOJ tapped its investigation agencies to reopen investigation with a view to identifying the perpetrators and apprehending them; and in one case (Samuel Bandilla), which had been dismissed by the Prosecutor's Office, the dismissal was appealed to the DOJ, the case folder went missing due to improper turnover of files, the DOJ is exerting efforts to get a copy of the Petition for Review (the lawyer of the complainant was killed shortly after filing the Petition and the complainant does not have a copy) and the STF is exploring, given the peculiar circumstances of this case, the exercise by the Secretary of Justice of her extraordinary powers under Section 4 of Republic Act 10071, which grants the authority to act directly on any matter involving a probable miscarriage of justice within the jurisdiction of the prosecution staff; and reopen cases dismissed by the prosecutors if and when warranted by the facts; and (d) with respect to the 14 cases endorsed to the CHR, ten were recommended for closure and/or archiving due to desistance, disinterest to pursue the case or lack of witnesses, without prejudice to its reopening should new evidence be available; Resolution No. 1, Series of 2011, adopted by the National TIPC Monitoring Body on 24 May 2011 endorsed the CHR recommendation without foreclosing further prosecution should witnesses or evidence become available and recommended provision of livelihood assistance to the immediate dependants of victims of extrajudicial killings in cases recommended for closure or archiving; the Committee notes that the Government has already issued Administrative Order No. 185 on 20 May 2011, directing the concerned regional directors to extend the relevant livelihood grants; on 6 May 2011, the CHR recommended the closure of the remaining four cases (Jesus Butch Servida, Gerson Lastimoso, Gerardo Cristobal and Armando Leabres Pallarca) due to reasons of disinterest, desistance or lack of evidence and witnesses but*

*the National TIPC Monitoring Body, taking into account the incomplete or conflicting sets of information, referred the cases back to the CHR and PNP Task Force Usig for further investigation.*

- 949.** *With reference to its previous comments concerning the archived cases closed for reasons of desistance, the Committee notes the confirmation of the closure of the eight cases, the recommendation of initially all 14 (subsequently corrected down to ten) cases before the CHR for closure and/or archiving due to desistance, disinterest to pursue the case or lack of witnesses as well as the Government's view that, although murder is a crime against public order and should be pursued by the State, disinterest to pursue the case, lack of witnesses or refusal to file a case normally trigger closure or archiving of a case (unless there are other witnesses or the evidence is strong to convict the suspect beyond reasonable doubt), because the existing Philippine criminal justice system relies heavily on testimonial evidence, rather than forensic evidence. While noting with interest the initiative to provide livelihood assistance to the immediate dependants of victims of extrajudicial killings in cases recommended for closure or archiving, the Committee continues to consider that the killing, disappearance or serious injury of trade union leaders and trade unionists require the institution of independent judicial inquiries in order to shed full light, at the earliest date, on the facts and the circumstances in which such actions occurred and in this way, to the extent possible, determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 48]. The Committee reiterates that such crimes, due to their seriousness, should be investigated and, where evidence exists, prosecuted *ex officio* without delay, i.e. even in the absence of a formal criminal complaint being lodged by a victim or an injured party. The Committee stresses 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]. It urges the Government to take all necessary measures so as to ensure that the investigation and judicial examination of all acts of extrajudicial killings advance successfully and without delay.*
- 950.** *Recalling that justice delayed is justice denied, the Committee also urges the Government to do its utmost to ensure the swift investigation and prosecution as well as a fair and speedy trial for the remaining four on-trial cases, the four cases still under investigation by the DOJ (particular regard being had to the peculiar circumstances of the case of Samuel Bandilla) and the four CHR cases referred back to the CHR and PNP Task Force Usig for further investigation.*
- 951.** *With regard to the Hacienda Luisita incident, the Committee expresses its deep concern that the Government confines itself to indicating that the STF has reported that the case of John Jun David et al. has been dismissed. The Committee recalls that the Hacienda Luisita incident, categorized in the case inventory as "John Jun et al.", has claimed the lives of at least seven trade union leaders and members (Jhaivie Basilio, Adriano Caballero, Jun David, Jesus Laza, Jaime Pastidio, Juancho Sanchez and Jessie Valdez) and led to the injury of 70 others, and that nine police officers had previously been identified as suspects in this connection and recommended to be charged for multiple homicide. Noting the Government's indication in its most recent communication that the case has been archived because the accused are at large but that the DOJ tapped its investigation agencies to reopen investigation with a view to identifying the perpetrators and apprehending them, the Committee expects that the Government will do its utmost to ensure that the investigation is pursued and that the guilty parties are brought to trial and convicted.*

952. *As regards the allegations of murder, and attempted murder, brought forward by the KMU in communications dated 30 September and 10 December 2009, as well as 2 June 2010 (Sabina Ariola, Gil Gojol, Carlito Dacudao, Joel Ascutia, Arnold Cerdo, Armando Dolorosa, Maximo Barranda, Liza Alo, Vicente Barrios and Edward Panganiban), the Committee notes the Government's indication that the National TIPC Monitoring Body, through Resolution No. 7, Series of 2012, classified one case of extrajudicial killing (Maximo Barranda) as possibly not labour related, that the case of Edward Panganiban is on its present case agenda, and that the remaining cases were referred to the concerned agencies (CHR, PNP Task Force Usig, DOLE, Supreme Court and the AFP) for prompt action and speedy disposition. The Committee expects that these cases will be reviewed by the TIPC and that the Government will make every effort to ensure the speedy investigation, prosecution and judicial examination of these new allegations. It urges the Government to indicate without delay the progress made in this regard.*
953. *The Committee further notes the important step taken by the Government to combat impunity through the indictment of General Palparan for failing to prevent, punish or condemn killings that took place under his command responsibility. The Committee requests the Government to keep it informed of developments in this regard.*

### **Abductions and enforced disappearances**

954. *The Committee notes the Government's indication that, on the 11 cases of abduction, the National TIPC Monitoring Body has issued Resolution No. 2-A, Series of 2011, on 24 May 2011 recommending the following actions: (i) one case (Normelita Galon et al.) to be referred to the PEZA to conduct a thorough investigation on the claimed abduction as well as the direct assault cases filed by the PEZA police against Galon et al.; (ii) 11 cases (including the case of Galon et al.) referred to the CHR for in-depth investigation or "final pass". It also notes that, on 5 January 2012, the CHR recommended the closure of the eleven cases of alleged abduction but that the National TIPC Monitoring Body referred nine of those cases (Jaime Rosios; Melvin Yares; Normelita Galon et al.; Perseus Geagoni; Virgilio Calilap et al.; Lourdes Rubrico; Rogelio Concepción; Leopoldo Ancheta; and Rafael Tarroza) for further investigation and information back to the PNP Task Force Usig, DOJ and Office of the Ombudsman, some with request for clarification from the CHR. Noting that the majority of the cases of abduction had been recommended for closure due to unavailability of witnesses or for lack of interest of the parties to pursue the case, the Committee cannot be satisfied with this situation and firmly expects that these cases will be the subject of inquiries and investigations for evidence, including forensic evidence. As regards the new allegation of abduction brought forward by the KMU (Roy Velez), the Committee notes that, according to the Government, the case was referred to the agencies concerned for prompt action and speedy disposition. The Committee expects that the Government will soon be in a position to inform on progress made in investigating and prosecuting without delay all alleged cases of abductions and enforced disappearances and provide any relevant court judgments.*
955. *Furthermore, the Committee recalls that it had previously noted that a Bill "defining and penalizing the crime of enforced or involuntary disappearance and for other purposes" was before the Congress. The Committee considered that the adoption of this Bill could represent an important step in acknowledging the existence of enforced disappearances and ensuring significant and dissuasive sanctions. Notwithstanding the considerable new material provided by the Government on other aspects, and ensuring significant and dissuasive sanctions, the Committee regrets that no new information has been provided on the progress made with the Bill and requests the Government to keep it informed in this regard and on the adoption of any other relevant legislative measures.*

## **Lengthy procedures, witness protection and other issues**

956. *With respect to the cases of extrajudicial killings, the Committee notes the Government's indication that the DOJ has created a new task force (STF), which after perusal of related documents to familiarize itself with the matter, has started to look into the cases. The Committee also notes the information provided by the Government concerning the action taken by the Supreme Court to expedite the resolution of cases of extrajudicial killings. Recalling once again that justice delayed is justice denied, and that the absence of judgements 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 continue to take the necessary measures to ensure their swift investigation and judicial examination. It requests the Government to keep it informed of any developments in this respect.*
957. *The Committee further requests the Government to supply information on the working of the regional trial courts, including on the length of procedures in practice.*
958. *Furthermore, the Committee once again requests the Government to provide information regarding the adoption and implementation of the "Omnibus Rules" elaborated by the CHR, which would require cases to be treated within a maximum of one year.*
959. *Lastly, the Committee recalls that it had previously noted that the Supreme Court considered that the witness protection programme (WPP) was shown to be insufficient in some aspects and that together with the CHR, it was reviewing the WPP on the Writ of Amparo adopted in 2007. The Committee further recalls that it had previously noted with interest the adoption, on 11 December 2009, of Act No. 9851 on crimes against international humanitarian law, genocide, and other crimes against humanity, providing, in section 13, for measures which could be taken by the court or prosecutor for the protection of victims and witnesses; and, on 10 November 2009, of Act No. 9745 (Anti-Torture Act), which penalizes torture and other cruel, inhuman and degrading treatment or punishment, reinforces the earlier issuances of the Supreme Court on the Writ of Habeas Data and Writ of Amparo, and provides that "an 'order of battle' shall not and can never be invoked as a justification for torture and other cruel, inhuman and degrading treatment or punishment". The Committee also recalls that it had previously requested the Government to take all measures with a view to ensuring full implementation of the recommendations of the Melo Commission on the adoption of legislation to require police and military forces and other government officials to maintain strict chain-of-command responsibility with respect to extrajudicial killings and other offences committed by personnel under their command, control or authority; and had noted that the abovementioned Acts contain provisions providing for criminal responsibility of superiors and penalizing commanding officers involved in the prohibited acts. The Committee requests the Government to keep it informed on: (i) the review by the Supreme Court and the CHR of the witness protection programme on the Writ of Amparo adopted in 2007; (ii) any application of the Anti-Torture Act No. 9745; and (iii) any application of Act No. 9851 on crimes against international humanitarian law, genocide, and other crimes against humanity.*

## **Harassment and intimidation**

960. *The Committee notes the information transmitted by the Government, according to which, the National TIPC Monitoring Body has issued Resolution No. 2-B, Series of 2011, on 24 May 2011, recommending the following actions concerning the 12 cases of harassment: (i) five cases for closure but with request for "final pass" by the CHR; (ii) seven cases to*

be referred to the CHR for in-depth investigation or “final pass”; and (iii) DOLE to conduct follow-up action/validation and submit a final report on whether the labour issues related to the harassment cases have already been resolved with finality. The Committee also notes that the CHR recommended on 5 January 2012: (i) the closure of three cases of harassment for lack of interest of the parties to pursue the case, and/or no material evidence to establish that human or labour rights violations have been committed (Angelita Ladera; Mercy Santomin and Vincent Borja, who was arrested and released on 13 October 2010 after the only witness failed to identify him in court); and (ii) further investigation on the other nine harassment cases (Rene Acinue Manalo; Ricardo Bellamia; members of Sulpicio Lines Workers’ Union; Ariel Geres Legaspi; Edison Alpiedan et al; Noel Tenorio Sanches; 52 workers of Chiyoda Integre Phils.; Aldrene Tambalo, Roque Roncales and Nestor Legaspi at Fresh Banana Agricultural Corporation – Osmiguel; and Vicente Barrios et al., Packing Plant 92 Workers’ Union and Joel Cuyos et al. at Fresh Banana Agricultural Corporation – Suyapa). Following the verification of the harassment cases by DOLE, the National TIPC Monitoring Body requested the CHR to expedite the resolution of four cases (Fresh Banana Agricultural Corporation – Osmiguel; Fresh Banana Agricultural Corporation – Suyapa; members of Sulpicio Lines Workers’ Union; and Edison Alpiedan et al.); requested the DOLE and NLRC to exert efforts to resolve expeditiously the remaining issues connected to the labour disputes in Nestlé and Hanjin Garments; and requested the RTIPC monitoring bodies to continuously gather information and monitor the cases. Noting that, in a number of the abovementioned cases, the supposed victims or their relatives executed affidavits denying the incident or stating that no complaint will be filed, the Committee trusts that due account is being taken of the fact that victims of acts of intimidation or harassment might refrain from lodging a complaint out of fear.

- 961.** *With respect to the new allegations of harassment and intimidation brought forward by the KMU in its communications dated 30 September and 10 December 2009, as well as 2 June 2010 (Rene Galang, Gaudencio Garcia, Luz Fortuna, Jason Hega, et al., Belen Navarro Rodriguez, Leo Caballero, Romualdo Basilio et al., Arman Blasé, workers of Tritran Union, Universal Robina Corporation Employees’ Union, Worker Communities near Pacific Cordage Corporation, Maragusan United Workers’ Union et al., Romeo Legaspi, Union of Filipro Employees, Farm workers in the Cagayan Valley, Bukidnon and Davao del Sur; ULWU leaders, workers of Sumitomo Fruits Corporation, and union in Suyapa Farm), the Committee notes that, according to the Government, the National TIPC Monitoring Body classified one case of harassment and intimidation (Farm workers in the Cagayan Valley, Bukidnon and Davao del Sur) as possibly not labour related and referred the remaining cases to the concerned agencies (CHR, PNP Task Force Usig, DOLE, Supreme Court and the AFP) for prompt action and speedy disposition.*
- 962.** *Taking due note of the information provided by the Government concerning the allegations of union busting and intimidation of members of the AMADO–KADENA–NAFLU–KMU at Dole Philippines, the Committee requests the Government to keep it informed on the outcome of the discussion by the National TIPC Monitoring Body of all remaining alleged acts of harassment enumerated above and to indicate the progress made in ensuring their full and swift investigation and resolution.*
- 963.** *As regards labour dispute settlement, the Committee notes the information provided by the Government concerning reforms endorsed by the TIPC that are pursued to ensure the de-judicialization of the labour dispute settlement system through: (i) a 30-day mandatory conciliation–mediation of all labour cases with settlement services that are speedy, impartial, inexpensive and accessible (DOLE Department Order No. 107-10 of 7 October 2010 and Rules of Procedure of the Single Entry Approach issued on 25 February 2011); and (ii) NLRC reforms, grievance settlement and voluntary arbitration. The Committee*

*requests the Government to keep it informed on further progress achieved towards facilitating the settlement of labour disputes.*

### **Militarization of workplaces**

- 964.** *The Committee once again reiterates its previous request to provide observations on the allegations concerning: (i) massive military deployment from the 66th IB of the AFP since September 2008 and incidents of military harassment against MUWU, NAMAOS, NAMASUFA, NAMASAN, Packing Plant 92 Workers' Union and Rotto Freshmax Workers' Union; (ii) conduct of meetings by the military in September 2009 at the Universal Robina Corporation Employees' Union – Farm Division, lecturing workers that they should dissociate from the KMU; (iii) since November 2008, deployment of the 66th IB in the vicinity of Sumitomo Fruits Corporation with the military entering the premises on a daily basis during the management's refusal to implement the latest CBA with NAMAOS, conducting daily forums, showing videos vilifying the KMU and NAMAOS as NPA supporters, and conducting a survey to identify the whereabouts of union leaders and members in January 2009; (iv) in 2006, deployment of the 28th IB of the AFP in the vicinity of the Suyapa Farm to watch over the union, with armed men on motorbikes patrolling the vicinity of the workplace and asking the whereabouts of union President Vicente Barrios and of the union's activities; (v) in February 2008, deployment of the 71st, 48th and 69th IBs in the different barangays (villages) surrounding the Hacienda Luisita, conducting meetings with film screenings saying that "communism" is behind unions and strikes, and monitoring activities of ULWU leaders; (vi) the military conducting film screenings of "Knowing your enemy" to farm workers in the Cagayan Valley, Bukidnon and Davao del Sur, tagging the different activist organizations like the KMU as communist fronts; (vii) deployment of AFP elements in Polomolok, Cotabato, where AMADO–KADENA–NAFLU–KMU is active, openly accusing the KMU leaders as NPA recruiters, conducting programmes such as the "integrated territorial defence system" or psy-war operations in the community, red-baiting and smear campaigns against the KMU and Anakpawis Party list, social awareness programme, industrial safety focus seminars to espouse anti-KMU and anti-union orientation; and (viii) in Bicol, deployment of the AFP community organizing, recovery and development (ACORD) team and the BDS in worker communities near the Pacific Cordage Corporation.*
- 965.** *The Committee notes the information provided by the Government concerning: (i) the commitment of the new AFP Chief under the Internal Peace and Security Plan Bayanihan, under which troops will be shifted from combat operations to civilian–military operations; and (ii) the agreement in principle between DOLE and AFP on AFP's participation in the RTIPCs for better appreciation of social dialogue, freedom of association and civil liberties; on the conduct of capacity-building seminars on freedom of association as it relates to civil liberties and human rights; and on the crafting of a Memorandum of Agreement or Social Accord with the DOLE, labour groups and employers that would clarify AFP engagement in the community and set the parameters on non-engagement in unions and workplaces. The Committee notes with interest the Government's indication in its most recent communication that: (i) a Manifesto of Commitment between DOLE, the labour sector and the AFP has been signed on 21 July 2011, in which the signatories committed themselves to promote and protect human rights and workers' rights; to engage in social dialogue to craft 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 and to establish a mechanism to allow joint implementation and monitoring of the said guidelines; (ii) the said DOLE–DILG–PNP–DND–AFP Joint Guidelines are being drafted by the Technical Executive Committee of the TIPC, are to be adopted on 8 May 2012 and expected to prohibit the deployment of military personnel in any labour-related mass actions and disputes except written request from DOLE due to the security situation; (iii) the revised Joint DOLE–PNP–PEZA*

*Guidelines on the conduct of PNP personnel, economic zone police and security guards, company security guards and similar personnel during labour disputes have been issued on 23 May 2011, and orientation seminars have been conducted to facilitate their implementation; and (iv) the PNP Guidelines on the accountability of the immediate officer for the involvement of his subordinates in criminal offences to strengthen command responsibility have been issued. The Committee welcomes the adoption on 7 May 2012 of the Guidelines on the conduct of the DOLE, DILG, DND, DOJ, AFP and PNP relative to the exercise of workers' rights and activities. It requests the Government to supply copies of the abovementioned PNP Guidelines on accountability and to continue to keep it informed regarding the measures taken or envisaged, in particular the issuance of appropriate high-level instructions, to: (i) bring to an end prolonged military presence inside workplaces which is liable to have an intimidating effect on the workers wishing to engage in legitimate trade union activities and to create an atmosphere of mistrust which is hardly conducive to harmonious industrial relations; (ii) to ensure that any emergency measures aimed at national security do not prevent in any way the exercise of legitimate trade union rights and activities, including strikes, by all trade unions irrespective of their philosophical or political orientation, in a climate of complete security; and (iii) to ensure the strict observance of due process guarantees in the context of any surveillance and interrogation operations by the army and police in a way that guarantees 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.*

## **Arrest and detention**

- 966.** *The Committee recalls that it had previously noted with deep concern from the complainant's allegations, that, for more than two-and-a-half years, 20 workers of Karnation Industries had been imprisoned, without judgment, in appalling conditions (prison cell not allowing 20 persons to sleep at the same time; inadequate food and medical care, etc.) for exercising their right to unionize and struggle against allegedly unjust and illegal practices of their employer; and that two of the 20 workers, Melvic Lupe and Leo Paro, had died in jail of tuberculosis. It had also noted that in November 2009, 14 out of the 18 workers had been released on bail. The Committee welcomes the information provided by the Government that all the (19) workers of Karnation Industries are now out on bail. The Committee trusts that this case will be concluded without delay and requests the Government to keep it informed in this regard.*
- 967.** *As regards the illegal arrest and detention since 7 May 2007 and filing of a trumped-up criminal case against Vincent Borja, KMU national council member and the KMU Eastern Visayas Regional Coordinator, the Committee notes from the Government's reply that Mr Borja was arrested for the murder of a certain Marianito Calibo, and that he was released on 13 October 2010 after the only witness failed to identify him in court. In the light of this information, and unless the complainant provides additional substantive information, the Committee will not pursue the examination of this allegation.*
- 968.** *On the remaining allegations of arrest and detention and subsequent filing of criminal charges against trade unionists, brought forward by the complainant (i.e. (i) the filing of fabricated criminal cases against AMADO-KADENA officers and members; (ii) the filing of trumped-up charges of multiple murder, attempted murder and multiple attempted murder against PAMANTIK-KMU Chairman, Romeo Legaspi, and other union officers; (iii) the criminalization of some 250 workers of Nestlé Cabuyao, charged with an average of 37 criminal cases each, before the Municipal Trial Court in Cabuyao and the Regional Trial Court in Biclan; (iv) the re-filing of trumped-up murder and attempted murder cases in Calapan City, Mindoro Oriental, against 72 persons, of which 12 are trade union leaders and advocates; and (v) the illegal arrest and detention of attorney Remigio Saladero Jr, Chief Legal Counsel of the KMU, on fabricated charges of arson, murder,*



multiple murder and attempted multiple murder), the Committee notes from the Government's report that the case involving Remigio Saladero was recommended for closure considering that the criminal charges against him were already dismissed, and that the case of Romeo Legaspi was referred to the concerned agencies for prompt action and speedy disposition.

- 969.** *The Committee urges the Government to communicate its detailed observations, including specific information in relation to the arrests and the legal or judicial proceedings upon which they were based, in respect of the remaining allegations. The Committee once again urges the Government to take the necessary measures to ensure that the investigation and judicial examination of all cases of illegal arrest and detention proceed in full independence and without further delay, so as to shed full light on the current situation of those concerned and the circumstances surrounding their arrest. It also requests the Government to communicate the texts of any judgments handed down in the above cases, together with the grounds adduced therefore.*

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

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

- (a) The Committee welcomes the measures taken by the Government so far and requests the Government to continue to keep it informed of the steps taken and envisaged to ensure a climate of justice and security for trade unionists in the Philippines.*
- (b) Noting the efforts made by the Government to involve the KMU in the resolution of the cases involving its members and leaders, the Committee expects that the Government will continue to engage with the KMU in dealing with these cases and invites the complainant organization to cooperate as far as possible with the Government to this end. The Committee requests to be kept informed in this respect.*
- (c) With respect to the alleged extrajudicial killings, the Committee:*
  - (i) reiterating that such cases should, due to their seriousness, be investigated and, where evidence exists, prosecuted ex officio without delay, urges the Government to do its utmost to ensure the swift investigation and prosecution as well as a fair and speedy trial for the remaining four on-trial cases, the four cases still under investigation by the DOJ (particular regard being had to the peculiar circumstances of the case of Samuel Bandilla) and the four CHR cases referred back to the PNP Task Force Usig and the CHR for further investigation, and requests the Government to keep it informed of any developments in this respect;*
  - (ii) expressing its deep concern that, as regards the Hacienda Luisita incident, the Government indicates that the case of John Jun David et al. has been dismissed because the accused are at large but that steps are being taken to reopen investigation with a view to identifying the perpetrators and apprehending them, the Committee expects that the Government will do its utmost to ensure that the investigation is*

*pursued and that the guilty parties are brought to trial and convicted; and*

- (iii) concerning the allegations of murder and attempted murder, brought forward by the KMU in communications dated 30 September and 10 December 2009 as well as 2 June 2010, expects that these cases will be reviewed by the TIPC and that the Government will make every effort to ensure the speedy investigation, prosecution and judicial examination of these new allegations, and urges the Government to indicate without delay the progress made in this regard.*
  - (iv) requests the Government to keep it informed of developments in the procedure of indictment of General Palparan for failing to prevent, punish or condemn killings that took place under his command responsibility.*
- (d) As to the alleged cases of abduction and enforced disappearance, the Committee:*
- (i) firmly expects that the cases of abduction recommended for closure due to unavailability of witnesses or for lack of interest of the parties to pursue the case, will be the subject of inquiries and investigations for evidence including forensic evidence, and expects that the Government will soon be in a position to inform on progress made in investigating and prosecuting without delay all cases of abduction and enforced disappearance and provide any relevant court judgments; and*
  - (ii) further requests the Government to keep it informed of the progress made in the adoption of the Bill “defining and penalizing the crime of enforced or involuntary disappearance and for other purposes”, or of any other relevant legislative measures.*
- (e) As to the issue of lengthy procedures, the Committee:*
- (i) noting the information concerning action taken by the Supreme Court to expedite the resolution of cases of extrajudicial killings, requests the Government to supply information on the working of the regional trial courts, including on the length of procedures in practice; and*
  - (ii) requests the Government once again to provide information regarding the adoption and implementation of the “Omnibus Rules” elaborated by the CHR, which would require cases to be treated within a maximum of one year.*
- (f) Furthermore, the Committee requests the Government to keep it informed on: (i) the review by the Supreme Court and the CHR of the witness protection programme on the Writ of Amparo adopted in 2007; (ii) any application of the Anti-Torture Act No. 9745; and (iii) any application of Act No. 9851 on crimes against international humanitarian law, genocide, and other crimes against humanity.*

- (g) *In relation to the alleged cases of harassment and intimidation, the Committee:*
- (i) *requests the Government to keep it informed on the outcome of the discussion by the National TIPC Monitoring Body of all remaining alleged acts of harassment;*
  - (ii) *trusting that due account is being taken of the fact that victims of acts of intimidation or harassment might refrain from lodging a complaint out of fear, requests the Government to indicate the progress made in ensuring their full and swift investigation and resolution;*
  - (iii) *requests the Government to keep it informed on further progress achieved towards facilitating the settlement of labour disputes.*
- (h) *As regards the alleged militarization of workplaces, the Committee:*
- (i) *once again urges the Government to communicate its observations on the outstanding allegations;*
  - (ii) *the PNP Guidelines on the accountability of the immediate officer for the involvement of his subordinates in criminal offences to strengthen command responsibility; and*
  - (iii) *requests the Government to continue to keep it informed regarding the measures taken or envisaged, in particular the issuance of appropriate high-level instructions, to: (a) bring to an end prolonged military presence inside workplaces which is liable to have an intimidating effect on the workers wishing to engage in legitimate trade union activities and to create an atmosphere of mistrust which is hardly conducive to harmonious industrial relations; (b) ensure that any emergency measures aimed at national security do not prevent in any way the exercise of legitimate trade union rights and activities, including strikes, by all trade unions irrespective of their philosophical or political orientation, in a climate of complete security; and (c) ensure the strict observance of due process guarantees in the context of any surveillance and interrogation operations by the army and police in a way that guarantees 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.*
- (i) *With respect to the alleged cases of arrest and detention, the Committee:*
- (i) *urges the Government to communicate its detailed observations, including further specific information in relation to the arrests and the legal or judicial proceedings upon which they were based, in respect of the allegations of illegal arrest and detention regarding the AMADO-KADENA officers and members; the 250 workers of Nestlé Cabuyao; and the 72 persons in Calapan City, Mindoro Oriental, of which 12 are trade union leaders and advocates;*

- (ii) *once again requests the Government to take all necessary measures so as to ensure that the investigation and judicial examination of all cases of illegal arrest and detention proceed in full independence and without further delay, so as to shed full light on the current situation of those concerned and the circumstances surrounding their arrest; and also requests the Government to communicate the texts of any judgments handed down in the above cases, together with the grounds adduced therefore; and*
- (iii) *while welcoming the information provided by the Government that all the (19) workers of Karnation Industries are now out on bail, trusts that this case will be concluded without delay and requests the Government to keep it informed in this regard.*
- (j) *The Committee draws the special attention of the Governing Body to the extreme seriousness and urgent nature of the matters dealt with in this case.*

CASE NO. 2745

INTERIM REPORT

**Complaint against the Government of the Philippines  
presented by  
the Kilusang Mayo Uno (KMU)**

***Allegations: The complainant alleges the implementation of an unofficial “no union, no strike” policy by the Philippines Export Processing Zones Authority (PEZA), in collusion with local and national government agencies. Elements of the anti-union policy include: illegal dismissal of trade unionists; restrictive union registration processes; the closure of companies to obstruct union formation and collective bargaining; interference by local government authorities in union affairs; and violation of civil liberties – including assaults, threats, intimidation, harassment, blacklisting, criminalization, abduction and murder of trade unionists***

**971.** The Committee last examined this case at its June 2011 meeting, when it presented an interim report to the Governing Body (360th Report, paras 1030–1082, approved by the Governing Body at its 311th Session (June 2011)).

**972.** The Government forwarded its observations in communications dated 1 June 2011 and 5 March 2012.

973. The Philippines 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

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

- (a) The Committee deplores the gravity of the allegations in this case. It notes however the Government's indication that actions have been taken in key areas of concern, notably to address the issue of impunity and exploring "out of the box" solutions to the long-standing cases.
- (b) As regards the alleged interference by the public authorities, the Committee:
  - (i) notes the Government's indication that a legislative reform to further strengthen trade unionism and remove obstacles to the effective exercise of labour rights has been progressing as committed to by the Government in response to the ILO High-level Mission in October 2009 and requests the Government to keep it informed in this regard and to indicate the specific measures envisaged to ensure the full and effective exercise of labour rights in EPZs;
  - (ii) requests the Government to take the necessary measures to ensure that public authorities do not intervene in relation to the internal affairs of trade unions;
  - (iii) requests the Government to keep it informed of the investigations conducted by the CHR;
  - (iv) understands from the information provided by the Government that these cases were scheduled to be discussed by the TIPC in the first quarter of 2011 and urges the Government to indicate the progress made by the TIPC in these cases without delay.
- (c) As regards the alleged anti-union discrimination, the Committee:
  - (i) requests the Government to keep it informed of the investigations conducted by the CHR and requests the Government to indicate the progress made by the TIPC with respect to these various cases;
  - (ii) urges the Government, should the allegations concerning the 2007 reinstatement order be true, to ensure that the union members who were dismissed by Enkei Philippines are reinstated immediately in their jobs under the same terms and conditions prevailing prior to their dismissal with compensation for lost wages and benefits, in conformity with the order for reinstatement; requests the Government to keep it informed of any developments in this regard and to indicate the progress made by the TIPC in this case;
  - (iii) noting the contradictory information provided by the parties in the case of Sun Ever Lights, requests the Government to review this matter and keep it informed of developments and to indicate the progress made by the TIPC in this case;
  - (iv) requests the Government to carry out independent investigations in respect of the other abovementioned allegations of illegal dismissals and, if it finds that they constitute anti-trade union acts, to take measures to ensure the reinstatement of the workers concerned; if reinstatement is not possible, the Government should ensure that the workers concerned are paid adequate compensation which would represent a sufficient dissuasive sanction for anti-trade union dismissals. The Committee requests the Government to keep it informed of the investigations conducted by the CHR and to indicate the progress made by the TIPC in these cases;
  - (v) urges the Government to keep it informed of any judgment handed down by the NLRC RAB VII or the NLRC Division 4 in Cebu City in the case of ANGLO-KMU.

- (d) With respect to the alleged denial of the right to strike, the Committee requests the Government to keep it informed of the ongoing legislative reform and expects that the Government will take the necessary measures to ensure the full respect for the trade unions rights of EPZ workers. It further asks the Government to indicate the progress made by the TIPC with respect to the cases revised.
- (e) As regard the alleged blacklists, the Committee requests the Government to keep it informed of the investigation conducted by the CHR and to indicate the progress made by the TIPC with respect to the cases revised.
- (f) The Committee requests the Government to establish an independent judicial inquiry and proceedings before the competent courts as soon as possible with regard to the allegations of abductions, disappearances and killing of a protester, with a view to shedding full light onto the relevant facts and circumstances, and to determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events. The Committee requests to be kept informed in this respect and requests the Government to indicate the progress made by the TIPC in relation to these cases.
- (g) The Committee requests the Government to take all necessary measures for an independent investigation to be carried out into the various incidents of harassment and the militarization of the workplace, alleged by the complainant, with a view to identifying and punishing those responsible without further delay. It requests the Government to keep it informed in this regard and to indicate the progress made by the TIPC in these cases.
- (h) The Committee further requests the Government to give adequate instructions to the law enforcement authorities so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations and to bring to an end any continuing military presence inside the workplaces and requests to be kept informed of any developments in relation to the revised DOLE-PNP-PEZA guidelines in the conduct of PNP personnel, economic zone police and security guards, company security guards and similar personnel during labour disputes.
- (i) With respect to the alleged arrests and detentions, the Committee:
  - (i) requests the Government to communicate the texts of any judgments handed down in relation to: the charges brought against Pamantik-KMU Chairman Romeo Legaspi and other union officers; the detention of five injured protesters at Asia Brewery; the criminal case against Christopher Capistrano, Vice-President of AMIHAN-Independent; the charges against Ricardo Cahanap, union Vice-President of Phils. Jeon, and 33 leaders of Chong Won and Phils. Jeon workers' union; the charges against 25 union officers and members of GWFPWO-Independent; and the arrest and detention of Declard Cangmaong;
  - (ii) requests the Government to ensure that all relevant information is gathered in an independent manner so as to shed full light on their situation and the circumstances surrounding their arrest and, should it be determined by the court that they were arrested in relation to their trade union activities, requests the Government to take the necessary measures to ensure that they are immediately released and all charges dropped;
  - (iii) requests the Government to keep it informed of the investigations conducted by the CHR and to indicate the progress made by the TIPC in these cases and to provide information on all alleged cases.
- (j) The Committee draws the special attention of the Governing Body to the extreme seriousness and urgent nature of the matters dealt with in this case.

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

**975.** In its communication dated 1 June 2011, the Government provides detailed information from all concerned parties, which has been gathered for consideration by the Tripartite Industrial Peace Council (TIPC), and indicates that it will provide further information on developments by the end of the year.

**976.** In its communication dated 5 March 2012, the Government refers to a list of 17 cases of trade union rights violations that allegedly transpired within the economic zones reported by the KMU in its complaint. The Government indicates that the Monitoring Body of the National Tripartite Industrial Peace Council (National TIPC-Monitoring Body), through Resolution No. 8, Series of 2012, classified all cases as possibly labour-related under Convention No. 87, given that the circumstances of the cases apparently constitute an infringement of the exercise of freedom of association and the right to organize. The Government further states that, aside from one case, which the National TIPC-Monitoring Body recommended for closure on the ground of settlement, all other cases were referred to the concerned agencies (Court of Appeals, National Labour Relations Commission (NLRC), Commission on Human Rights (CHR), Philippine Economic Zone Authority (PEZA), Department of Labor and Employment (DOLE), Department of Interior and Local Government (DILG), Supreme Court and Department of Justice (DOJ)) for appropriate action and immediate resolution. Progress on these cases will be submitted as soon as available.

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

**977.** *The Committee notes that the present case concerns allegations of the denial of the right to organize, strike and collective bargaining in the Philippines export processing zones (EPZs), special economic zones, industrial enclaves and related areas due to the implementation of an unofficial “no union, no strike” policy by the PEZA, in collusion with the local and national government agencies. Elements of anti-union policy include allegations of: illegal dismissal of trade unionists; restrictive union registration processes; the closure of companies to obstruct union formation and collective bargaining; interference by local government authorities in union affairs; and violation of civil liberties – including assaults, threats, intimidation, harassment, blacklisting, criminalization, militarization, abduction and murder of trade unionists in more than 15 different companies.*

**978.** *The Committee notes that according to the Government, while the KMU had conveyed interest in participating in the National Tripartite Industrial Peace Council (TIPC) and the National TIPC-Monitoring Body and was to be appointed to the Technical Executive Committee (TEC), recent developments appear to have brought about a change in its position in so far as the KMU has declined to participate in the formally reconstituted national TIPC including at the TEC level; but the invitation stands. The Committee notes that the Government further states that the KMU was provided with the recently undertaken comprehensive inventory of the cases mentioned in the complaint and requested to provide additional information. Noting the efforts made by the Government to involve the KMU, the Committee expects that the Government will continue to engage with the KMU in dealing with cases involving its members and leaders and invites the complainant organization to cooperate as far as possible with the Government to this end. The Committee requests to be kept informed in this respect.*

**979.** *The Committee notes the Government’s indication that the National TIPC-Monitoring Body, through Resolution No. 8, Series of 2012, classified all cases reported by the KMU as possibly labour related under Convention No. 87, given that the circumstances of the cases apparently constitute an infringement of the exercise of freedom of association and the right to organize.*

**980.** *The Committee also notes that some issues raised by the complainant are being addressed in Case No. 2528 and were previously examined by the Committee in its 359th Report, paragraphs 1093–1134. These elements, which will not be raised in the present case, concern: (i) the abduction of Normelita Galon and Aurora Afable, President and Shop Steward of Kaisahan ng Manggagawa sa Phils. Jeon Inc. – Independent on 5 August 2007;*

and (ii) arrest and detention of Romeo Legaspi, Chairman of PAMANTIK-KMU, and other union officers.

### **Interference by the public authorities**

- 981.** *The Committee notes the Government's indication that, in the framework of the legislative reform to further strengthen trade unionism and remove obstacles to the effective exercise of labour rights, the TIPC endorsed the Strengthening Workers' Rights to Self-Organization Bill, which removes the 20 per cent minimum membership for registration of independent labour organizations, reduces the required membership of local unions for federation registration, and removes the required government authorization on receipt of foreign funding. The Committee requests the Government to keep it informed on any progress made towards the adoption of the Bill.*
- 982.** *As regards its previous recommendation that the Government indicate the specific measures envisaged to ensure the full and effective exercise of labour rights in the EPZs, the Committee notes with regret that the Government provides no information in this respect. Recalling that the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy provides that special incentives to attract foreign investment should not include any limitation of the workers' freedom of association or the right to organize and bargain collectively, and considering that legal provisions on EPZs should ensure the right to organize and bargain collectively for workers [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 266], the Committee once again requests the Government to indicate the concrete steps taken or envisaged to guarantee the full and effective exercise of trade union rights in the EPZs.*
- 983.** *Concerning the concrete allegations of interference of Local Government Units into internal union affairs at the Nagkakaisang Manggagawa sa Hoffen Industries-OLALIA factory (Hoffen), Samahan ng Manggagawa sa Mariwasa Siam Ceramics, Inc. (Siam Ceramics), Golden Will Fashion and Samahan ng Manggagawa sa EDS Mfg, Inc. (EDS Inc.), the Committee notes that the Government indicates that these cases were referred to the concerned agencies (Court of Appeals, NLRC, CHR, PEZA, DOLE, DILG, Supreme Court and DOJ) for appropriate action and immediate resolution. The Committee requests the Government to keep it informed of the motu proprio investigations that were to be conducted into these allegations by the CHR and expects that the Government will soon be able to report progress in the resolution of these cases. Recalling that respect of principles of freedom of association requires that the public authorities and employers exercise great restraint in relation to intervention in the internal affairs of trade unions [see **Digest**, op. cit., para. 859], the Committee requests the Government to take all the necessary measures to ensure full respect of this principle.*

### **Anti-union discrimination**

- 984.** *With respect to the complainant's allegations that on various occasions, companies in the EPZs closed down either the whole company or strategic departments where most unionists were located following the recognition of a union (in particular Goldilocks, Sensuous Lingerie and Golden Will Fashion Philippines), the Committee notes the information provided by the Government that these cases were referred to the concerned agencies (Court of Appeals, NLRC, CHR, PEZA, DOLE, DILG, Supreme Court and DOJ) for appropriate action and immediate resolution.*



985. *Considering that, while the genuine closure or restructuring of companies is not contrary to freedom of association principles, the closure or restructuring and the lay-off of employees specifically in response to the exercise of trade union rights is tantamount to the denial of such rights and should be avoided, the Committee urges the Government to ensure that the Labor Code, which governs the relationship between labour and management in the registered enterprises in the EPZs, is applied in practice. The Committee requests the Government to provide information concerning the motu proprio investigations conducted by the CHR and expects that the Government will make efforts to ensure a speedy resolution of the above cases by the agencies concerned. It requests the Government to keep it informed in this regard.*
986. *As regards the allegations of anti-union discrimination and more particularly of illegal dismissals of trade union members in the enterprises Daiho Philippines Inc., Hanjin Garments, Asia Brewery, Nagkakaisang Manggagawa sa Chong Won (NMCW) and Anita's Home Bakeshop, the Committee notes the information provided by the Government concerning the last company, in which the management indicates that: (i) the dismissals of Perez and the 28 other employees were declared valid and legal by the NLRC, duly affirmed by the Court of Appeals and the Supreme Court; (ii) as regards the case of Bela and Lacerna, the company appealed the Court of Appeals decision to the Supreme Court; the ultimate judgment as to the validity of their dismissal still has to be passed upon by the High Court; and (iii) Bela and Lacerna were dismissed under the closed shop provision of the collective agreement between the company and the TPMA on the ground of expulsion from the union; and the remaining 29 employees were dismissed for staging an illegal strike in October 2004 and committing illegal acts in the process.*
987. *Furthermore, the Committee notes the information forwarded by the Government concerning the case of Sun Ever Lights, in which the management states that the dismissal was not illegal but the consequence of staging an illegal strike; that the great majority of the participants had duly signed and executed quitclaims and release in exchange for financial assistance; that eight of the 12 employees ordered to be reinstated by the NLRC already resigned and executed their quitclaims, release and waiver; and three of the 12 were dismissed on grounds outside NLRC jurisdiction for absence without leave. Likewise, the Committee notes the information forwarded by the Government concerning the case of Enkei Philippines, in which the management states that the 47 employees were dismissed on the ground of insubordination for boycotting work on 19 June 2006 (according to the complainant, they were attending the union's general membership meeting); that their explanation referring to the special non-working holiday was found unsatisfactory as the rendition of overtime work fell within the exceptions provided by the law; that out of the 47 employees, eight have voluntarily resigned and executed their quitclaims and release to the full and complete satisfaction of their claims against the company and four have not reported to the company despite due notice to return to work; and that the reinstatement order was not implemented due to the exercise of the right of the company to resort to legal remedy.*
988. *The Committee notes the Government's statement that all cases enumerated above were referred to the concerned agencies (Court of Appeals, NLRC, CHR, PEZA, DOLE, DILG, Supreme Court and DOJ) for appropriate action and immediate resolution.*
989. *The Committee reminds the Government that it is responsible for preventing all acts of anti-union discrimination and must ensure that complaints of anti-union discrimination are examined in the framework of national procedures which should be prompt, impartial and considered as such by the parties concerned. Cases concerning anti-union discrimination contrary to Convention No. 98 should be examined rapidly, so that the necessary remedies can be really effective. An excessive delay in processing cases of anti-union discrimination, and in particular a lengthy delay in concluding the proceedings*

concerning the reinstatement of the trade union leaders and members dismissed by the enterprise, constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned [see **Digest**, *op. cit.*, paras 817 and 826].

- 990.** *In view of the principles enunciated above, the Committee requests the Government, in respect of Enkei Philippines, to take the necessary steps so that, pending the outcome of any appeal proceedings instituted by the company, the union members who were dismissed are reinstated immediately in their jobs under the same terms and conditions prevailing prior to their dismissal with compensation for lost wages and benefits, in conformity with the 2007 NLRC order for reinstatement. If reinstatement is not possible for objective and compelling reasons, the Government should ensure that the workers concerned are paid adequate compensation which would represent a sufficiently dissuasive sanction for anti-union dismissals. Similarly, in the case of Sun Ever Lights, the Committee requests the Government to keep it informed of any developments in regard to the motion for writ of execution of the 2008 NLRC reinstatement order pending with the NLRC.*
- 991.** *Concerning the other abovementioned allegations of illegal dismissals, the Committee requests the Government to carry out independent investigations of the dismissals and, if it finds that they constitute anti-union acts, to take measures to ensure the reinstatement of the workers concerned without delay. If reinstatement is not possible for objective and compelling reasons, the Government should ensure that the workers concerned are paid adequate compensation which would represent a sufficiently dissuasive sanction for anti-trade union dismissals. In addition, in the case of Anita's Home Bakeshop, the Committee once again urges the Government to keep it informed of any relevant judgment handed down, and in particular of the decisions of the NLRC RAB VII or the NLRC Division 4 in Cebu City.*
- 992.** *The Committee further requests the Government to keep it informed of the motu proprio investigations that were to be conducted by the CHR into the abovementioned allegations. It expects that the Government will do its utmost to ensure a speedy and equitable resolution of all cases by the agencies concerned.*

### **Denial of the right to strike**

- 993.** *The Committee notes that the Government states that, in the case of Aichi Forging Company, the National TIPC-Monitoring Body recommended closure of the case on the ground of settlement, and that the case of NMCW was referred to the concerned agencies for appropriate action and immediate resolution.*
- 994.** *The Committee also notes the Government's indication that one of the DOLE priority bills is Senate Bill No. 632, which seeks to amend articles 263, 264 and 272 of the Labor Code, and in particular to align article 263(g) of the Philippine Labor Code with the essential services criteria under Convention No. 87. This bill, which was processed through the TIPC, and for which the workers' group at the TIPC expressed support, was not endorsed as a tripartite bill and is now the subject of hearings before the Senate Committee on Labor.*
- 995.** *The Committee trusts that the ongoing legislative reform will advance successfully and requests the Government to continue to keep it informed in this regard. Recalling that workers in EPZs – despite the economic arguments often put forward – like other workers, without distinction whatsoever, should enjoy the trade union rights provided for by the freedom of association Conventions [see **Digest**, *op. cit.*, para. 264], the Committee expects that the Government will take the necessary measures without delay to ensure the full respect for the trade union rights of EPZ workers in practice, including the right to strike, as well as to ensure the speedy resolution of the case of NMCW.*

## **Blacklists**

- 996.** *With respect to the allegations of blacklisting and vilification of union members at Daiho Philippines and Anita's Home Bakeshop, the Committee notes that the Government indicates that these cases were referred to the concerned agencies (Court of Appeals, NLRC, CHR, PEZA, DOLE, DILG, Supreme Court and DOJ) for appropriate action and immediate resolution.*
- 997.** *The Committee recalls that the restriction of a person's movements to a limited area, accompanied by the prohibition of entry into the area in which his or her trade union operates and in which he or she normally carries on trade union functions, is inconsistent with the normal enjoyment of the right of association and with the exercise of the right to carry on trade union activities and functions, and that all practices involving blacklisting of trade union officials or members constitute a serious threat to the free exercise of trade union rights and, in general, governments should take stringent measures to combat such practices [see *Digest*, op. cit., paras 129 and 803]. The Committee requests the Government to keep it informed of the outcome of any inquiries conducted by the CHR and to make efforts to ensure the swift investigation and resolution of these cases.*

## **Harassment and interference: Militarization of the workplace**

- 998.** *As regards the serious allegations that on many occasions, the PEZA and municipal government sent units of the Philippine National Police (PNP) and/or the Special Warfare Group (SWAG), Emirates security guards, the Regional Special Action Forces–PNP to intimidate and/or disperse workers during protests, strikes or on picket lines, which, in the case of Hanjin Garments, resulted in the death of one protester, the Committee notes the information supplied by the Government that, according to the PNP, the Cabuyao Municipal Police Station proceeded in the area of the protest/rally in front of the abovementioned factory to maintain peace and order. The Committee also notes the Government's indication that the case was referred to the concerned agency for appropriate action and immediate resolution.*
- 999.** *Recalling 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 [see *Digest*, op. cit., para. 49], the Committee once again requests the Government to establish without delay an independent judicial inquiry and proceedings before the competent courts as soon as possible, with regard to the allegation of the killing of a protester with a view to shedding full light onto the relevant facts and circumstances, and to determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events. The Committee firmly expects that the Government will do its utmost to ensure the speedy investigation and judicial examination of the abovementioned case. The Committee requests to be kept informed in this respect.*
- 1000.** *Concerning the allegations of involvement of the army and police in the dispersal of the picket line and union collective actions at Sun Ever Lights, Sensuous Lingerie, Hanjin Garments and Asia Brewery, the Committee notes the following information provided by the Government concerning the first three companies: (i) with respect to the first company, the PNP states that it has no record of the incident since the strike occurred in an area under PEZA jurisdiction; the provincial Government of Laguna denies any involvement; and the management states that violence, coercion and destruction of company property by union members made necessary the immediate assistance of the PNP Biñan and Calamba,*

and denies having ordered PEZA guards to prevent re-entry of the union members and officers participating in the illegal strike; (ii) as to the second company, the PNP states that it has no record of the incident since the strike occurred in an area under PEZA jurisdiction; the provincial Government of Laguna denies any involvement; and the management reiterates the information previously supplied by PEZA; and (iii) as regards the third company, the NMCB indicates that after hours of negotiations the picketing workers clashed with the police causing injuries to both parties and according to the PNP, the Cabuyao MPS proceeded in the area of the protest/rally in front of the factory to maintain peace and order. The Committee also notes that, according to the Government, these cases were referred to the concerned agencies (Court of Appeals, NLRC, CHR, PEZA, DOLE, DILG, Supreme Court and DOJ) for appropriate action and immediate resolution.

- 1001.** *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]. Noting the conflicting versions of the complainant and the Government (through PNP and the provincial Government of Laguna) as well as, in the case of the first company, the contradictory information provided by the PNP and the management, the Committee requests the Government to take all necessary measures for an independent investigation to be carried out into the abovementioned incidents alleged by the complainant with a view to identifying and punishing those responsible without further delay. The Committee requests the Government to keep it informed of the motu proprio investigations conducted by the CHR and to make all efforts to ensure timely progress in the resolution of these cases.*
- 1002.** *Concerning the allegations of a prolonged presence of the army inside the workplaces in the enterprises Sun Ever Lights, Aichi Forging Company and Siam Ceramics, the Committee notes the following information forwarded by the Government concerning the first two companies: (i) with respect to the first company, the management states that the SWAG is an independent contractor serving the security needs of the company by monitoring, escorting and protecting staff during their ingress and egress; and (ii) as to the second company, the management echoes PEZA indicating that the increase in the number of security guards sought to intensify the level of safety and security within premises due to several incidents involving specific acts of sabotage and security breaches, and states that a new collective agreement was concluded between the union and the company on 23 March 2010 putting an end to all issues between the parties. The Committee also notes the Government's indication that the case of the latter company was recommended for closure by the National TIPC-Monitoring Body on the ground of settlement, and that the other cases were referred to the concerned agencies (Court of Appeals, NLRC, CHR, PEZA, DOLE, DILG, Supreme Court and DOJ) for appropriate action and immediate resolution.*
- 1003.** *With a view to giving instructions to the law enforcement authorities so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations, the Committee notes with interest that the revised Joint DOLE-PNP-PEZA guidelines on the conduct of PNP personnel, economic zone police and security guards, company security guards and similar personnel during labour disputes were issued on 23 May 2011, and orientation seminars have been conducted to facilitate their implementation.*

- 1004.** *The Committee further notes the information provided by the Government concerning: (i) the commitment of the new Chief of the Armed Forces of the Philippines (AFP) under the Internal Peace and Security Plan “Bayanihan”, under which troops will be shifted from combat operations to civilian–military operations; and (ii) the agreement in principle between DOLE and AFP on AFP’s participation in the regional TIPC’s for better appreciation of social dialogue, freedom of association and civil liberties; on the conduct of capacity-building seminars on freedom of association as it relates to civil liberties and human rights; and on the crafting of a Memorandum of Agreement or Social Accord with the DOLE, labour groups and employers that would clarify AFP engagement in the community and set the parameters on non-engagement in unions and workplaces. The Committee notes with interest the Government’s indication in its most recent communication that: (i) a Manifesto of Commitment between DOLE, the Labor Sector and the AFP has been signed on 21 July 2011, in which the signatories committed themselves to promote and protect human rights and workers’ rights; to engage in social dialogue to craft 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 and to establish a mechanism to allow their joint implementation and monitoring; (ii) the said DOLE–DILG–PNP–DND–AFP Joint Guidelines are currently being drafted by the TEC of the TIPC, are to be adopted on 8 May 2012 and expected to prohibit the deployment of military personnel in any labour-related mass actions and disputes except written request from DOLE due to the security situation; and (iii) the PNP Guidelines on the accountability of the immediate officer for the involvement of his subordinates in criminal offenses, which seek to strengthen command responsibility, have been issued. The Committee welcomes the adoption on 7 May 2012 of the Guidelines on the conduct of DOLE, DILG, DNG, DOJ, AFT and PNP relative to the exercise of workers’ rights and activities. It requests the Government to supply copies of the abovementioned PNP Guidelines on accountability.*
- 1005.** *The Committee further requests the Government to keep it informed of the motu proprio investigations conducted by the CHR and to take the necessary measures to ensure the speedy resolution of these cases.*

### **Arrest and detention**

- 1006.** *As regards the allegations of false criminal charges filed against labour leaders and unionists at the onset of union formation, during collective bargaining negotiations, picket protests, and strikes at the companies Hanjin Garments, Asia Brewery, Golden Will Fashion, Sensuous Lingerie and Kaisahan ng Manggagawa sa Phils. Jeon Inc., the Committee notes the following information forwarded by the Government concerning Hanjin Garments whereby the management states that Christopher Capistrano, Vice-President of AMIHAN-Independent, charged together with three others with direct assault and physical injury before the Biñan Regional Trial Court, have been released on bail and their case is pending before the Municipal Trial Court in Cabuyao. The Committee also notes the Government’s indication that these cases were referred to the concerned agencies (Court of Appeals, NLRC, CHR, PEZA, DOLE, DILG, Supreme Court and DOJ) for appropriate action and immediate resolution.*
- 1007.** *The Committee recalls that in cases involving the arrest, detention or sentencing of a trade union official, the Committee, taking the view that individuals have the right to be presumed innocent until found guilty, has considered that it was incumbent upon the Government to show that the measures it had taken were in no way occasioned by the trade union activities of the individual concerned [see **Digest**, op. cit., para. 94]. The Committee therefore requests the Government to ensure that all relevant information is gathered in an independent manner so as to shed full light on the situation and the circumstances surrounding the arrest of the above trade unionists; should it be determined*

*that they were arrested in relation to their trade union activities, the Committee requests the Government to take the necessary measures to ensure that they are immediately released and all charges dropped. The Committee requests the Government to keep it informed of the motu proprio investigations conducted by the CHR, to do its utmost to soon be able to report progress in investigating all alleged cases of arrest and detention and to communicate the texts of any judgments handed down in these cases.*

## **The Committee's recommendations**

**1008.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee expects that the Government will continue to engage with the KMU in dealing with cases involving its members and leaders and invites the complainant organization to cooperate as far as possible with the Government to this end. The Committee requests to be kept informed in this respect.*
- (b) The Committee requests the Government to keep it informed on any progress made towards the adoption of the Strengthening Workers' Rights to Self-Organization Bill.*
- (c) Recalling that the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy provides that special incentives to attract foreign investment should not include any limitation of the workers' freedom of association or the right to organize and bargain collectively, the Committee once again requests the Government to indicate the concrete steps taken or envisaged to guarantee the full and effective exercise of trade union rights in the EPZs.*
- (d) Concerning the concrete allegations of Government interference into internal union affairs at the Nagkakaisang Manggagawa sa Hoffen Industries-OLALIA factory (Hoffen), Samahan ng Manggagawa sa Mariwasa Siam Ceramics, Inc. (Siam Ceramics), Golden Will Fashion and Samahan ng Manggagawa sa EDS Mfg, Inc. (EDS Inc.), the Committee requests to be kept informed of the motu proprio (on its own violation) investigations that were to be conducted into these allegations by the CHR, expects that the Government will soon be able to report progress in the resolution of these cases and requests the Government to take all the necessary measures to ensure full respect of the principle that public authorities must exercise great restraint in relation to intervention in the internal affairs of trade unions.*
- (e) With respect to the complainant's allegations that on various occasions, companies in the EPZs closed down either the whole company or strategic departments where most unionists were located following the recognition of a union (in particular Goldilocks, Sensuous Lingerie and Golden Will Fashion Philippines), the Committee, considering that the closure or restructuring and the lay-off of employees specifically in response to the exercise of trade union rights is tantamount to the denial of such rights and should be avoided, the Committee urges the Government to ensure that the Labor Code, which governs the relationship between labour and*

*management in the registered enterprises in the EPZs, is applied in practice. The Committee requests the Government to provide information concerning the motu proprio investigations conducted by the CHR and expects that the Government will make efforts to ensure a speedy resolution of the above cases by the agencies concerned. It requests the Government to keep it informed in this regard.*

- (f) *As regards the allegations of anti-union discrimination and more particularly of illegal dismissals of trade union members in the enterprises Enkei Philippines, Sun Ever Lights, Daiho Philippines Inc., Hanjin Garments, Asia Brewery, Nagkakaisang Manggagawa sa Chong Won (NMCW) and Anita's Home Bakeshop, the Committee requests the Government, in respect of the first company, to take the necessary steps so that, pending the outcome of any appeal proceedings instituted by the company, the union members who were dismissed are reinstated immediately in their jobs under the same terms and conditions prevailing prior to their dismissal with compensation for lost wages and benefits, in conformity with the 2007 NLRC order for reinstatement; if reinstatement is not possible for objective and compelling reasons, the Government should ensure that the workers concerned are paid adequate compensation which would represent a sufficiently dissuasive sanction for anti-trade union dismissals. Similarly, in the case of the second company, the Committee requests the Government to keep it informed of any developments in regard to the motion for writ of execution of the 2008 NLRC reinstatement order pending with the NLRC. Concerning the alleged illegal dismissals at the other companies, the Committee requests the Government to carry out independent investigations of the dismissals and, if it finds that they constitute anti-union acts, to take measures to ensure the reinstatement of the workers concerned without delay. If reinstatement is not possible for objective and compelling reasons, the Government should ensure that the workers concerned are paid adequate compensation which would represent a sufficiently dissuasive sanction for anti-trade union dismissals. In addition, in the case of the last company, the Committee once again urges the Government to keep it informed of any relevant judgment handed down, and in particular of the decisions of the NLRC RAB VII or the NLRC Division 4 in Cebu City. The Committee further requests the Government to keep it informed of the motu proprio on its own volition investigations that were to be conducted by the CHR into the abovementioned allegations. It expects that the Government will do its utmost to ensure a speedy and equitable resolution of all cases by the agencies concerned.*
- (g) *As to the allegations concerning denial of the right to strike, the Committee trusts that the ongoing legislative reform will advance successfully and requests the Government to continue to keep it informed in regard to progress made towards the adoption of Senate Bill No. 632, which seeks to align article 263(g) of the Philippine Labor Code with the essential services criteria under Convention No. 87. The Committee expects that the Government will take the necessary measures without delay to ensure the full respect for the trade union rights of EPZ workers in practice, including the right to strike, as well as to ensure the speedy resolution of the case of NMCW.*

- (h) *With respect to the allegations of blacklisting and vilification of union members at Daiho Philippines and Anita's Home Bakeshop, the Committee requests the Government to keep it informed of the outcome of any inquiries conducted by the CHR and to make efforts to ensure the swift investigation and resolution of these cases.*
- (i) *As regards the serious allegations that on many occasions, the PEZA and municipal government sent PNP units or security forces to intimidate and/or disperse workers during protests, strikes or on picket lines, which, in the case of Hanjin Garments, resulted in the death of one protester, the Committee once again requests the Government to establish without delay an independent judicial inquiry and proceedings before the competent courts as soon as possible with regard to the allegation of the killing of a protester with a view to shedding full light onto the relevant facts and circumstances, and to determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events. The Committee firmly expects that the Government will do its utmost to ensure the speedy investigation and judicial examination of this case and requests to be kept informed in this respect. Concerning the alleged involvement of the army and police in the dispersal of the picket line and union collective actions at Sun Ever Lights, Sensuous Lingerie, Hanjin Garments and Asia Brewery, the Committee, in view of the conflicting versions of the complainant, the Government and the management, requests the Government to take all necessary measures for an independent investigation to be carried out into the alleged incidents with a view to identifying and punishing those responsible without further delay. The Committee requests the Government to keep it informed of the motu proprio investigations conducted by the CHR and to make all efforts to ensure timely progress in the resolution of these cases.*
- (j) *Concerning the allegations of a prolonged presence of the army inside the workplaces in the enterprises Sun Ever Lights, Aichi Forging Company and Siam Ceramics, the Committee requests the Government to keep it informed of the motu proprio investigations conducted by the CHR and to take the necessary measures to ensure the speedy resolution of these cases. It also requests the Government to supply a copy of the PNP Guidelines on the Accountability of the Immediate Officer for the Involvement of His Subordinates in Criminal Offenses.*
- (k) *As regards the allegations of arrest and detention following false criminal charges filed against labour leaders and unionists at the onset of union formation, during collective bargaining negotiations, picket protests, and strikes at the companies Hanjin Garments, Asia Brewery, Golden Will Fashion, Sensuous Lingerie and Kaisahan ng Manggagawa sa Phils. Jeon Inc., the Committee requests the Government to ensure that all relevant information is gathered in an independent manner so as to shed full light on the situation and the circumstances surrounding the arrest of the above trade unionists; should it be determined that they were arrested in relation to their trade union activities, the Committee requests the Government to take the necessary measures to ensure that they are immediately released and all charges dropped. The Committee requests the Government to keep it informed of the motu proprio investigations conducted by the CHR, to do its*



*utmost to soon be able to report progress in investigating all alleged cases of arrest and detention and to communicate the texts of any judgments handed down in these cases.*

- (l) *The Committee draws the special attention of the Governing Body to the extreme seriousness and urgent nature of the matters dealt with in this case.*

CASE NO. 2712

INTERIM REPORT

**Complaint against the Government of the Democratic Republic of the Congo**  
presented by  
**the Congolese Labour Confederation (CCT)**

***Allegations: Abduction and arbitrary detention by the special services of three trade unionists, including the President of the Congolese Labour Confederation***

- 1009.** 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 1083–1092].
- 1010.** At its March 2012 meeting [see 363rd 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.
- 1011.** 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**

- 1012.** 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. 1092]:
- (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 to hold an independent inquiry without delay to elucidate the reasons for the arrests of the two CCT trade unionists, Mr Richard Kambale Ndayango and Mr Israël Kanumbaya Yambasa, and of the President of the organization, Mr Nginamau Malaba, on 11, 16 and 19 January 2009, respectively, by ANR agents; to ascertain the charges laid against them to justify their detention; and, if it is found that they were detained solely for reasons linked to their legitimate union activities, to release them immediately and punish those responsible in a manner sufficiently dissuasive to prevent any recurrence of such acts in the future, and compensate them for any lost wages.
- (c) The Government is requested to provide copies of the relevant court decisions in this case, including the decision of 26 February 2009 of the Kinshasa/Gombe magistrate's court, the decision of the appeals court for which a hearing was set for 13 March 2009, and to indicate any follow-up action taken.
- (d) The Committee urges the Government to hold an inquiry without delay into the allegation that the three trade unionists concerned were held in custody for one month before obtaining a hearing and were subjected to inhumane and degrading treatment, and to indicate the outcome.
- (e) The Committee requests the Government or the complainant organization to indicate the follow-up action taken on the complaint filed by the CCT with the Attorney-General of the Republic on 28 January 2009.
- (f) The Committee draws the Governing Body's attention to the extreme seriousness and urgent nature of the present case.

## B. The Committee's conclusions

**1013.** *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 comments and observations on the allegations and its response to the recommendations made by the Committee in its previous examination of the case [see 356th Report, 359th Report and 363rd Report, para. 5].*

**1014.** *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 account of the information it had hoped to receive from the Government.*

**1015.** *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 trade union rights 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 the allegations brought against them [see First Report of the Committee, para. 31].*

**1016.** *The Committee deplores the fact that the Government has not yet 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 once again 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 the Government to*

*be more cooperative in the future. The Committee reminds the Government once again of the possibility to avail itself of the technical assistance of the Office.*

**1017.** *In these circumstances, the Committee finds itself obliged to reiterate its previous recommendations and firmly expects the Government to provide information without delay, given the gravity of the allegations in this case.*

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

**1018.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) In general, the Committee can only deplore the fact 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 once again 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 the Government to be more cooperative in the future. With regard to the present case, 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.*
- (b) The Committee urges the Government to hold an independent inquiry without delay to elucidate the reasons for the arrests of the two Congolese Labour Confederation (CCT) trade unionists, Mr Richard Kambale Ndayango and Mr Israël Kanumbaya Yambasa, and of the President of the organization, Mr Nginamau Malaba, on 11, 16 and 19 January 2009, respectively, by ANR agents; to ascertain the charges laid against them to justify their detention; and, if it is found that they were detained solely for reasons linked to their legitimate union activities, to release them immediately and punish those responsible in a manner sufficiently dissuasive to prevent any recurrence of such acts in the future, and compensate them for any lost wages.*
- (c) The Government is requested to provide copies of the relevant court decisions in this case, including the decision of 26 February 2009 of the Kinshasa/Gombe magistrate's court, the decision of the appeals court for which a hearing was set for 13 March 2009, and to indicate any follow-up action taken.*
- (d) The Committee urges the Government to hold an inquiry without delay into the allegation that the three trade unionists concerned were held in custody for one month before obtaining a hearing and were subjected to inhumane and degrading treatment, and to indicate the outcome.*

- (e) *The Committee requests the Government or the complainant organization to indicate the follow-up action taken on the complaint filed by the CCT with the Attorney-General of the Republic on 28 January 2009.*
- (f) *The Committee requests the Government to accept a high-level mission to discuss all the complaints pending before the Committee concerning the Democratic Republic of the Congo.*

CASE No. 2890

INTERIM REPORT

**Complaint against the Government of Ukraine  
presented by  
the Federation of Trade Unions of Ukraine (FPU)  
supported by  
the International Trade Union Confederation (ITUC)**

*Allegations: The complainant organization alleges that the recently adopted Tax Code violates Conventions Nos 87 and 98. It further alleges a case of interference in the establishment of trade union organizations, as well as cases of harassment of trade union leaders and the attempt by the State to seize the Federation of Trade Unions of Ukraine's (FPU) property*

- 1019.** The Federation of Trade Unions of Ukraine (FPU) submitted its complaint in communications dated 22 July and 18 August 2011. The International Trade Union Confederation (ITUC) associated itself with the complaint in a communication dated 1 August 2011.
- 1020.** The Government submitted its observations in communications dated 16 September and 3 October 2011.
- 1021.** Ukraine 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**

- 1022.** In its communications dated 22 July and 18 August 2011, the FPU alleges that, cases of establishment of trade unions under employers' control, interference by the government agencies and harassment of trade union leaders has become frequent in recent years. It alleges, in particular, that the recently adopted Tax Code of Ukraine contains a number of provisions allowing tax authorities to intervene in the statutory and financial activities of trade unions. In particular, section 20.1.6 of the Code stipulates that the State Fiscal Service is entitled to receive from all taxpayers, including non-profit organizations (trade unions) certificates and copies of documents relating to financial and economic activities.

- 1023.** According to the FPU, on the basis of this provision, the State Fiscal Service in Khmelnytsky and Donetsk regions brought an action against some primary trade union organizations seeking the annulment of their legal personality. According to the complainant, the reason behind this action is the failure of these organizations to file income tax returns and account reports.
- 1024.** The FPU indicates that article 157.14 of the Code gives the central body of the State Fiscal Service the power to decide whether to exclude non-profit organizations from the Registry of Non-Profit Organizations and Institutions and whether to impose taxes on their income in case of violation by such organizations of the tax code or any other legislation concerning non-profit organizations. According to the complainant, this means that in order to confirm the status of a non-profit organization, trade unions must allow the tax authorities to conduct inquiries into the expenditure of their funds.
- 1025.** The FPU further indicates that in order to implement paragraph 30.6 of the Code, the Cabinet of Ministers of Ukraine issued a decree dated 27 December 2010 “On approval of order of treatment of taxes and fees not paid by a business entity in the budget in connection with the receipt of tax benefits”. On the basis of this decree, the fiscal authorities require trade union organizations to file reports every three, six, nine and 12 months, in which the unions shall declare the amount of all funds received from trade union members, enterprises, institutions and organizations for cultural, sport and recreational activities, all other financial support, donations and passive income, as well as the value of property and services received by primary trade union organizations from an employer pursuant to a collective agreement, i.e. tax-exempt funds.
- 1026.** The FPU indicates that it had repeatedly appealed to the public authorities urging them to bring the Code into conformity with international standards and the law on trade unions. It has also drafted a proposed amendment to the Code which is currently pending in Parliament.
- 1027.** The FPU further alleges that the founding conference of the Trade Union of the Sea Transport Employees (United) took place on 15 April 2011. According to the complainant, the Deputy Chairperson of the National Sea and River Transport Agency of Ukraine had actively participated in the conference. Furthermore, upon his orders, three employees from each sea transport company were sent by their employers to participate in that conference, without any inquiry as to their wish to establish a union. According to the complainant, some of them being members of the FPU-affiliated organization refused to vote. Nevertheless, the trade union was established and is now in the process of being legalized by the Ministry of Justice. On 22 April 2011, the FPU urged the Office of the Prosecutor and the Ministry of Justice to redress the violation of Convention No. 98 but received no reply.
- 1028.** The complainant further alleges the following instances of interference in its activities by the authorities. On 11 May 2011, directors of educational institutions at all levels received an instruction from the Ministry of Education and Science to provide information on all trade union fees paid to structural organizations of the Trade Union of Workers of Education and Science of Ukraine. On 20 May 2011, the Nadvirnya District Regional Auditing Authority in Ivano-Frankivsk region requested the Chairperson of the trade union committee of the Nadvirnya technical college No. 11 to provide information on the receipt and use of trade union dues paid by students between 1 May 2009 and 31 April 2011.
- 1029.** Furthermore, on 23 May 2011, the FPU was instructed by the General Prosecutor’s Office not to examine questions of its statutory activities at the sitting of its presidium on 24 May 2011. On 27 May 2011, the Prosecutor’s Office requested the FPU to provide information on the discussion by its elected bodies of questions relating to the union property. On 2 and

3 June 2011, the Prosecutor's Office also requested notarized copies of the FPU statutes, regulations of its standing commissions, list of members of the FPU's presidium and council, the council's and conference's rules, minutes of meetings of standing commissions, presidium and council, including audiotapes, etc.

- 1030.** The FPU further alleges that its Chairperson, his deputies, as well as the Chairpersons of the FPU-affiliated unions are regularly called to the Prosecutor's Office for interrogations that last over three hours. It also alleges that it has been receiving numerous requests from the authorities to provide information, documents and explanations regarding its activities, often on impossibly short notice or with regard to the events or activities which have yet not taken place.
- 1031.** According to the complainant, the Prosecutor's Office has prohibited the elected FPU bodies from making any decision concerning the union property which rightfully belongs to the FPU as confirmed by numerous court decisions. In this respect, the FPU indicates that on 15 June 2011, the Khmelnytsky region Prosecutor's Office sent a letter to the Chairperson of the Federation of Trade Unions of the Khmelnytsky region instructing him to inform the Office within two days about all trade union organizations existing in the region and all enterprises created by them since 2007, as well as to indicate whether any of its organizations have been investigated, and to inform about violations committed and the measures taken to eliminate such violations. On that same day, the Chairperson of the Federation of Trade Unions of Lugansk region received a letter from the Prosecutor's Office of the Lugansk region requiring him to produce, not later than 12 p.m. on 17 June 2011, all information and documents concerning the FPU property.
- 1032.** On 16 June 2011, the Chairperson of the trade union committee of the "Dnepr AZOT" was requested by the Prosecutor's Office of the Bagliysky region of Dneprodzerzhynsk city in the Dnepropetrovsk region to produce notarized copies of the trade union committee statutes, staff list, decisions adopted by trade union meetings held between 2010 and 2011. The union Chairperson was called to the Prosecutor's Office to provide further explanations on 20 June 2011.
- 1033.** On 21 June 2011 the Chairperson of the Dnepropetrovsk regional trade union association was requested by the Prosecutor's Offices of the Kirovskiy and Leninskiy districts of Dnepropetrovsk to produce a certificate detailing information regarding the implementation by the FPU of the legislative requirements with regard to its property between 2008 and 2011 and ensuring the right of citizens to health care and rest in the Kirovskiy district, as well as other documents confirming property rights and the right to use a plot of land.
- 1034.** The Prosecutor's Office of Kamenets-Podolsk requested the Chairperson of the Khmelnytsky region Federation of Trade Unions to provide within one day information about the sanatoriums, hotels, tourist and sport centres, property complexes and buildings and premises belonging to the FPU, closed joint stock companies "Ukrproftour" and "Ukrprofzdravnitsa". It also asked to provide all information on the alienation of the abovementioned property between 1994 and 10 June 2011. The Federation of Khmelnytsky region was also requested to indicate whether the FPU owned any land and property in the Khmelnytsky district.
- 1035.** In May and June 2011, the Chairperson of the Zakarpattia regional council and the Chairperson of the trade union council of the Ivano-Frankivsk region received multiple verbal requests from the officers of the Prosecutor's Office to provide information on the decisions made by the presidium and the council of the FPU on 24 and 25 May 2011.

- 1036.** The Prosecutor's Office of the Centralnogradskoi and Dzerzhinsky districts of Krivoy Rog city, carried out a rush inspection of the activities of the municipal workers' organizations in construction, health-care sectors, government agencies etc.
- 1037.** On 4 July 2011, the FPU Chairperson received a letter from the Kiev Prosecutor's Office demanding him to urgently provide copies of all documents related to the acquisition, issuance, distribution of tour certificates to the health resorts between 2008 and 2011 among members of the Federation, trade union committees, and employees of undertakings, institutions and organizations established by the FPU.
- 1038.** According to the complainant, the authorities try to seize trade union property through courts. For example, the Prosecutor's Offices of the Chernihiv, Cherkassy and Chernivtsi regions, Irpin and Nova Kakhovka cities requested the economic courts to invalidate state certificates of ownership of a number of real estate properties of closed joint stock companies "Ukrproftour" and "Ukrprofzdravnitsa" and to transfer the property to the State Property Fund of Ukraine. The following property was designated to be transferred: health resorts "Dubki", "Zvezda", "Ukraina", "Health resort for children named after Shchors", tourist health complex "Pridneprovsky", boarding house "Bukovyna" and tourist hotel "Nova Kakhovka".
- 1039.** The complainant further alleges harassment of trade union leaders. In this respect, it alleges that on 8 June 2011, following the illegal interference by the Prosecutor's Office into the FPU internal affairs, the FPU carried out a picket of the General Prosecutor's Office. During the picketing, the Chairperson of the Trade Union of Workers of Food and Food Processing Industry of the Kiev region, Ms Galina Karnatova, addressed the meeting and accused the authorities of violating the Law on Trade Unions. Following her speech, she was persecuted by the Office of the Prosecutor. On 20 June 2011, she was summoned to the Prosecutor's Office to give explanations on the circumstances related to the investigation of the FPU activities. Later, she was requested to provide information on the structure of the regional trade union organization. Her organization was also requested to provide information on its internal activities and the list of its business entities, as well as those legal entities that have wage arrears and the measures undertaken by the Chairperson to guarantee the payment. The FPU alleges that Ms Karnatova is under psychological pressure as she is constantly summoned for interrogations. Following the expression by the Chairperson of the Trade Union of Workers of Energy and Electrical Industry of Kiev region, Ms Ludmila Maximenko, of her indignation about Ms Karnatova's treatment, the Prosecutor's Office began an investigation of that union as well.
- 1040.** The complainant also alleges a large-scale campaign aimed at discrediting the FPU as a legitimate owner and manager of its property. The FPU filed petitions to the district court of Kiev to declare the disseminated information as false and detrimental to its business reputation and to trade unions in general. However, the court considered that it had no jurisdiction and the matter should be examined by the economic courts instead. The FPU considers that these cases are a civil matter and therefore appealed the court decision.
- 1041.** The complainant further alleges cases where interference in trade union affairs is conducted on the basis of judicial decisions and refers, in particular, to the June–July 2011 decisions of the Shevchenkivski District Court of Kiev which declared illegal the decision by the Statutory Commission of the FPU not to include one more candidate in the list of the candidates for the FPU Chairperson election. In addition, the judge obliged the FPU to take a decision on the inclusion of this candidate in the list of candidates. The judge did not take into account that this candidate did not meet statutory requirements for the position and was not a member of the FPU's affiliate and the fact that the FPU had already elected its President.

**1042.** The second decision of the court invalidated the decision of the 10th Kiev City Trade Union Conference of 17 December 2010 and reinstated, in the position of the Chairperson, the candidate who did not have the majority of votes. By that decision, the judge substituted the union statutory procedure by his own decision and thereby dismissed the duly elected Chairperson.

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

**1043.** By its communications dated 16 September and 3 October 2011, the Government informs that the FPU allegations have been examined by the Prosecutor's Office. The Government indicates that trade unions have rights and obligations. In accordance with section 36 of the Law on Trade Unions, trade unions are required to respect the Constitution and the legislation of the country.

**1044.** The Government indicates that the Office of the Prosecutor has been currently carrying out inspections in order to verify the legality of the use of the State assets held by the FPU and entities established by it. These inspections have revealed a number of infringements of law. In order to defend the interests of the State and to hold those responsible for contravention accountable, a number of prosecutions have been instigated. The Government further indicates that the matters examined by the Prosecutor's Office are currently pending before the courts.

**1045.** The Government stresses that interference in the lawful activities of unions is not allowed and that in carrying out inspections, prosecutors are guided exclusively by the procedures established by the legislation aimed at prosecution of individuals who break the law. According to section 20 of the Act concerning the prosecution service, the Public Prosecutor has the right to access the documents and materials required for inspections, including commercial secrets or other confidential information. A public prosecutor is entitled by law to demand, in writing, the submission of any decisions, orders and instructions, to summon officials and private citizens and request them to give an oral or written deposition on matters relating to contraventions of laws. Under section 8 of the Act, lawful demands issued by a public prosecutor are binding on all bodies and must be complied with within the period specified by law or by the prosecutor.

**1046.** The Government indicates that pursuant to article 67(1) of the Constitution of Ukraine, everyone is required to pay taxes as well as social charges as established by law. The Tax Code governs the relations that arise in connection with the levying of taxes and charges and includes an exhaustive list of taxes and charges levied in Ukraine, the procedures for administering them, persons liable to pay taxes and charges, the competence of the tax authorities and liability for contravention of the law. Pursuant to section 4.1 of the Code, the tax law is based on the principle of equality of all taxpayers, individuals and organizations. Under section 56(1) and (2) of the Code, decisions of the tax authority may be contested through administrative or judicial procedures.

**1047.** The Government indicates that the situation described by the FPU results from the uncertain legal status of a part of the property in its possession. It explains that the main part of the property currently in the possession of the FPU was the property of all unions of the former USSR active in Ukraine. The Government points out that the legal status of that property is uncertain; in the light of the Supreme Council Order No. 3943-XII of 4 February 1994 concerning the property of all union public associations of the former USSR, the property in question is deemed to be the property of the State until such time as legislation defines the lawful owners. Therefore, in order to protect the interests of the State in respect of the property in the possession of the FPU and given attempts by trade unions to expropriate that property, a law imposing a moratorium on attempts to expropriate the property was introduced. The moratorium was in force until 1 January



2008. The Government emphasizes that the intention was not to deprive the FPU of its property which it has acquired at its own expense or by other lawful means, but rather concerns only the disputed property in the FPU's possession. For that reason, all disputed issues relating to the property in question are under consideration by various judicial instances.

- 1048.** The Government concludes by stressing that the rights of trade unions, including their property rights, are protected by legislation. Interference by state authorities in the activities of trade unions is prohibited. According to section 12 of the Law on Trade Unions, trade unions and their federations operate independently of the state authorities, local administration, employers and other public associations and political parties. Pursuant to section 34 of the Law, trade unions and their federations may own resources and assets needed to carry out their activities. The state authorities and local administrations do not carry out financial oversight of assets owned by trade unions and their federations. Trade unions may be dispossessed of their property or denied the use of the assets entrusted to them only by a court and for reasons established by law. Pursuant to section 46 of the Law, officials and other persons who violate the terms of the law and by their actions obstruct trade unions' activities bear disciplinary, administrative and criminal responsibility in accordance with the relevant laws.

### C. The Committee's conclusions

- 1049.** *The Committee notes that the complainant alleges interference by the state authorities and employers in its internal affairs and activities.*
- 1050.** *The Committee notes that the FPU's first set of allegations relates to the recently adopted Tax Code. According to the complainant, the Code contains a number of provisions allowing tax authorities to intervene in the activities of trade unions. The Committee notes that the complainant refers to the following sections which, in its opinion, open the way for the tax authorities to intervene in internal trade union affairs: section 20.1.6, which entitles fiscal authorities to obtain from all taxpayers, including trade unions, certificates and copies of documents relating to financial and economic activities; and section 157.14, which gives the central body of the State Fiscal Service the power to decide whether to exclude non-profit organizations from the Registry of Non-Profit Organizations and Institutions. According to the FPU, this means that in order to confirm the status of a non-profit organization, trade unions must allow the tax authorities to conduct inquiries into the expenditure of their funds.*
- 1051.** *The Committee further notes the FPU's allegations that on the basis of Decree No. 1233 of 27 December 2010 "On approval of order of treatment of taxes and fees not paid by a business entity in the budget in connection with the receipt of tax benefits", the fiscal authorities require trade union organizations to file reports every three, six, nine and 12 months in which trade unions shall declare the amount of all funds received from trade union members, enterprises, institutions and organizations for cultural, sport and recreational activities, all other financial support, donations and passive income, as well as the value of property and services received by primary trade union organizations from an employer pursuant to a collective agreement, i.e. tax-exempt funds. The Committee understands, however, that this Decree is applicable to commercial undertakings (businesses) and to business activities of non-commercial organizations.*
- 1052.** *The Committee takes due note of the information provided by the Government that the Ukrainian legislation in force prohibits interference in trade union internal affairs and activities and establishes criminal and administrative liability in cases of violation. The Committee notes that according to the Government, the Tax Code governs the relations that arise in connection with the levying of taxes and charges and includes an exhaustive*

*list of taxes and charges levied in Ukraine, the procedures for administering them, persons liable to pay taxes and charges, the competence of the tax authorities and liability for contravention of the law. Pursuant to section 4.1 of the Code, the tax law is based on the principle of equality of all taxpayers, individuals and organizations. Under section 56(1) and (2) of the Code, decisions of the tax authority may be contested through administrative or judicial procedures.*

- 1053.** *The Committee recalls that questions concerning general tax legislation fall outside its competence unless such legislation is used in practice to interfere in trade union activities. The Committee notes that the complainant's allegations are of a general nature with an exception of the allegation that on the basis of the provisions of the Tax Code, the State Fiscal Service in the Khmelnytskyi and Donetsk regions brought an action against some primary trade union organizations seeking the annulment of their legal personality. The Committee notes, however, that according to the FPU itself, the reason behind this action is the failure of these organizations to file income tax returns and account reports.*
- 1054.** *With regard to the alleged attempts to seize the FPU property and numerous alleged investigations into its assets as well as assets of affiliates, as detailed in the complaint, the Committee notes the Government's indication that the situation described by the FPU results from the uncertain legal status of part of the property in its possession. It explains that the main part of the property currently in the possession of the FPU was the property of all unions of the former USSR active in the Ukraine. The Government points out that in the light of the Supreme Council Order No. 3943-XII of 4 February 1994 concerning the property of all union public associations of the former USSR, the property in question is deemed to be the property of the State until such time as legislation defines the lawful owners. In order to protect the interests of the State in respect of the property in the possession of the FPU and given attempts by trade unions to expropriate that property, a law imposing a moratorium on the attempts to expropriate the property was introduced. The moratorium was in force until 1 January 2008. The Government emphasizes that the intention is not to deprive the FPU of its property which it has acquired at its own expense or by other lawful means, but rather concerns only the disputed property in the FPU's possession. For that reason, all disputed issues relating to the property in question are under consideration by various judicial instances.*
- 1055.** *The Committee understands that the FPU performs not only functions of protection of social rights but also provides their members with some social service through its recreational institutions and sanatoriums. The Committee further understands that under the communist regime, the assets accumulated by the trade unions were very large because the functions exercised by trade unions went well beyond the traditional activities carried out by workers' organizations in the defence of the interests of their members. It appears to the Committee that the complainant's concerns are mostly about the rest houses, resorts and sanatoriums and other lucrative undertakings. The Committee understands from the Government's reply that there is no intention to strip the FPU from all of its property, or the property that it had legally acquired or purchased, but rather to settle the issue of the disputed property of the former USSR trade unions which is currently in the FPU's possession.*
- 1056.** *In examining this case, the Committee is fully aware of the great complexity of the matters raised. This complexity is due to several factors: the diversity and origin of the resources held by the former Ukrainian (USSR) trade unions (state subsidies and contributions from their members), the nature of the functions assigned to them, and the time that has elapsed since the formal disappearance of Ukrainian (USSR) trade unions and the issue of their property arose. The Committee understands that various normative acts maintained that the property of the former USSR unions active on the territory of Ukraine was the property of the State until such time as the legislation defines the legal owners. In order to protect*

*the interests of the State in respect of such property, a law imposing a moratorium on attempts to expropriate and/or alienate it was introduced. The Committee understands that in the recent years, there have been attempts by the State to make an inventory of such property. In the opinion of the Committee, the State intervention alleged, in this case, in respect of the devolution of trade union assets, is not necessarily incompatible with the principles of freedom of association. While noting that cases relating to the issue of property are currently pending in courts, the Committee considers that this question is best solved by an agreement between the Government and the trade unions concerned. In these circumstances, the Committee invites the Government to engage in consultations with the trade union organizations concerned in order to settle the question of the assignment of property. It requests the Government to provide information on the evolution of the situation and, in particular, on any agreement, which may be reached in this respect.*

**1057.** *The Committee also observes that at least the following alleged instances of interference by the authorities in the activities of the FPU and its affiliates do not appear to relate to the question of property: inquiry into trade union fees paid to the structural organizations of the Trade Union of Workers of Education and Science of Ukraine; inquiry into the receipt and the use of trade union dues paid by students to the trade union committee of the Nadvirnya technical college No. 11 in Ivano-Frankivsk; instruction given by the General Prosecutor's Office on 23 May 2011 to the FPU not to examine certain issues at the sitting of its presidium on 24 May 2011; and request by the Prosecutor's Office of the Bagliysky region of Dneprodzerzhynsk city in Dnepropetrovsk region addressed to the Chairperson of the trade union committee of the "Dnepr AZOT" to produce notarized copies of the trade union committee statutes, staff list and decisions adopted at trade union meetings between 2010 and 2011. The Committee requests the Government to provide its observations in this regard. The Committee further requests the Government to provide its observations on the two 2011 decisions of the Shevchenkivski District Court of Kiev (in the first decision, the court declared illegal the decision by the Statutory Commission of the FPU not to include one more candidate in the list of the candidates for the FPU Chairperson election and obliged the organization to take a decision on the inclusion of this candidate in the list of candidates; in the second decision, the court invalidated the decision of the 10th Kiev City Trade Union Conference of 17 December 2010 and reinstated, in the position of the Chairperson, the candidate who did not have the majority of votes), which, based on the information provided by the complainant, appear to interfere with the right of trade unions to elect their representative in full freedom.*

**1058.** *The Committee notes the FPU's allegation that the Trade Union of the Sea Transport Employees (United) was established upon the initiative and involvement of the Deputy Chairperson of the National Sea and River Transport Agency of Ukraine and employers of sea transport companies, whereas some of the employees requested to vote for the creation of that union were members of an FPU-affiliated union. The Committee regrets that no information has been provided by the Government in this regard. It recalls that the intervention by an employer to promote the establishment of a parallel trade union constitutes an act of interference by the employer in the functioning of a workers' association, which is prohibited under Article 2 of Convention No. 98. The Committee requests the Government to institute an independent inquiry into this allegation and to provide information on its outcome.*

## The Committee's recommendations

**1059.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) *The Committee invites the Government to engage in consultations with the trade union organizations concerned in order to settle the question of the assignment of property. It requests the Government to provide information on the development of the situation and, in particular, on any agreement which may be reached in this respect.*
- (b) *The Committee requests the Government to provide its observations on the remaining alleged instances of the interference in the FPU and its affiliates' trade union affairs. It further requests the Government to provide its observations on the two 2011 decisions of the Shevchenkivski District Court of Kiev.*
- (c) *The Committee requests the Government to institute an independent inquiry into the allegation of the establishment of the Trade Union of the Sea Transport Employees (United) by, or upon, the initiative of employers and to provide information on its outcome.*

CASE NO. 2727

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

**Complaint against the Government of the Bolivarian  
Republic of Venezuela  
presented by  
the Workers' Confederation of Venezuela (CTV)**

***Allegations: The Venezuelan Workers' Confederation (CTV) alleges the murder of union officials and members in the construction industry, criminal proceedings against trade unionists, dismissal of workers for striking and refusal by the public authorities to bargain collectively in a number of sectors***

**1060.** The Committee last examined this case at its meeting in June 2011, when it submitted an interim report to the Governing Body [see 360th Report, paras 1166–1190, approved by the Governing Body at its 311th Session (June 2011)].

**1061.** The Government sent new observations in a communication dated 18 October 2011.

**1062.** 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

**1063.** In its previous examination of the case in June 2011, the Committee made the following recommendations concerning the outstanding issues [see 360th Report, para. 1190]:

- (a) The Committee expresses its grave concern about the serious allegations of murders of workers and union officials, which it deeply regrets.
- (b) With regard to the allegations concerning the murder of three officials of the Bolivarian Union of Workers in the Construction Industry in El Tigre (Mr Wilfredo Rafael Hernández Avile, General Secretary, Mr Jesús Argenis Guevara, Organizational Secretary, and Mr Jesús Alberto Hernández, Culture and Sports Secretary) and of two trade union delegates in the Los Anaucos area in June 2009 (Mr Felipe Alejandro Matar Iriarte and Mr Reinaldo José Hernández Berroteran), the Committee firmly trusts that judicial sentences will be handed down on the perpetrators, instigators and accomplices in the near future. The Committee once again requests the Government to keep it informed in this regard.
- (c) As regards the allegations concerning the Office of the Attorney General's preparation of criminal charges against and detention of six workers at PDVSA because, during a protest in defence of their labour rights, they paralysed the enterprise's activities, the Committee requests the Government or competent authorities to take the necessary measures to have the criminal proceedings brought against the six union officials at PDVSA dropped and to ensure their release without delay. The Committee also requests the Government to take the necessary steps to amend section 139 of the Act for the Defence of Persons in Accessing Goods and Services so that it does not apply to services which are not essential in the strict sense of the term and so that in no event may criminal sanctions be imposed in cases of peaceful strikes. The Committee requests the Government to keep it informed in this regard. It once again draws the attention of the Committee of Experts to the legislative aspect of this case.
- (d) The Committee regrets that for the third consecutive time the complainant organization has failed to send the additional information requested in its earlier conclusions and recommendations and informs it that, if it fails to do so before the next consideration of the case, the Committee will not be in a position to pursue its examination of the allegations. The Committee reproduces its earlier recommendations below:
  - Concerning the allegations in relation to the contract killings of more than 200 workers and union officials in the construction sector, the Committee requests the trade union to provide the Government, without delay, with a list of these murders and the circumstances thereof so that the Government can undertake the appropriate investigations without delay.
  - With respect to the allegations concerning the criminalization of protests, the initiation of judicial proceedings at various enterprises in the oil, gas and steel sectors, and the dismissal of union officials as a result of these protests (according to the CTV, judicial proceedings were started against 27 workers at the state holding PDVSA, 25 workers at the "Alfredo Maneiro" Orinoco steelworks for staging a protest in defence of their labour rights and 10 trade union delegates of the "El Palito" refinery were dismissed after 600 workers decided to stop work as a result of failure to abide by commitments under the collective agreement; according to the CTV, workers at the enterprises Gas PetroPiar and Gas Comunal have also been affected), the Committee again requests the complainant organization to send the text of the accusations allegedly made against the union members in question.
  - With regard to the criminal court proceedings against 110 workers for claiming their rights, the Committee again requests the complainant organization to supply additional information concerning these allegations, specifically, the names of those involved and the activities they are alleged to have undertaken, so that the Government can send its observations in this regard.

- The Committee again invites the complainant organization to indicate whether the collective bargaining rights of its affiliates have been respected in the bargaining processes mentioned by the Government.
- (e) The Committee draws the Governing Body's attention to the extreme seriousness and urgent nature of the matters dealt with in this case.

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

- 1064.** In its communication dated 18 October 2011, the Government states once again that it disagrees with the designation of Case No. 2727 as extremely serious and urgent given the continued lack of information from the complainant organization despite repeated requests to which the Committee has received no reply. In this respect, the Government requests that the information be provided by the complainant organization and that it complies with the provisions of Report No. 360, paragraph 1190(d) in which the Committee, having requested information from the complainants on three consecutive occasions without receiving any reply, informed them that if it did not receive the information before the next consideration of the case, i.e. the meeting of the Committee on Freedom of Association on 3–4 November 2011, the Committee would not pursue its examination of the allegations; in the light of the complainant organization's failure to provide the required information, the Government therefore expressly requests the Committee on Freedom of Association to reach a decision on the matter, end its examination of the abovementioned allegations and close this case. The Government indicates that it is making this request to ensure that the Committee's considerations are uniform, coherent and transparent in all the pending cases it is examining against the Government. The Government draws the Committee's attention to cases and allegations that do not receive the due examination necessary for their objective and impartial assessment and are rejected and closed; the Committee should not receive vague and imprecise accusations that far from providing solutions to disputes between parties and being in line with the Committee's purpose, cause delays in judicial proceedings and produce unfounded rulings against the Government.
- 1065.** As regards the point in which "The Committee expresses its grave concern about the serious allegations of murders of workers and union officials, which it deeply regrets", the Government has expressed on several occasions its regret regarding the death of workers, trade union leaders and any other national. The Government and the competent institutions and bodies have acted diligently and swiftly to resolve these cases and have fully complied with the obligation to inform the Committee on developments in these cases and to provide details of investigations being carried out by the Office of the Attorney-General, demonstrating their unswerving commitment to providing the supervisory body of the ILO with all the information it has requested.
- 1066.** With regard to the events concerning the murder of three officials of the Bolivarian Union of Workers in the Construction Industry in El Tigre (Mr Wilfredo Rafael Hernández Avile, Mr Jesús Argenis Guevara, and Mr Jesús Alberto Hernández), the Government indicates that according to the Office of the Attorney-General, on 5 October 2010, the Third Court of First Instance, acting as overseeing court for the Criminal Judicial Circuit of the state of Anzoátegui, in El Tigre, ruled that the case be closed in accordance with section 318(3), and pursuant to section 48(1), of the Code of Criminal Procedure. There is no ongoing investigation or open file on these events since, taking into account the information in the previous reply, the case was closed when judicial proceedings were dropped following the death of the accused.
- 1067.** As regards the allegations concerning the Office of the Attorney-General's preparation of criminal charges against and detention of six workers at Petróleos de Venezuela (PDVSA) because, during a protest they paralysed the enterprise's activities, the Government once again respectfully draws the Committee's attention to the requests made and expressly

requests that the information provided be assessed with total objectivity. The Government cannot address the Committee's request to drop "without effect" measures and judicial proceedings which are in strict compliance with the relevant domestic legislation as well as due process and other principles. The Government adds that the Committee has no jurisdiction to request the dropping of legal measures and judicial proceedings against offences laid down and sanctioned in the law and for which the corresponding legal procedures are established. By these recommendations the Committee is asking the Government to disregard domestic legislation and procedures laid down to sanction typical offences, which would give rise to a situation of impunity. The Government and the corresponding state bodies of the Bolivarian Republic of Venezuela respect and comply with the principles embodied in the Constitution and national legislation, and, given their full force in the Bolivarian Republic of Venezuela, the principle of the separation and independence of the different state branches; therefore the Government cannot comply with recommendations that are unfounded and that the Committee has no competence to make, and that are at odds with the constitutional principles and laws of the Bolivarian Republic of Venezuela. On the other hand, the Committee also requests the Government to amend section 139 of the Act for the Defence of Persons in Accessing Goods and Services. The Committee is informed that this law was fully debated, discussed and adopted by the Venezuelan National Assembly, i.e. the legislative branch of the State. It was adopted to defend, protect, and safeguard the rights and interests of individuals in accessing goods and services in order to meet their needs. Section 139 concerns the penalties for any individual who impedes the production, manufacture, import, warehousing, transport, distribution or sales of commodities classified as being of prime necessity for the population.

**1068.** In this respect, the Government indicates that it finds itself in the position once again of having to explain to the Committee that any activity in relation to the production, distribution, and sale of gas constitutes in the Bolivarian Republic of Venezuela an essential service of prime necessity for the population. In order that the Committee can understand and take note of the necessity and predominance of this commodity in the Bolivarian Republic of Venezuela, the following information is provided:

- According to the National Institute of Statistics (INE), in 2011 there were approximately 5,855,547 households in the Bolivarian Republic of Venezuela. Of these, 5,094,326 used liquefied petroleum gas (LPG) and 761,221 used other energy sources.
- At present 87 per cent of the population need LPG for cooking and other uses, thus its classification as an essential public service and of social and public interest.
- Over 150,000 gas cylinders are distributed daily. If distribution were to be interrupted for just one day, it would affect over 93,000 Venezuelan households.
- Besides for cooking, LPG is used in the Bolivarian Republic of Venezuela in both heating and cooling systems.
- LPG is used for cooking not only in Venezuelan homes but also in schools.
- LPG is also used in health centres, clinics, hospitals, etc., for cooking, in heating and cooling systems, and in steam boilers to sterilize surgical instruments.
- LPG is also distributed and used by commerce and industry, for example in bakeries, restaurants, refineries, petrochemical companies, etc.
- The capture, storage or use of natural gas as well as gas produced from petroleum or other fossil fuels, and the processing, industrialization, transport, distribution, and domestic or foreign trading of these gases is governed by the Petroleum Act, published in *Official Gazette* No. 36793 of 23 September 1999.

- 1069.** Section 4 of this Act stipulates “The activities referred to in this Act, as well as the works required for their management, are declared of public utility”, and section 5 states “Activities that are directly or indirectly related to the transport and distribution of hydrocarbon gases destined for public consumption constitute a public service”.
- 1070.** The Act conferring on the State the Sole Rights to the Exploitation of the Domestic Market in Hydrocarbon Derivatives declares of public utility and national interest the exploitation of the domestic market for hydrocarbon derivatives such as, inter alia, combustible fuels and liquefied petroleum gas and, furthermore states that the activities of public interest reserved to the State under this law include the import, transport, supply, storage, distribution and sale of the abovementioned products within the national territory. It also declares liquefied petroleum gas of prime necessity. It constitutes an essential public service of public necessity since disruption or stoppage of activities relating to its production, distribution or sale would affect the vast majority of Venezuelan households as well as schools, care centres, commerce and industry. For these reasons the Bolivarian Republic of Venezuela does not and shall not permit actions or omissions that affect the production or distribution of gas since they would jeopardize and infringe the Venezuelan population’s right to food, health and life.
- 1071.** The Government expects the Committee to take due note of this information and not make observations or requests that violate the principles of the State and are against domestic law.
- 1072.** Finally, the Government is under the obligation once again to remind the Committee of Article 8(1) of Convention No. 87, which we fully observe and comply with: “In exercising the rights provided for in this Convention workers and employers and their respective organizations, like other persons or organized collectivities, shall respect the law of the land.”

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

- 1073.** *With regard to the Committee’s recommendation (a) contained in its previous examination of the case and the Government’s view contained in its previous reply that it disagrees with the Committee’s decision to designate this case as extremely serious and urgent given the continued lack of information from the complainant organization despite repeated requests, the Committee wishes to point out that in recommendations (b) and (c) of its previous examination of the case, the Committee refers to issues concerning the murders of three officials and two trade union delegates, the initiation of criminal proceedings and the arrest of six workers in the oil sector for paralysing state enterprise PDVSA’s activities. In this regard, the Committee wishes to point out that the designation of a case as extremely serious and urgent is determined by the Committee on the basis of the seriousness of the issues raised and the information provided by the Government. The Committee wishes to emphasize that the murder of officials is always regarded within the ILO as serious and that in its rules of procedure (see rule 54) it is expressly established that included in the category of urgent cases are “Matters involving human life or personal freedom ...”.*
- 1074.** *With regard to recommendation (b) of the previous examination of the case concerning the murder of three officials and two trade union delegates, the Committee notes the Government’s statements, according to which: (1) with regard to the point in which “the Committee expresses its grave concern about the serious allegations of murders of workers and union officials, which it deeply regrets”, the Government and the competent institutions have acted diligently and swiftly to resolve these cases fully and have fully complied with the obligation to inform the Committee on developments in these cases and to provide details of investigations being carried out by the Office of the Attorney-General, demonstrating their permanent commitment to providing all the required information;*



(2) with regard to the events concerning the murder of three officials of the Bolivarian Union of Workers in the Construction Industry in El Tigre (Mr Wilfredo Rafael Hernández Avile, Mr Jesús Argenis Guevara, and Mr Jesús Alberto Hernández), according to the Office of the Attorney-General, on 5 October 2010, the Third Court of First Instance, acting as overseeing court for the Criminal Judicial Circuit of the state of Anzoátegui, in El Tigre, ruled that the case be closed in accordance with section 318(3), and pursuant to section 48(1), of the Code of Criminal Procedure. There is no ongoing investigation or file open on these events since, as explained in the previous reply, the case was closed when judicial proceedings were dropped following the death of the accused.

**1075.** *The Committee wishes to recall its previous conclusions relating to these allegations [see 360th Report, paras 1181–1185]:*

*With regard to the allegations concerning the murder of three officials of the Bolivarian Union of Workers in the Construction Industry in El Tigre (Mr Wilfredo Rafael Hernández Avile, General Secretary, Mr Jesús Argenis Guevara, Organizational Secretary, and Mr Jesús Alberto Hernández, Culture and Sports Secretary) and of two trade union delegates in the Los Anaucos area in June 2009 (Mr Felipe Alejandro Matar Iriarte and Mr Reinaldo José Hernández Berroteran), the Committee wishes to recall that it had requested the Government to intensify the judicial proceedings and investigations of the Office of the Attorney General in order to identify and severely punish the perpetrators, instigators and accomplices. The Committee had also requested the Government to keep it informed on the developments of the proceedings and expects that they will yield results in the near future.*

*The Committee notes the Government's observation that the complaint was presented in June 2009 and was subsequently transmitted to the Government, which sent its reply in October of the same year, i.e. only months after the complaint was presented, and that in this initial reply the Government informed the Committee of the investigations being conducted by the Office of the Attorney General, together with the names of the investigating bodies concerned, and of the steps taken by the Scientific, Penal and Criminal Investigating Body. The Committee further notes the Government's indication that in March and May 2010, it sent additional replies on the case, thus fulfilling its obligation to keep the Committee abreast of developments, and that in these replies the Government informed the Committee of the names of the persons allegedly responsible for the incidents, of the charges brought by the investigating bodies, of the crimes involved, of the state of the proceedings and of the hearings that had been held.*

*The Committee notes that, in particular, the Government states that: (1) with respect to the murder of Mr Wilfredo Rafael Hernández, Mr Jesús Argenis Guevara and Mr Jesús Alberto Hernández on 24 June 2009, in the state of Anzoátegui, the Office of the Attorney General requested on 25 November 2009 that the case be closed in accordance with section 318(3) of the Code of Criminal Procedure and pursuant to section 48(1) of this Code, since the criminal proceedings against the accused, Mr Pedro Guillermo Rondón, had been discontinued following his death while committing a common crime; and (2) with respect to the death of Mr David Alexander Zambrano and Mr Freddy Antonio Miranda Avendaño in the Los Anaucos area of the state of Miranda, the Office of the Attorney General on 17 December 2009 submitted an indictment against Mr Richard David Castillo and Mr Jorge Mizaél López, for committing aggravated homicide and illegally bearing a firearm who were currently awaiting trial, a hearing having been set for 13 April 2011.*

*The Committee also notes the Government's comment that it is at a loss to explain the Committee's contention that it should "act diligently and swiftly to resolve these cases fully", "intensify the judicial proceedings and investigations of the Office of the Attorney General" and "punish the perpetrators, instigators and accomplices", inasmuch as Government and the competent institutions had proceeded with all the diligence and celerity that the cases warranted, with the sole purpose of clarifying the incidents and that the relevant investigations had been conducted and judicial proceedings instituted against the suspects who, should they be found guilty, would be punished in accordance with the law and as determined by the relevant authority. The Committee draws the Government's attention to the fact that its recommendations are intended to ensure the conviction in a court of law of those responsible for the murder of trade unionists and that the Government informed it only*

recently of the hearing that had been scheduled for 13 April 2011 in the case of the murder of two such trade unionists.

The Committee firmly trusts that judicial sentences will be handed down on the perpetrators, instigators and accomplices in the near future. The Committee requests the Government to keep it informed in this regard.

**1076.** *In this regard, the Committee stresses that concerning the murders of officials Mr Wilfredo Rafael Hernández Avile, Mr Jesús Argenis Guevara, and Mr Jesús Alberto Hernández, in its earlier conclusions and recommendations (to the extent that the Government stated that the accused had died while committing a common crime) it requested the Government to intensify the judicial proceedings and investigations of the Office of the Attorney-General in order to punish the instigators and accomplices (which would obviously entail an investigation that the Committee would like the authorities to carry out). The Committee urges the Government to expedite investigations in order to identify and punish the instigators or accomplices of the murders of these officials whose perpetrator according to investigations died while committing a common crime.*

**1077.** *With regard to the two trade union delegates, Mr Felipe Alejandro Matar Iriarte and Mr Reinaldo José Hernández Berroteran, the Committee had noted in its previous examination of the case that an indictment had been submitted against Mr Richard David Castillo and Mr Jorge Mizael López, for committing aggravated homicide and illegally bearing a firearm and who were currently awaiting trial, a hearing having been set for 13 April 2011. The Committee regrets that in its response the Government did not provide information on the development of the judicial proceedings and investigations concerning the aggravated homicide of the two abovementioned trade union delegates, whether the two accused have been arrested, and once again firmly expects that the judicial authorities will hand down sentences on the perpetrators, should they be found guilty, and where possible on the instigators and accomplices. The Committee requests the Government to keep it informed of developments.*

**1078.** *With regard to recommendation (c) of the previous examination of the case, the Committee wishes to recall the content of this recommendation:*

*As regards the allegations concerning the Office of the Attorney General's preparation of criminal charges against and detention of six workers at PDVSA because, during a protest in defence of their labour rights, they paralysed the enterprise's activities, the Committee requests the Government or competent authorities to take the necessary measures to have the criminal proceedings brought against the six union officials at PDVSA dropped and to ensure their release without delay. The Committee also requests the Government to take the necessary steps to amend section 139 of the Act for the Defence of Persons in Accessing Goods and Services so that it does not apply to services which are not essential in the strict sense of the term and so that in no event may criminal sanctions be imposed in cases of peaceful strikes. The Committee requests the Government to keep it informed in this regard. The Committee draws the attention of the Committee of Experts to the legal aspects of this case.*

**1079.** *The Committee notes the Government's statement that: (1) it cannot address the Committee's request to drop "without effect" measures and judicial proceedings which are in strict compliance with the relevant domestic legislation as well as due process and other principles; (2) the Committee has no jurisdiction to request the dropping of legal measures and judicial proceedings against offences laid down and sanctioned in the law and for which the corresponding legal procedures are established; (3) by these recommendations the Committee is asking the Government to disregard domestic legislation and procedures laid down to sanction established offences, which would give rise to a situation of impunity; and (4) the Government and the corresponding state bodies of the Bolivarian Republic of Venezuela respect and comply with the principles embodied*

*in the constitution and domestic legislation, and, given their full force in the Bolivarian Republic of Venezuela, the principle of the separation and independence of the different state branches; therefore, the Government will not address recommendations that are unfounded, that the Committee has no competence to make, and that are at odds with the constitutional principles and laws of the Bolivarian Republic of Venezuela. The Committee formulates its conclusions on these issues below but wishes to underline here that under its mandate it has the competence to consider whether domestic legislation and practice is in conformity with Conventions Nos 87 and 98 and freedom of association principles and that it is the practice on the basis of these principles to request governments to take measures to amend legislation or drop criminal proceedings.*

- 1080.** *With regard to the Committee's recommendation to amend section 139 of the Act for the Defence of Persons in Accessing Goods and Services, the Government states that: (1) this law was fully debated, discussed and adopted by the Venezuelan National Assembly, i.e. the legislative branch of the State, and was adopted to defend, protect, and safeguard the rights and interests of individuals in accessing goods and services in order to meet their needs; (2) section 139 concerns the penalties for any individual who impedes the production, manufacture, import, warehousing, transport, distribution or sale of commodities classified as being of prime necessity for the population; (3) any activity in relation to the production, distribution, and sale of gas constitutes in the Bolivarian Republic of Venezuela an essential service of prime necessity for the population; millions of households use LPG and 761,221 households use other energy sources; at present 87 per cent of the population need LPG for cooking and other uses, whence its classification as an essential public service and of social and public interest; besides cooking, LPG is used in the Bolivarian Republic of Venezuela in both heating and cooling systems; LPG is also used in health centres, clinics, hospitals, etc. for cooking, in heating and cooling systems, and in steam boilers to sterilize surgical instruments; LPG is distributed and used by commerce and industry, for example in bakeries, restaurants, refineries, petrochemical companies, etc.; finally, by law LPG constitutes an essential public service of public necessity since disruption or stoppage of activities relating to its production, distribution or sale would affect the vast majority of Venezuelan households as well as schools, assistance centres, commerce and industry; for these reasons the Bolivarian Republic of Venezuela does not and shall not permit actions or omissions that affect the production or distribution of gas since they would jeopardize and infringe the population's right to food, health and life; and (4) the Government recalls Article 8(1) of Convention No. 87, which states that: "In exercising the rights provided for in this Convention workers and employers and their respective organizations, like other persons or organized collectivities, shall respect the law of the land."*
- 1081.** *Furthermore, on this last statement by the Government, the Committee wishes to draw the Government's attention to Article 8(2) of Convention No. 87 which states: "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."*
- 1082.** *The Committee wishes to highlight that PDVSA is the largest enterprise in the country and that its activities in the petroleum sector do not only include LPG but also the extremely important activities of prospecting, refining and exporting petroleum and its derivatives, that is production and commercial activities which, if temporarily halted, would not endanger the life, security or health of the population. Noting that the law to which the Government refers imposes a complete prohibition of strikes in the petroleum sector, the Committee recalls that it has considered on previous occasions that the petroleum sector as well as the production, transport and distribution of fuel do not constitute essential services in the strict sense of the term [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 587]. However, the Committee has also noted that minimum service requirements could be introduced for*

“public services of fundamental importance” [see *Digest*, op. cit., para. 606] such as in the case of the petroleum sector in the Bolivarian Republic of Venezuela. The Committee notes in this regard that the petroleum sector can introduce minimum service requirements in order that the concerns raised by the Government regarding the supply of LPG to schools and hospitals may be overcome.

**1083.** *Therefore, the Committee maintains the recommendation formulated in its previous examination of the case concerning the need to amend the legislation and once again draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case. Furthermore, with regard to the arrest and initiation of criminal proceedings against six striking workers of the state enterprise PDVSA, the Committee recalls that the authorities should not resort to arrests and imprisonment in connection with the organization of or participation in a peaceful strike; such measures entail serious risks of abuse and are a grave threat to freedom of association [Digest, op. cit., para. 671], and 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 [Digest, op. cit., para. 672]. The Committee therefore maintains its previous recommendation and urges the Government and the competent authorities to take measures to have the criminal proceedings brought against the six workers at PDVSA by the Office of the Attorney-General dropped and to ensure their release.*

**1084.** *With regard to recommendation (d) of the previous examination of the case, the Committee notes that the complainant organization has not communicated the additional information requested for a fourth consecutive time and, therefore, the Committee is not in a position at this time to examine these allegations, despite their seriousness. The Committee firmly expects that the alleged acts will be the subject of an independent investigation.*

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

**1085.** *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 the murder of three officials of the Bolivarian Union of Workers in the Construction Industry in El Tigre (Mr Wilfredo Rafael Hernández Avile, General Secretary, Mr Jesús Argenis Guevara, Organizational Secretary, and Mr Jesús Alberto Hernández, Culture and Sports Secretary) the Committee urges the Government to expedite investigations in order to identify and punish the instigators or accomplices of the murders of these officials whose perpetrator according to investigations died while committing a common crime.*
- (b) *With regard to the murder of the two trade union delegates, Mr Felipe Alejandro Matar Iriarte and Mr Reinaldo José Hernández Berroteran, the Committee regrets that in its response the Government did not provide information on developments in the judicial proceedings and investigations concerning the aggravated homicide of the two abovementioned trade union delegates and whether the two accused have been arrested, and once again firmly expects that the judicial authorities will hand down sentences on the perpetrators, should they be found guilty, and where possible on the instigators and accomplices. The Committee requests the Government to keep it informed of developments.*

- (c) *As regards the allegations concerning the Office of the Attorney-General's preparation of criminal charges against and detention of six workers at PDVSA because, during a protest in defence of their labour rights, they paralysed the enterprise's activities, the Committee urges the Government and the competent authorities to take the necessary measures to have the criminal proceedings brought against the six union officials at PDVSA dropped and to ensure their release without delay. The Committee urges the Government to take the necessary steps to amend section 139 of the Act for the Defence of Persons in Accessing Goods and Services so that it does not apply to services which are not essential in the strict sense of the term and so that in no event may criminal sanctions be imposed in cases of peaceful strikes. The Committee requests the Government to keep it informed in this regard.*
- (d) *The Committee draws the attention of the Committee of Experts to the legal aspects of this case.*
- (e) *The Committee draws the special attention of the Governing Body to the extreme seriousness and urgent nature of the matters dealt with in this case.*

CASE NO. 2827

INTERIM REPORT

**Complaint against the Government of the  
Bolivarian Republic of Venezuela  
presented by  
the National Union of Workers of the National  
Institute for Socialist Training and Education  
(SINTRAINCES)**

*Allegations: The complainant organization alleges a failure to abide by collective agreements, anti-union reprisals and impediments to collective bargaining and strike action*

- 1086.** The complaint is contained in a communication from the National Union of Workers of the National Institute for Socialist Training and Education (SINTRAINCES) dated 7 December 2010.
- 1087.** The Government sent its observations in a communication dated 17 October 2011.
- 1088.** 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. The complainant's allegations**

**1089.** In its communication dated 7 December 2010, SINTRAINCES states that its complaint relates to the National Institute for Socialist Training and Education (INCES), an autonomous institute chaired by the Minister of People's Power for Communes who is, in turn, part of the national Government, and that it is the most representative trade union in INCES since it has the largest membership, namely, 4,110 worker members, including civil servants, workers and retirees. The Institute employs over 10,000 workers.

**1090.** The complainant trade union alleges that, despite the activities and organization of SINTRAINCES in defence of workers' rights, the employer party, acting through its representatives, ignores or selectively recognizes the benefits set forth in the 2007–09 collective agreement of which clause 46 requires INCES to pay "travel allowances to its workers when they are required, in the course of their professional or trade union activities, to travel away from their workplaces"; in practice, INCES does not fully recognize this right when it rejects applications by SINTRAINCES to organize its assemblies and board meetings, or only partially complies on an exceptional basis. INCES also promotes and funds a parallel trade union called SINTRASEP–INCES, which was founded later than the complainant trade union in December 2006, and whose executive board is not elected but appointed by the employer party. INCES agreed to allocate resources to cover transfers and travel allowances for members of the parallel trade union. Furthermore, this trade union is, with the permission of the employer party, organizing campaigns to disqualify SINTRAINCES and its members and officials. The campaigns were stepped up in October and November 2010 when libellous and slanderous messages were disseminated in all INCES branches nationwide.

**1091.** In this context, INCES is denying SINTRAINCES the spaces that have historically been used by workers and trade unions to organize meetings, workshops, assemblies and the like. Instead, it has worked with SINTRASEP–INCES to provide covered facilities with seating for registering new members. INCES representatives have taken various measures to interfere with trade union activities, such as the following:

- INCES managers have threatened and punished workers who attended SINTRAINCES meetings, and have therefore impeded the workers' right of assembly and their right to participate. Similarly, it has restricted and prevented travel by regional officials of the trade union, in violation of the clauses in the existing collective agreement that specify the employer party's financial contribution (travel allowance) to the cost of travel and assistance for regional officials attending national meetings;
- INCES has banned the use of the meeting facilities (auditoriums, meeting rooms) that always used to be made available to the trade union for the purpose of holding meetings with workers, and even locked members out or forcibly expelled them from workplaces. On 23 June 2010 in Guárico State, for example, a group led by the regional manager of INCES and various bosses travelling with him forced the national executive board of SINTRAINCES to move out of the INCES Guárico Socialist Training Centre that they had been visiting on that day for the purpose of hearing complaints from workers in the region. After an angry exchange, the trade union officials agreed to leave the Centre in order to avoid a violent turn of events. The trade union also submitted a written application on 28 May 2010 (i.e. far enough in advance) for the use of the auditorium facilities at INCES headquarters in Caracas for the purpose of holding an assembly of workers on 9 June 2010, and the application was granted. However, when the day of the assembly came, the workers were prevented from entering the auditorium and in response they held a peaceful demonstration that attracted media coverage. SINTRAINCES subsequently

announced that a new assembly would be held on 18 June 2010 away from INCES premises (in Generalísimo Francisco de Miranda park in Caracas) because of the refusal to allow the use of the Institute's facilities. As confirmed by communications from the human resources management department, the workers were told to refrain from attending or face sanctions. The workers were again invited to assemblies in each of the regional INCES branches on 10 October at 10 a.m., and the workers were again informed in writing that they were not permitted to attend.

**1092.** INCES has taken a number of measures of reprisal, including the following, against trade union members:

- It initiated dismissal proceedings against SINTRAINCES officials (Mr David Duarte of Trujillo State, and Mr Job Alexander Meza of Táchira State) after they complained to the media and organized peaceful demonstrations in defence of labour rights; the proceedings are now at the decision stage in the Ministry of Labour;
- it dismissed workers, including some who were entitled to immunity from dismissal (Ms Yesenia Cordero and Ms Desirée Mendoza), on the grounds that they had attended SINTRAINCES meetings and supported the trade union (they were subsequently reinstated after their appeals were upheld);
- SINTRAINCES officials from Táchira State (Mr Job Alexander Meza and Mr Wolfgang Crespo) were taking part in a peaceful demonstration in defence of labour rights when they were physically assaulted on 23 May 2010 by a group of persons goaded on by the employer party. A complaint was lodged the same day with the Third Prosecutor's Office of the Public Prosecution Service in Táchira State (there has yet to be any practical follow-up on the complaint).

**1093.** Not only has the executive committee of INCES treated its workers, and SINTRAINCES in particular, in a discriminatory, unfair and threatening manner, it has also neglected its obligation as the employer party to deduct union dues and remit them to the trade union, as required by clause 72 of the existing collective agreement, in compliance with section 446 of the Labour Act, which is also in force.

**1094.** In spite of numerous communications transmitted by SINTRAINCES to the human resources directorate for it to update membership information, the directorate has failed to do so, invoking trivial excuses in the hope of stifling the trade union. On 11 February 2010, an original document containing membership information on 4,110 workers, and indicating the first name and family name, identity card number, personal index code, job title, age, region and recruitment date of each of them, was transmitted to the directorate, which has refused to honour the commitments made in the collective agreement and with which it is legally bound to comply, in this case by deducting the dues of the workers in question. In addition to the update of membership information, SINTRAINCES also took the opportunity to request a change in the trade union dues since they had never been brought into line with the sum specified in the trade union's statutes, but no such change has been forthcoming.

**1095.** According to the complainant, the employer party has ordered regional managers to coerce workers into leaving SINTRAINCES and joining the parallel trade union by threatening them with sanctions and political blackmail or non-renewal of their contracts (in the case of workers with contracts). Many workers have been frightened and blackmailed into joining the parallel organization.

- 1096.** INCES also intends to ignore SINTRAINCES as a legitimate representative of INCES workers in order to avoid discussing the collective labour agreement with representatives of that union. Instead, with a view to preventing discussion, the parallel trade union submitted a draft collective agreement after SINTRAINCES had submitted its own draft.
- 1097.** According to the complainant, SINTRAINCES submitted the draft collective labour agreement for 2009–11 to the Ministry of People’s Power for Labour and Social Security (MINPPTRASS) on 17 November 2009 but it has so far proved impossible to initiate bargaining because of a clear failure by the Institute to comply with its obligation to negotiate, even though the trade union has faithfully adhered to the public sector collective bargaining procedure.
- 1098.** As a result of the situations described above, that is, the labour breaches and violations, SINTRAINCES decided on 13 September 2010 to initiate the established legal procedure for organizing a workers’ strike by submitting to MINPPTRASS a document known as a “list of grievances”. However, both INCES and the Ministry of Labour have hindered the process by ignoring the principles set forth in the Constitution, the deadlines specified in labour legislation and international conventions.
- 1099.** Furthermore, the complainant alleges that there has been an at least partial failure to comply with 24 clauses of the collective labour agreement for 2007–09, which remains in force. The clauses in question are as follows: 3 (mutual respect); 8 (replacements); 12 (performance evaluation); 16 (industrial safety and health); 17 (toiletries); 18 (supply of milk); 19 (housing plan); 22 (individual development and training plan); 28 (vacation plan); 29 (recreational tourism and sports events); 30 (end-of-year party); 31 (recognition of merit); 32 (canteen services); 35 (sporting events); 37 (preparing workers for retirement); 38 (annual recreation and leisure plan for retirees and pensioners); 41 (comprehensive medical services at headquarters and in regional INCES branches); 45 (work involving the use of motor vehicles); 46 (travel allowances for trade union officials); 47 (overtime and additional payments); 60 (tax revenue staff productivity bonus); 63 (May Day celebration); 66 (work meetings); and 72 (trade union dues).

## **B. The Government’s reply**

- 1100.** In its communication dated 17 October 2011, the Government states, with regard to the complainant’s allegation concerning the promotion and funding of a parallel trade union, that the provisions of article 95 of the Constitution of the Bolivarian Republic of Venezuela stipulate that “Workers, without distinction of any kind and without need for authorization in advance, have the right freely to establish such union organizations as they may deem appropriate for the optimum protection of their rights and interests, as well as the right to join or not to join the same, in accordance with law. These organizations are not subject to administrative dissolution, suspension or intervention. Workers are protected against any act of discrimination or interference contrary to the exercise of this right ....” Therefore, the complaint lodged against the Government by SINTRAINCES is inherently baseless and inconsistent given that the establishment of the collective entity known as the National Union of Public Sector Workers of the National Institute for Educational Cooperation (SINTRASEP–INCE–NACIONAL), like that of any trade union organization, is merely the result of the workers’ desire to set up a new trade union organization for the optimum protection of their labour rights and interests.
- 1101.** The Government adds that it considers the arguments deployed by SINTRAINCES to be false and baseless, and emphatically states that the employer party, namely, INCES, has respected the rights of the trade union organizations SINTRAINCES and SINTRASEP–INCE–NACIONAL in a completely impartial manner. Similarly, the Government denies the allegation that INCES does not pay travel allowances to SINTRAINCES officials for



them to take part in trade union activities, and likewise denounces the politically motivated attempts by the complainants to blame it for the hostile actions taken by the abovementioned trade unions against one another or against any other trade union organization in the heat of the trade union struggle.

- 1102.** By the same token, the Government denies that INCES, acting through its directors, threatens and sanctions workers who attend assemblies organized by SINTRAINCES. It also denies that travel by regional trade union officials is restricted or banned, and argues that the claim that they are deprived of any financial assistance on the part of the employer party (travel allowances) is completely without foundation.
- 1103.** As for the claim that the employer entity does not allow the use of meeting rooms for trade union activities and prevents meetings from taking place, the Government states that, two years ago, SINTRAINCES was given full access by INCES to premises in the Arauca building between Avenue Roosevelt and Nueva Granada in the parish of Santa Rosalía, which is part of the Libertador municipality in Caracas, and it has been able to pursue its trade union activities there rather than in many of the rooms and halls located in the various INCES headquarters which were converted into shelters that now house many of the victims made homeless by the heavy rains that have hit the country in 2010. It also notes that it is deliberately misleading of SINTRAINCES to quote a communication from the general manager of human resources, dated 18 June 2010, addressed to general and regional managers and intended to specify that staff were not permitted to leave their workplaces. The trade union was invited to apply, as usual, for the corresponding authorization at least 24 hours in advance. Indeed, this is the usual practice for the employer party. The request was denied at the time not only because it came at such short notice but also because it was well known that the abovementioned premises had been available for meetings since 2009.
- 1104.** The Government also denies the baseless claims of SINTRAINCES to the effect that INCES has taken measures of reprisal against some of its members on the grounds that it was an organization fighting for and defending human labour rights. Any dismissal proceedings affecting a worker must comply with the legislation in force and under no circumstances can they be the result of a reprisal against trade union activities. The corresponding administrative procedures comply in practice with the relevant national legislation.
- 1105.** The Government emphatically rejects the allegation that the employer party interfered with the operations of the trade union organization because at no time has INCES failed to meet its obligation to deduct ordinary and extraordinary dues, as specified in the union's statutes, from the salaries of workers who are members of SINTRAINCES. On the contrary, INCES is aware of the rights of trade union organizations and has always deducted the trade union dues in question and remitted the corresponding sums not only to SINTRAINCES but also to all the other trade union organizations active within the Institute.
- 1106.** It should also be noted that the delay in deducting the trade union dues owed to SINTRAINCES, which have now been paid in full, cannot now be and never could have been blamed on the employer party, because the executive committee of that union belatedly provided INCES with incomplete documentation for that purpose, especially in the case of new members and when changes were made to the level of union dues, thereby violating the provisions of clause 72 of the existing collective labour agreement. The Government states that it denies the inaccurate and utterly baseless allegations that INCES, acting through its managers, coerced workers into leaving SINTRAINCES.

- 1107.** The Government rejects the false accusation that INCES impeded the right to strike. Indeed, it appears that the executive committee of that union is unaware that labour legislation stipulates that before the right to strike can be exercised, all opportunities for conciliation provided by the law and agreed upon in existing collective labour agreements must first be exhausted. The allegation by SINTRAINCES that its right to strike is being impeded is thus baseless and inconsistent, since that trade union organization has submitted a list of grievances to MINPPTRASS, which accepted and is currently processing the list in compliance with the Labour Act and the corresponding regulations. At its first meeting before the Conciliation Board, the representative of the employer party raised objections and made allegations that were ruled inadmissible in reasoned Order No. 2010-070 by the competent authority, in accordance with the existing legal procedure in this area. Bargaining was ordered to resume and conciliatory bargaining is ongoing before the Directorate of Mediation, Conciliation and Arbitration of MINPPTRASS.
- 1108.** Regarding the alleged refusal to negotiate a collective agreement, the Government states that the claim by the trade union organization that the employer party has refused to engage in collective bargaining is completely false. Contrary to the allegations made by SINTRAINCES, three draft collective labour agreements were submitted to MINPPTRASS by various trade union organizations active in INCES, namely, SINTRAINCES, SINTRASEP–INCE–NACIONAL, and the National Union of the Socialist Workers’ Council of the National Institute for Socialist Training and Education (SINCONTRAS–INCES), with a view to their being debated with INCES.
- 1109.** In the light of the above, the Government states that the draft collective labour agreement submitted by SINTRASEP–INCE–NACIONAL was rejected on the grounds that its supporters did not meet the admissibility requirements. However, the draft collective labour agreements submitted by the other trade union organizations that are active in INCES (SINTRAINCES and SINCONTRAS–INCES) were accepted by the Directorate for the National Inspectorate and Other Collective Labour Issues in the Public Sector, which demanded that INCES should commission the corresponding comparative economic studies for submission to the Ministry of People’s Power for Planning and Finance (MPPPF) since the collective bargaining in question was taking place in the public sector. That administrative body would then produce the mandatory report required for bargaining to commence in accordance with the provisions of article 157 of the Labour Act regulations, without prejudice to the start of bargaining with the most representative trade union organization. That being so, it should also be noted that the existence of two draft collective labour agreements submitted by two different trade union organizations for discussion with a single employer (INCES) means that the competent labour inspector is authorized, under article 115 of the Labour Act regulations, to organize a referendum in order to determine which of the applicant collective entities represents the majority of workers concerned, and thus which one has the legitimacy to discuss the INCES collective labour agreement.
- 1110.** As for the allegation that there has been a failure to comply with clauses of the 2007–09 collective agreement, the Government states that it has repeatedly and consistently complied with the clauses of the collective labour agreement currently in force at INCES, and points out that, in compliance with the law, a conciliatory list of grievances submitted by SINTRAINCES to MINPPTRASS is now being processed, responses have been given to most of the points raised by the applicants regarding the failure to comply with clauses of the collective labour agreement currently in force, and there are now only two aspects that remain to be resolved, namely, the annual recreation and leisure plan for retirees and pensioners, since the retirees and pensioners have not decided which recreation activities are to take place, and the tax revenue staff productivity bonus, since payment of the bonus is dependent on surplus tax revenue.

## C. The Committee's conclusions

- 1111.** *The Committee observes that, in its complaint, the complainant trade union (SINTRAINCES) alleges: (1) a failure to comply with 24 clauses of the 2007–09 collective labour agreement by INCES, with particular reference to impediments to the deduction of trade union dues, and the clause of the collective agreement that relates to the payment of travel allowances to trade union representatives when they are required, in the performance of their duties, to travel away from their workplaces; (2) the promotion and operation of a parallel trade union that conducts campaigns of defamation against the complainant, and the instruction given by INCES to its regional managers requiring them to coerce workers into leaving the complainant trade union and joining the parallel trade union promoted by the employer; (3) the initiation of disciplinary proceedings against two officials of the complainant trade union, and the dismissal of two (subsequently reinstated) workers on the grounds that they had supported the complainant trade union; (4) physical assaults on two officials of the complainant trade union in Táchira State; and (5) delays and impediments to the exercise of the right to collective bargaining and the right to strike.*
- 1112.** *Regarding the alleged total or partial failure to comply with 24 clauses of the 2007–09 collective labour agreement, which remains in force, the Committee notes that the Government states that it has repeatedly and consistently complied with the clauses of the collective labour agreement currently in force at INCES, and points out that, in compliance with the law, a conciliatory list of grievances submitted by SINTRAINCES to MINPPTRASS is now being processed, responses have been given to most of the points raised by the applicants regarding the failure to comply with clauses of the collective labour agreement currently in force, and there are now only two aspects that remain to be resolved, namely, the annual recreation and leisure plan for retirees and pensioners, since the retirees and pensioners have not decided which recreation activities are to take place, and the tax revenue staff productivity bonus, since payment of the bonus is dependent on the surplus tax revenue. Given that the official complaint concerning the failure to comply with clauses of the collective agreement was made by the complainant trade union in September 2010, the Committee emphasizes the importance of prompt examination by the authorities of complaints concerning a failure to comply with collective agreements. The Committee notes that the Government points out that only two of the aspects previously mentioned in connection with the failure to comply with the collective agreement remain to be resolved, and firmly expects that full compliance with the collective agreement will be ensured in the case of those two aspects.*
- 1113.** *Regarding the alleged impediments to the deduction of the dues of members of the complainant trade union, in violation of clause 72 of the collective agreement and article 446 of the Labour Act, the Committee observes that the complainant trade union denounces not only the refusal by the authorities to update the membership information transmitted by the complainant trade union in spite of having received all the necessary data, but also the refusal by INCES to bring the dues into line with the sum specified in the trade union's statutes. The Committee notes that the Government states that: (1) at no time has INCES failed to meet its obligation to deduct ordinary and extraordinary dues, as specified in the union's statutes, from the salaries of workers who are members of SINTRAINCES since, on the contrary, it is aware of the rights of trade union organizations and has always deducted the trade union dues in question and remitted the corresponding sums not only to SINTRAINCES but also to all the other trade union organizations active within the Institute; and (2) the delay in deducting the trade union dues owed to SINTRAINCES, which have now been paid in full, cannot now be and never could have been blamed on the employer party, because the executive committee of that union violated the provisions of clause 72 of the existing collective labour agreement by belatedly providing INCES with incomplete documentation for that purpose, especially in the case of new members and when changes were made to the level of union dues. The Committee*

*notes that although the complainant trade union and the Government have differing opinions regarding the blame for the delays in deductions, the Government's statements indicate that the former problems with the deduction of trade union dues and the levels of those dues have now been overcome. Consequently, the Committee will not pursue the examination of these issues unless the complainant trade union provides new evidence.*

- 1114.** *Regarding the alleged failure to comply with the collective agreement in connection with the payment of travel allowances to enable trade union officials to perform their duties away from their workplaces, the Committee notes that the complainant organization states that INCES has refused to pay travel allowances for the organization of assemblies and board meetings and paid them only partially and on an exceptional basis, and refers to the failure to pay travel allowances to cover the cost of travel and assistance for regional officials attending national meetings. The Committee does, however, note that the Government denies these allegations, states that they are completely without foundation, and rejects the claim that any restrictions have been placed on travel by regional officials. The Committee observes that the attachments transmitted by the complainant trade union do not mention any specific cases but do allude to an INCE memorandum in which it is stated that the trade union organization failed to make arrangements in advance for (trade union) leave with the highest authorities. In these conditions, the Committee concludes that it is not aware of specific examples that might enable it to note violations of the clauses of the collective agreement in the area of trade union leave.*
- 1115.** *Regarding the alleged promotion and funding of a parallel trade union (SINTRASEP–INCE–NACIONAL) whose executive board is allegedly not elected but appointed by INCE, and which is allegedly treated more favourably by INCE, to the detriment of the complainant trade union (when, for example, rooms for trade union assemblies and meetings are made available not to the complainant trade union but to the parallel one), the Committee takes note of the Government's statements to the effect that the alleged parallel trade union (SINTRASEP–INCE–NACIONAL) was established by workers of their own volition within the context of the right of freedom of association enshrined in the Constitution. Similarly, the Committee notes that the Government: (1) denies all interference or partiality by INCES, that the complainant trade union is denied access to rooms in which to carry out trade union activities, that its meetings are prevented, or that workers who attend assemblies of the complainant trade union are threatened or sanctioned; and (2) states that two years ago INCES gave SINTRAINCES full access to premises in the Arauca building between Avenue Roosevelt and Nueva Granada in the parish of Santa Rosalía, which is part of the Libertador municipality in Caracas, and that it has been able to pursue its trade union activities there, bearing in mind that many of the rooms and halls located in the various INCES headquarters were converted into shelters that now house many of the victims made homeless by the heavy rains that have hit the Bolivarian Republic of Venezuela in 2010. The Committee stresses that SINTRAINCES should be treated on an equal footing with the other unions of INCE in terms of use of rooms for trade union activities.*
- 1116.** *Regarding the alleged prevention of board meetings and trade union assemblies, the Committee takes note that the Government highlights the need for the trade union to submit its application for the organization of meetings at least 24 hours in advance, and further states that the trade union has had access to a meeting room since 2009. However, the Committee observes that the Government has not responded to the specific allegations according to which: (1) the executive board of the parallel trade union was not elected but appointed by INCE; (2) on 23 June 2010, in Guárico State, a group led by the regional manager of INCES and various bosses travelling with him forced the national executive board of SINTRAINCES to move out of the INCES Guárico Socialist Training Centre that they had been visiting on that day for the purpose of hearing complaints from workers in the region; after an angry exchange of words, the trade union officials agreed to leave the*

Centre in order to avoid a violent situation; and (3) the complainant trade union submitted a written application on 28 May 2010 (i.e. far enough in advance) for the use of the auditorium facilities at INCES headquarters in Caracas for the purpose of holding an assembly of workers on 9 June 2010, and the application was granted. However, when the day of the assembly came, the workers were prevented from entering the auditorium and in response they held a peaceful demonstration that attracted media coverage; SINTRAINCES subsequently announced that a fresh assembly would be held on 18 June 2010 away from INCES premises (in Generalísimo Francisco de Miranda park in Caracas) because of the refusal to allow the use of the Institute's facilities, and the fact that the workers were told to refrain from attending or face sanctions; the workers were again invited to assemblies in each of the regional INCES branches on 10 October at 10 a.m., and the workers were again informed in writing that they were not permitted to attend. The Committee recalls that Article 3 of Convention No. 87 enshrines the principle of non-interference by the authorities with the activities of trade union organizations and requests the Government to respond to these allegations.

- 1117.** *Regarding the alleged anti-union reprisals against officials and members of the complainant trade union (dismissal of Ms Yesenia Cordero and Ms Desirée Mendoza on the grounds that they had attended union meetings and supported the trade union, although they were subsequently reinstated after their appeals were upheld, and dismissal proceedings initiated against trade union officials Mr David Duarte of Trujillo State and Mr Job Alexander Meza of Táchira State after they complained to the media or organized peaceful demonstrations in support of labour rights), the Committee notes that the Government denies the accusations made by the trade union organization known as SINTRAINCES and claiming that INCES took measures of reprisal against some of its members on the grounds that it was an organization fighting for and defending human labour rights, meaning that any dismissal proceedings affecting a worker must comply with the legislation in force and under no circumstances can they be the result of a reprisal against trade union activities; the corresponding administrative procedures comply in practice with relevant national legislation.*
- 1118.** *The Committee regrets that the Government has not supplied specific information on the events that might have led to the dismissals of two (subsequently reinstated) trade union members, or on disciplinary proceedings against two other officials or trade union members. The Committee recalls the principle whereby no worker or union official should be the target of sanctions or prejudiced as a result of their participation in legitimate trade union activities, and requests the Government to provide detailed observations on the dismissal procedure followed in the case of those two trade union officials, and the events that might have led to the initiation of that procedure.*
- 1119.** *Regarding the alleged refusal to negotiate a collective agreement, the Committee takes note of the fact that the Government states that the claim by the trade union organization that the employer party has refused to engage in collective bargaining is completely false; contrary to the allegations made by SINTRAINCES, three draft collective labour agreements were submitted to MINPPTRASS by various trade union organizations active in INCES, namely, SINTRAINCES, SINTRASEP–INCE–NACIONAL, and SINCONTRAS–INCES, with a view to their being debated with INCES. Similarly, the Committee notes that, according to the Government, the draft collective labour agreement submitted by SINTRASEP–INCE–NACIONAL (which is considered to be a parallel trade union by the complainant organization) was rejected on the grounds that its supporters did not meet the admissibility requirements, whereas the draft collective labour agreements submitted by the other trade union organizations that are active in INCES (SINTRAINCES and SINCONTRAS–INCES) were accepted by the Directorate for the National Inspectorate and Other Collective Labour Issues in the Public Sector, which demanded that INCES should commission the corresponding comparative economic studies for submission to*

*MPPPF since the collective bargaining in question was taking place in the public sector, so that that administrative body could then produce the mandatory report required for bargaining to commence in accordance with the provisions of article 157 of the Labour Act regulations, without prejudice to the start of bargaining with the most representative trade union organization. The Committee also notes that the Government points out that the existence of two draft collective labour agreements submitted by two different trade union organizations for discussion with a single employer (INCES) means that the competent labour inspector is authorized, under article 115 of the Labour Act regulations, to organize a referendum in order to determine which of the applicant collective entities represents the majority of workers concerned, and thus which one has the legitimacy to discuss the INCES collective labour agreement.*

- 1120.** *The Committee wishes to emphasize that, as is made clear by the complaint of the complainant organization and the documentation provided, the complainant trade union submitted a draft collective labour agreement for 2009–11 in November 2009, and notes that, as mentioned by the complainant trade union, negotiations have yet to begin. The Committee wishes to stress that neither the Government’s argument that economic studies need to be carried out by MPPPF nor the argument that a referendum needs to be organized in order to determine which of the trade union organizations represents the majority of workers can justify a delayed start to negotiations. The Committee further observes that the Government has not denied the claim by the complainant trade union that it is the most representative organization since it has 4,110 members out of the more than 10,000 workers in INCES. That being so, the Committee considers that there is no need in this case to organize a referendum in order to determine the most representative trade union organization.*
- 1121.** *Given these conditions, the Committee reminds the Government that Article 4 of Convention No. 98 stipulates that measures appropriate to national conditions should be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation, with a view to the regulation of conditions of employment by means of collective agreements, and that the excessive delay in the holding of negotiations over the draft collective agreement is a violation of Article 4 of the Convention, and is particularly serious when the employer is a public institution, which should ensure the observance of freedom of association and collective bargaining principles. The Committee deeply regrets the excessive delay in the collective bargaining and reminds the Government that the principle that both employers and trade unions should negotiate in good faith and make efforts to reach an agreement means that any unjustified delay in the holding of negotiations should be avoided [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 937], and urges it to take the necessary steps to ensure that INCES initiates collective bargaining without delay with the complainant trade union.*
- 1122.** *Regarding the alleged impediments to the exercise of the right to strike by INCES, the Committee notes that, according to the allegations, on 13 September 2010 the complainant trade union initiated the established legal procedure for organizing a strike by submitting a list of grievances to the Ministry in the light of the problems addressed in the present complaint, including the authorities’ attitude to collective bargaining. The procedure was allegedly impeded both by the Ministry and by INCES since the deadlines stipulated in the legislation were not met. The Committee notes that, in its reply, Government rejects this accusation on the grounds that it is false and that labour legislation stipulates that before the right to strike can be exercised, the conciliation procedures provided by the law and agreed upon in existing collective labour agreements must first be exhausted; the Government’s point of view is that the allegation by the SINTRAINCES trade union that its right to strike is being impeded is thus baseless and inconsistent, since that trade union organization has submitted a conciliatory list of demands to MIPPTRASS, which accepted*

and is currently processing the list in compliance with the Labour Act and the corresponding regulations; at its first meeting before the Conciliation Board, the representatives of the employer party raised objections and made allegations that were ruled inadmissible in reasoned Order No. 2010-070 by the competent authority, bargaining was ordered to resume and conciliatory bargaining is ongoing before the Directorate of Mediation, Conciliation and Arbitration of MIPTRASS. The Committee notes that the Government adds that most of the points relating to the failure to comply with the collective agreement in the complainant trade union's list of complaints have been resolved and only two aspects (already mentioned earlier in the conclusions) remain to be resolved.

- 1123.** *The Committee duly notes the Government's point of view according to which procedures for conciliation must first be exhausted before a strike can be declared but wishes to emphasize that, bearing in mind the fact that conciliation began in 2010 and is still ongoing, that the time frames for conciliation must be reasonable and must not prevent the exercise of the right to strike. The Committee states in this connection that although a strike may be temporarily restricted by law until all procedures available for negotiation, conciliation and arbitration have been exhausted, such a restriction should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage [see *Digest*, op. cit., para. 551]. Under these conditions, the Committee regrets that the complainant organization has not been able, after a reasonable period of conciliation, to exercise the right to strike enshrined in the legislation, and requests the Government to take the necessary steps to ensure that the competent authority respects the abovementioned principles in future.*

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

- 1124.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee underlines the importance of ensuring that complaints concerning a failure to comply with collective agreements are examined rapidly by the authorities and firmly expects that the collective agreement will be effectively complied with in the case of the last two remaining unresolved issues.*
  - (b) The Committee requests the Government to respond to the allegations concerning the expulsion of the national executive board of the complainant trade union from the INCES Guárico Socialist Training Centre, as well as impediments to a trade union assembly and to the right to hold trade union meetings in Caracas.*
  - (c) The Committee regrets that the Government has not supplied concrete information on the events that might have led to disciplinary proceedings against two officials or trade union members and requests the Government to provide detailed observations on the dismissal procedure followed in the case of those two officials, and the events that might have led to the initiation of that procedure. The Committee recalls the principle whereby no worker or union official should be the target of sanctions or prejudicial measures as a result of their participation in legitimate trade union activities.*

- (d) *The Committee urges the Government to take the necessary steps to ensure that INCES initiates collective bargaining without delay with the complainant trade union.*
- (e) *Regretting that the complainant organization has not been able, after a reasonable period of conciliation (starting in 2010), to exercise the right to strike, the Committee requests the Government to take the necessary steps to ensure that, in future, the competent authority respects the principles mentioned in the conclusions, according to which excessive time frames for conciliation make it impossible, in practice, to exercise the right to strike.*

CASE NO. 2862

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

**Complaint against the Government of Zimbabwe  
presented by  
the Zimbabwe Congress of Trade Unions (ZCTU)**

*Allegations: The complainant organization alleges that it was prevented from holding International Women's Day and International Labour Day processions and that even after the High Court allowed processions, the police in some cities refused to comply with the court order*

- 1125.** The complaint is contained in communications dated 6 May 2011 and 7 and 21 May 2012 from the Zimbabwe Congress of Trade Unions (ZCTU).
- 1126.** The Government provided its observations in communications dated 17 October 2011 and 13 February 2012.
- 1127.** Zimbabwe 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**

- 1128.** In its communication dated 6 May 2011, the ZCTU explains that it had joined the rest of the world in commemorating International Women's Day. Prior to this, on 18 February 2011, it notified the police office in Harare of its intention to hold a commemoration of International Women's Day scheduled for 12 March 2011. The commemoration was to begin by a workers' procession from Mufakose Shops to Rutendo Hall, which was the commemoration venue. However, on 8 March 2011, the police responded to the ZCTU notification by stating that "only the commemoration has been approved and no processions should be allowed to take place". As a result of the police ban on processions, the commemoration was held without the procession.



- 1129.** The ZCTU further alleges that on 28 February 2011, it notified the police officer commanding Bulawayo West District of its intention to commemorate International Women's Day. The commemorations were to begin by a procession. On 3 March 2011, the police officer chief superintendent responded by banning the procession. The issue of the gathering was referred to the officer commanding Bulawayo West District, but on 4 March 2011, he declined to permit the gathering on the ground that there was a spate of violence in the country and that the ZCTU had not complied with section 25(2) of the Public Order and Security Act (POSA). On 7 March 2011, the ZCTU, through the Zimbabwe Lawyers for Human Rights, made an application to the Magistrate Court in Bulawayo to have the police ban lifted and the gathering declared lawful. The court duly granted the order for the commemoration and procession to go ahead as planned. Despite the court order, on 8 March, about 30 police officers dressed in riot gear wielding baton sticks disrupted the event and arrested 19 trade union officers. Another group of about 20 police officers invaded the location and did not permit participants to gather, yet another group of 17 raided the ZCTU Bulawayo offices and ordered people not to gather. As a result of the police's defiance of the court order, the commemoration did not take place.
- 1130.** The ZCTU alleges that on 11 April 2011, its Mutare office notified the Mutare police of its intention to commemorate International Labour Day and requested a police escort during the procession. On 13 April, a police officer chief superintendent replied by banning the procession for security reasons. Furthermore, on 19 April 2011, the ZCTU notified the Harare police in the Southern District of its intention to commemorate the workers' day by organizing a procession. However, the officer commanding the Southern District replied by banning the procession. The ZCTU also received reports that processions were banned in Masvingo and Chegutu. In order to protect its fundamental rights to freedom of assembly, expression and association, the ZCTU made an application to the High Court seeking an order to declare the police decisions unlawful and enable the union processions to be held in all 38 districts where the ZCTU had organized May Day celebrations. The High Court granted the order on 29 April 2011. As a result of this order, processions were later held in most cities and towns, except Masvingo.
- 1131.** The ZCTU concludes by stating that it is clear from the POSA that trade unions are not bound to notify the police of the conduct of its activities and the police have no right to ban such activities. The courts have repeatedly confirmed this, but the Government has since developed a "hobby of ignoring the court orders". The ZCTU considers that such attitude by the Government is in violation of Article 3 of Convention No. 87.
- 1132.** By its communications dated 7 and 21 May 2012, the ZCTU informs the Committee of the difficulties it had faced in organizing public processions and gatherings to commemorate International Women's Day and International Labour Day in 2012. In particular, it alleges that the police in Bulawayo banned the procession scheduled by the ZCTU for 8 March 2012. With regard to May Day, the complainant alleges that while the Kwekwe district police, allowed the commemoration under strict conditions, it banned the procession. Only after the intervention by the Ministry of Labour and Social Services was the ban on the procession lifted, on 30 April at about 7 p.m., which made it difficult for the union to communicate the lifting of the ban to its members. The ZCTU also alleges that it had approached the High Court with an urgent application seeking an order to protect trade union rights. To the union's surprise, the High Court held that a ban on workers' fundamental right to freedom of association, expression and movement cannot be treated as an urgent matter. The ZCTU also describes in detail the incident which occurred in Harare on May Day where following a peaceful procession and gathering, a soccer match between two trade union football teams was organized as part of the May Day celebrations. The match was stopped by the police at 5.15 p.m., about 15 minutes before its end, because the ZCTU's notification to the police indicated that the event was to end at 5 p.m. The ZCTU alleges that the police conduct was a deliberate move aimed at provoking ZCTU

members and inciting them to retaliate and cause violence. Finally, the complainant alleges that its regional officer was summoned to Southerton police for a meeting where he was interrogated for two and half hours in respect of the May Day events and celebrations.

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

- 1133.** In its communication dated 17 October 2011, the Government submits that the issues pertaining to the allegations of the banning of trade union activities are part and parcel of the matters that are progressively being attended to in the context of the broader initiatives by the Government to improve its compliance with Convention No. 87, in line with the recommendations of the 2009 Commission of Inquiry. These initiatives are being implemented under the technical assistance package that was launched in August 2010. The Government states that it is unfortunate that the technical assistance suffered a delayed implementation due to unforeseen administrative challenges encountered by the Ministry of Labour in the last quarter of 2010. The Government has, however, renegotiated the technical assistance package with the Office in January 2011 and the activities commenced in July 2011.
- 1134.** The Government points out that one of the core activities in the technical assistance package concerns information sharing between ILO officials and the state actors who interface with organized labour directly and indirectly. The objective is to familiarize these officials with the principles enshrined in Convention No. 87 so as to allow workers to organize their activities in full freedom. Issues relating to the application of the POSA to trade union meetings, the thin dividing line between trade unionism and politics, and the extent of political agitation by labour form the core elements of discussion with the target group during the information sharing workshops.
- 1135.** The Government reports that two information sharing sessions have so far been undertaken and that it was engaged with the targeted participants with a view to undertaking the last information activity with the state actors in 2011. It is the Government's view that the situation of the interface between trade unionists and the state actors is expected to progressively improve once a significant critical mass of the targeted group is reached. The Government also intends, within the realm of the technical assistance package, to develop a customized handbook on the ILO core Conventions, national legislation and practice and the respective roles of the state actors in industrial relations and is currently working with the Office in this regard. In the Government's opinion, this will go a long way in addressing the concerns of the use of the POSA with regard to trade union activities since the handbook will be mainstreamed in the training programmes of the state actors.
- 1136.** The Government points out that the impact of these activities will be realized progressively, as the Government gradually implements the activities under the technical assistance package. There is therefore a need for continued support from the Office. The Government remains committed to work with both the Office and the ILO supervisory bodies in implementing the recommendations of the Commission of Inquiry and improving compliance with the ratified ILO instruments in general.
- 1137.** With regard to the facts of the case, in its communication dated 13 February 2012, the Government indicates that the police had indeed sanctioned the holding of the International Women's Day commemorations for Harare and Bulawayo, as well as May Day celebrations in the cities mentioned in the complaint. The police, however, did not permit the holding of processions. The Government explains that the period in question coincided with the beginning of the Arab Spring uprisings, hence, most States, including Zimbabwe, had to take precautionary measures for the protection of law and order. The Government points out that the ZCTU was cleared to hold celebrations and commemorations. It is the Government's view that the banning of processions was a temporary measure meant to

protect the peace and security of the country during the period in question and was not intended to violate the rights of trade unions.

**1138.** The Government stresses that through the workshops conducted under the ILO technical assistance package there has been dialogue and interface with the law enforcement bodies on the nexus between international labour standards and the national laws and practice. The Government will seek to concretize on the gains of the interaction and positive outcomes of the workshops through reaching out to more participants from the law enforcement bodies with a view to improving their interaction with trade unions. The Government anticipates that incidents such as those outlined in the complaint will gradually diminish as the knowledge on international labour standards cascades to more representatives of the law enforcement bodies. The Government hopes that the ILO will assist the Government in extending the knowledge gained in the workshops to more law enforcement officials for progressive improvement in their interactions with trade unions across the country. The Ministry of Labour and Social Services has also taken the initiative for continued interface with the law enforcement bodies in various provinces of the country with a view to establishing collaboration on the ground regarding the exercise of trade union rights. The Government hopes that through these interactions, the ZCTU will find it convenient not to seek police permission to conduct their meetings as provided under the POSA.

### C. The Committee's conclusions

**1139.** *The Committee notes that in its communication dated 6 May 2011, the ZCTU alleges that it was prevented from holding International Women's Day and International Labour Day processions and that even after the High Court allowed May Day processions, the police in some cities refused to comply with the court order. The Committee notes that the Government does not dispute the alleged facts and expresses the view that the banning of processions was a temporary measure adopted by the police, meant to protect the peace and security of the country during the period in question and was not intended to violate the rights of trade unions.*

**1140.** *The Committee recalls that in its 2009 report, entitled "Truth, reconciliation and justice in Zimbabwe", the Commission of Inquiry, appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by the Government of Zimbabwe of Conventions Nos 87 and 98, examined the allegation of systematic infringements of freedom of assembly and demonstration in relation to the implementation of the POSA and describing, in particular, situations similar to those raised in the present case. In this respect, the Committee notes the following relevant paragraphs of the Commission's report:*

133. *Part IV of the POSA concerns public gatherings, defined under section 2, so as to include processions, public demonstrations and meetings. Sections 23 and 24 place an obligation on organizations to appoint conveners and authorized officers, in the case of processions and public demonstrations, and responsible officers, in the case of public meetings, who are responsible for giving notice of the public gathering. A failure to give notice of a gathering constitutes an offence and is punishable by a fine not exceeding level 12 and/or imprisonment for a period not exceeding one year. Section 26 provides for consultations and/or negotiations between a regulating authority and a convener or an authorized officer, if necessary, on amendment of notices and conditions with respect to public gatherings so as to avoid public disorder. The section also provides that a person who opposes or fails to comply with a prohibition notice or any directions or conditions, under which a gathering is authorized, shall be guilty of an offence and liable to a fine not exceeding level 14 and/or to imprisonment for a period not exceeding one year. However, the abovementioned sections (23, 24 and 26) do not apply to gatherings of a class described in the Schedule (section 26A), which includes public*

- gatherings of members of professional, vocational or occupational bodies held for purposes which are not political (paragraph (c)); held by any club, association or organization which is not of a political nature and at which the discussions and matters dealt with are not of a political nature (paragraph (i)); held by a registered trade union for bona fide trade union purposes for the conduct of business in accordance with the Labour Relations Act (paragraph (j)); or held to form any club, association or organization which is not of a political nature (paragraph (k)).*
134. *Section 27 provides for a temporary prohibition on holding processions and public demonstrations within particular police districts so as to prevent public disorder. To that end, a regulating authority can issue an order for a period not exceeding one month. The Minister of Home Affairs may, on appeal, confirm, vary or set aside the order or give any other order in the matter as s/he thinks just. Any person who organizes, assists in organizing, takes part in, or attends any procession or public demonstration held in contravention of an order under this section shall be guilty of an offence and liable to a fine not exceeding level six and/or to imprisonment for a period not exceeding one year. Section 27A provides for a prohibition of all gatherings within a radius of between 20 and 100 metres of Parliament, courts and protected places (with the exception of gatherings of persons who are employed at institutions), unless special permission has been granted.*
135. *Any prohibition notice, directions or conditions imposed pursuant to section 26, as well as an order issued in terms of section 27, may be appealed to the Magistrates' Court, although such an appeal will not have the effect of suspending any prohibition order appealed against (section 27B), unless and until the court so orders.*
269. *... It was made known to the Commission that section 24 of the POSA required organizers of "public gatherings" to notify the police of those events except, inter alia, in relation to public gatherings "held by a registered trade union for bona fide trade union purpose for the conduct of business in accordance with the Labour Relations Act". The ZCTU and Attorney-General both noted that in law the POSA explicitly did not apply to trade union gatherings for trade union – rather than political – purposes.*
274. *The Co-Ministers of Home Affairs, responsible for the POSA, noted that since the establishment of the inclusive Government they had clarified through the press the legal procedure to be followed if people wanted to express themselves through demonstration. The Permanent Secretary stated that the problem with the POSA was that it was not sufficiently understood; the police must be informed of a demonstration rather than permission being sought, as the duty of the police was to protect both demonstrators and the general public. With regard to the suggestion that the POSA be repealed or modified, a Co-Minister considered that the POSA should stay, but perhaps not in its present form. He explained that steps were being taken to modify the law to give people more space and freedom, indicating that new draft legislation would be presented to Parliament when it reconvened.*
559. *In relation to both trade union meetings and public demonstrations organized by trade unions, the Commission was informed that the operation of the POSA in practice seriously interfered with the right of trade unions in relation to such events. While being aware that the POSA did not formally apply to trade unions carrying out trade union activities, the Commission was informed that it had been held, in practice, to apply to most trade union gatherings.*
560. *The basis for this application appears to be the belief by the authorities that the ZCTU was exceeding its trade union role when it organized public demonstrations on matters touching upon social and economic issues. The Commission wishes to categorically state that the exercise by trade unions of the right to demonstrate includes the right to freedom of expression in relation to matters of social and economic issues. In this regard, the Commission must reiterate the principle developed by the ILO supervisory bodies that the freedom of expression which should be enjoyed by trade unions and their leaders should also be guaranteed when they wish to criticize the Government's economic and social policy.*
561. *The Commission received much documentation and many statements concerning the way in which the requirement under the POSA of permission being granted by the police for*

trade union gatherings violated the Conventions. The Commission was told that ZCTU public meetings and demonstrations were almost uniformly refused by the authorities, and that trade union meetings, labour forums and conferences were, if allowed, subjected to the imposition of stringent conditions. In addition, the Commission is aware of the penal sanctions applicable to trade unionists who are found to be in contravention of the POSA and considers this to be a serious impediment to the right to demonstrate.

562. In this regard, the Commission is of the opinion that the way in which the POSA has been used in practice denies trade unions the right to demonstrate.

- 1141.** While noting the Government's explanation on the temporary nature of the banning of trade union demonstrations or processions, the Committee notes with concern the ZCTU's communication dated 7 and 21 May 2012, in which the complainant organization describes in detail the difficulties it had faced in organizing and holding public processions, gatherings and celebrations to commemorate International Women's Day and May Day 2012. The committee request the Government to provide its observations thereon. The Committee deeply regrets that two years following the acceptance by the Government of Zimbabwe of the Commission's conclusions and recommendations, the POSA continues to be used in practice so as to infringe upon the right of trade unions to organize such events. The Committee recalls that the right to organize public meetings and processions, particularly on the occasion of May Day, constitutes an important aspect of trade union rights [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 136]. The Committee notes the Government's indication that the Ministry of Labour and Social Services initiated an interface with the law enforcement bodies in various provinces of the country with a view to establishing collaboration on the ground regarding the exercise of trade union rights. The Committee expects that the Government will intensify its efforts in this respect so as to ensure that the POSA is not used to infringe upon legitimate trade union rights and requests the Government to provide information on all concrete measures, undertaken under the abovementioned initiative, aimed at ensuring that trade unions may freely organize peaceful demonstrations and that permission to hold processions and demonstrations is not arbitrarily refused.
- 1142.** Further in this connection, the Committee observes that the 2011 Conference Committee on the Application of Standards requested the Government to carry out, together with the social partners, a full review of the application of the POSA in practice, and considered that concrete steps should be taken to enable the elaboration and promulgation of clear lines of conduct for the police and security forces with regard to human and trade union rights. The Committee therefore expects that a full review of the application of the POSA in practice has been carried out together with the social partners and requests the Government to inform it of the outcome. If this has not yet been done, the Committee urges the Government to do so without delay. The Committee further expects that clear lines of conduct for the police and security forces will be elaborated and promulgated without delay. It requests the Government to keep it informed in this respect.
- 1143.** The Committee recalls that the Commission of Inquiry recommended that the POSA be brought in line with Convention No. 87. In this respect, the Committee notes from the 2011 observation on the application of Convention No. 87 in Zimbabwe that the Government had indicated to the Committee of Experts on the Application of Conventions and Recommendations (CEACR) that the POSA, notwithstanding its non-application to trade union meetings, was being amended. The CEACR noted, however, that in the framework of the Universal Periodic Review process of the United Nations Human Rights Council, the Government of Zimbabwe had clearly indicated that it did not support the recommendations calling for the amendment of the POSA. The Committee, like the CEACR, requests the Government to clarify whether the POSA is being considered for amendment and, if so, the status thereof.

**1144.** *The Committee recalls that in the light of its findings, the Commission of Inquiry also recommended that the Government ensure that training, education and support be given to key institutions and personnel in the country, most notably the police and security forces, in relation to freedom of association and collective bargaining, civil liberties and human rights. In this respect, the Committee notes that the Government refers to the activities that have taken place in 2011 under the ILO technical assistance package and underlines their importance and impact. The Committee deeply regrets, however, that since the launch of the ILO technical assistance package in August 2010, only one training course on human and trade union rights for the police and security forces has taken place, as appears from the abovementioned CEACR observation. The Committee, like the CEACR, firmly expects that the Government will take the necessary steps without delay to ensure that trainings on human and trade union rights for the police and security forces are intensified and requests the Government to keep it informed in this regard.*

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

**1145.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee expects that the Government will intensify its efforts in ensuring that the POSA is not used to infringe upon legitimate trade union rights and requests the Government to provide information on all concrete measures aimed at ensuring that trade unions could organize freely peaceful demonstrations and that permissions to hold processions and demonstrations are not arbitrarily refused.*
- (b) The Committee requests the Government to provide its observations on the allegations submitted by the ZCTU in communications dated 7 and 21 May 2012.*
- (c) The Committee expects that a full review of the application of the POSA in practice has been carried out together with the social partners and requests the Government to inform it of the outcome. If this has not yet been done, the Committee urges the Government to do so without delay. The Committee further expects that clear lines of conduct for the police and security forces will be elaborated and promulgated without delay. It requests the Government to keep it informed in this respect.*
- (d) The Committee requests the Government to clarify whether the POSA is being considered for amendment and, if so, the status thereof.*
- (e) The Committee firmly expects that the Government will take the necessary steps without delay to ensure that trainings on human and trade union rights for the police and security forces are intensified and requests the Government to keep it informed in this regard.*

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Geneva, 4 June 2012

(Signed) Professor Paul van der Heijden  
Chairperson

*Points for decision:* Paragraph 106  
Paragraph 163  
Paragraph 211  
Paragraph 231  
Paragraph 308  
Paragraph 317  
Paragraph 334  
Paragraph 390  
Paragraph 431  
Paragraph 449  
Paragraph 484  
Paragraph 501  
Paragraph 518  
Paragraph 537  
Paragraph 554  
Paragraph 574  
Paragraph 593  
Paragraph 649  
Paragraph 675  
Paragraph 700  
Paragraph 728  
Paragraph 759  
Paragraph 771  
Paragraph 788  
Paragraph 828  
Paragraph 875  
Paragraph 896  
Paragraph 912  
Paragraph 970  
Paragraph 1008  
Paragraph 1018  
Paragraph 1059  
Paragraph 1085  
Paragraph 1124  
Paragraph 1145